

Appendix J is being replaced by Appendix H, Vendor Agreement Form.

Date: [insert]/10

PROJECT

ADDRESS: _____ [insert], [insert], [insert], NY

TRADE: _____ [insert]

OWNER: _____ [insert]
(herein called the "Owner") acting by and through

CONSTRUCTION _____ **TISHMAN OF CONTRACTING TISHMAN ENTITY]**
MANAGER: _____ (herein called the "Construction Manager") as agent for Owner.

CONTRACTOR: _____ [insert]
_____ [insert]
_____ [insert], [insert]
_____ **Attn: [insert]**

(herein called the "Contractor")

~~All actions to be taken by Construction Manager, all approvals, notices, consents, directions, and instructions to be given by, all notices and plans to be delivered to Construction Manager, all determinations and decisions to be made by Construction Manager, and, in general, all other action to be taken by, or given to, the Owner, shall be taken, given and made by, delivered or given to the Construction Manager in the name of, as duly authorized agent and on behalf of, the Owner. All rights of Construction Manager hereunder shall be deemed rights available to both Construction Manager and Owner, jointly and severally. All obligations of Construction Manager shall be deemed obligations of the Owner (and not the Construction Manager) and the Owner shall be solely obligated to the Contractor for all sums required to be paid hereunder to the Contractor. Unless expressly stated otherwise, a reference (a) to both Owner and Construction Manager, (b) to Owner or Construction Manager, or (c) to Owner and/or Construction Manager shall be deemed to be both to Owner and Construction Manager.~~

As used herein:

~~(i) "Architect" shall mean: _____
_____ [insert]~~

~~As used herein, the term Architect shall also mean any successor or replacement or similarly situated participants in the Project who are identified through means of a written notice to the Contractor from the Construction Manager.~~

~~(ii) "Project" shall mean: _____
_____ [insert], [insert]~~

~~(iii) "Indemnitees" shall mean:

Tishman [NAME OF TISHMAN ENTITY], Owner and their respective parent companies, corporations, members and/or partnerships and their owned, controlled, affiliated, associated and subsidiary companies, corporations, members, and/or partnerships and the respective agents, consultants, principals, partners, members, servants, officers, stockholders, directors and employees of each, and any other persons or entities that identified to Contractor by Construction Manager.~~

~~(iv) "Site" shall mean: _____ [insert]~~

~~(v) "Work" shall mean all work that is identified in the Contract Documents and shall include all things required to be provided, delivered, accomplished, submitted, furnished, supplied, performed and/or undertaken by the Contractor under the terms of the Contract Documents and includes all labor, supervision and materials required to be supplied hereunder and thereunder, as well as all any other activities related or applicable thereto, associated therewith or arising therefrom.~~

~~(vi) "Contract Documents" shall have the meaning specified in **Clause 58**, below.~~

~~(vii) "Officer" shall mean any individual who serves as President, Chairman, Chief Executive Officer, Chief Financial Officer, or Chief Operating Officer of one of the parties by whatever titles known.~~

~~WITNESSETH: WHEREAS, Owner has undertaken the construction and/or renovation of the Project on the Site in accordance with the drawings and specifications prepared by the Architect; and~~

~~WHEREAS, Construction Manager has agreed to act in a capacity as agent for Owner in connection with the construction and/or renovation of the Project; and~~

~~WHEREAS, Owner desires to award, and Contractor desires to perform, a portion of the construction work; and~~

~~WHEREAS, Contractor desires to perform a certain portion of the Project as further specified in this Agreement.~~

~~NOW, THEREFORE, Owner, through its agent, Construction Manager and Contractor agree as follows:~~

CONTRACTOR TO COMPLY WITH PLANS AND SPECIFICATIONS

~~1. The Contractor hereby agrees to perform, pursuant to this Agreement, the Work, as more fully defined herein, which includes and is generally described as: See Rider A. The Contractor shall provide for the Project all the labor, supervision and materials hereinafter set forth in accordance with specifications hereto annexed or described herein and as shown on plans, drawings and details prepared by the Architect. Such additional drawings as may be necessary to explain and detail the Work will be furnished by the Architect, if requested by the Contractor, and will be conformed to by Contractor, except where inconsistent with original plans and specifications. The plans, drawings and details, and the specifications are intended to supplement one another, and any Work or materials shown, mentioned or reasonably implied in one and not in the others shall be furnished by the Contractor without extra charge. The enumeration of particular items in this Agreement or in the other Contract Documents as hereinafter defined shall not be construed to exclude other items. The intention of the Contract Documents is to include all labor, materials, engineering, equipment, transportation, tools, plant, appliances, appurtenances and other facilities, whether specified herein or not, necessary for the proper execution and completion of the Work. Contractor must refer any question respecting the specifications, plans, drawings and details, about which it is in doubt, or which seems to admit of a dual interpretation, to the Construction Manager for Construction Manager's referral of the question to the Owner or Architect for their decision, by which Contractor must abide. Any decision of the Owner or Architect as to the meaning, intent or contents of the specifications and plans shall be final, binding and conclusive and Contractor must proceed with said decision so as not to delay, slow down or impede progress of the Project in any way. This Contract includes, and this Contractor shall perform, all work commonly performed by this trade, whether or not shown on the plans and specifications in detail. The Contractor is familiar and experienced with this type of work, has inspected the plans and specifications, and has represented to the Owner that the plans and specifications are complete and contain all of the information necessary for the Contractor to perform its Work. The Contractor shall not receive any additional compensation by reason of any alleged incompleteness of the Contract Documents, or lack of coordination amongst the Contract Documents, or inconsistencies amongst the Contract Documents. Should there be any conflict or inconsistency in or among the Contract Documents, Construction Manager shall have the right to resolve such conflict as the Construction Manager may elect in its sole discretion, which determination shall be binding upon Contractor, and Construction Manager shall have the right to the most costly or burdensome alternative, without an increase to the Contract Price.~~

DUTIES OF CONTRACTOR

~~2(a). The Contractor recognizes the relationship of trust and confidence established between it and the Construction Manager by this Agreement. The Contractor covenants and agrees with the Construction Manager to furnish its best skill and judgment and to cooperate with the Owner and Construction Manager in furthering the best interests of the Construction Manager and Owner as determined by the Construction Manager and/or Owner. Contractor agrees to keep all documents, drawings and all forms of communications with Construction Manager and others involved in the Project confidential, except as necessary for the completion of the Work or as required by law. If Contractor concludes that it is required to disclose such confidential information under compulsion of law, it shall give sufficient notice to Construction Manager such that Construction Manager is afforded a reasonable opportunity to seek a protective order before Contractor disclose such information. The Construction Manager shall have the right to exercise complete supervision and control over the Work to be done by the Contractor, but such supervision and control shall not in any way limit the obligation of the Contractor to perform in strict conformity with this Agreement and the Contract Documents, nor shall it relieve Contractor from responsibility for errors and omissions in connection with such Work, including Contractor's sole liability for means and methods. The names of any and all subcontractors or suppliers shall be submitted in writing to Construction Manager, and no subcontractor or supplier shall be employed by Contractor unless acceptable to Construction Manager and/or the Owner. Each subcontractor and supplier shall be bound by all Contract Documents to the same extent and with the same effect as if the subcontractor or supplier were the Contractor. Contractor shall cause subcontractors and suppliers to comply with all the Contract Documents. Contractor shall be responsible for all the acts, work, material and equipment of its employees, subcontractors and suppliers, all persons either directly or indirectly employed by any of them, and anyone for whose acts any of them may be liable.~~

DESIGN DELEGATION

~~(b). Whenever the Contract Documents specifically require the Contractor to furnish, as part of its Work, design or engineering services or certifications of any kind, the Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other Submittals prepared by such professional. The Owner and Construction Manager shall be entitled to rely upon the adequacy, accuracy, and completeness of such services. The Contractor shall furnish a certificate of insurance from each design professional certifying to professional liability insurance coverage for such design profession in an amount not less than \$1.0 million or such greater amount as required by the Contract Documents. Such coverage shall remain and be maintained in full force and effect through the date of Substantial Completion and thereafter for a period of (i) six years and three months following the date of the Architect's certification of Substantial Completion or (ii) three months following the expiration of any applicable statute of repose, whichever is longer.~~

~~The Contractor shall defend, indemnify and hold the Owner and Construction Manager harmless from all claims, damages or losses, including reasonable attorneys fees, arising out of or related to any errors or omissions in design, or to any claim for infringement or misappropriation of any other person's intellectual property arising out of such design, in addition to any other claims for which indemnification is required hereunder.~~

SHOP DRAWINGS; ELECTRONIC DOCUMENTS SHOP DRAWINGS

~~3(a). The Contractor shall, at its own cost and expense, furnish the Construction Manager within ten (10) days from the date hereof with a submission schedule of all shop drawings, schedules, reports, diagrams, layouts, setting plans, cuts, explanations, catalogue references, samples and other data regarded by the Construction Manager as necessary, in the number required by the Construction Manager, for submission to the Architect for its approval, correction, rejection or disapproval. The Owner's, Construction Manager's and/or the Architect's and Consultants' approval of such shop drawings, schedules, reports, diagrams, layouts, setting plans, cuts, explanations, catalogue references, samples and other data shall not relieve the Contractor from responsibility for deviations from this Agreement, or the Contract Documents, including without limitation the specifications and/or drawings, unless it has, in writing, called the Construction Manager's attention to such deviations, at the time of delivery of such shop drawings, schedules, reports, diagrams, layouts, setting plans, cuts, explanations, catalogue references, samples and other data to the Construction Manager and received Architect's written approval, nor shall it relieve Contractor from responsibility for its errors and omissions. The Contractor shall make any corrections required by the Owner, Architect and/or Construction Manager, file with the Construction Manager for submission to the Architect corrected copies and furnish such other copies as may be needed. The Contractor shall make all submissions of shop drawings requiring the Architect's approval directly to the Construction Manager. No submission shall be made directly to the Owner or Architect, unless approved in writing by Construction Manager, and if any submission is so made, the approval or modifications authorized by the Architect shall not be binding upon the Owner or Construction Manager unless and until the Construction Manager has granted its written approval thereto. The Contractor shall obtain shop drawings from other contractors and coordinate its Work to avoid interference with other contractors' work. The Contractor shall furnish its shop drawings to other contractors as specified by the Construction Manager if the Construction Manager regards such submittals as necessary for the Project.~~

USE OF ELECTRONIC FILES

~~3(b). As a convenience to the Contractor, the Construction Manager may provide electronic files, including drawings, specification sections, and other documents, in electronic format to assist the Contractor in preparing shop drawings and other submittals required for the Work and for preparing as-built or record drawings. If so provided, such electronic files shall be used only as a supplement to previously issued paper Contract Documents. The furnishing of electronic files does not relieve the Contractor of its obligation to fully comply with the Contract Documents, including and without limitation, the need to check, confirm and coordinate all dimensions and details, take field measurements, verify field conditions and coordinate the Work with that of other trades. The use of electronic files may also include use of Building Information Modeling software and related technologies ("BIM"). The Contractor shall participate in the use of BIM for the Work and the Project as requested and/or directed by the Construction Manager, and, in addition, to the full extent as may be required under the Contract Documents. The Contractor shall fully comply with and is bound by all requirements and terms and conditions of the Contract Documents related to BIM. Any use of BIM shall in no event and in no way, however, otherwise alter, change, limit, diminish or excuse the Contractor's duties and obligations under the Agreement or the Contract Documents.~~

NO LICENSE

~~3(c). By providing electronic files, the Construction Manager does not convey any license or right, including copyright, in the original documents, or any right to prepare derivative works.~~

INDEMNITY

~~3(d). The use or re-use of any electronic files by the Contractor or on the Contractor's behalf shall be at the Contractor's sole risk and without liability to the Owner or Construction Manager. The Contractor shall indemnify, defend and hold the Owner and the Construction Manager, its clients, consultants and employees harmless against all damages, liabilities, losses or expenses arising out of or relating to the Contractor's use of the electronic files furnished through the Construction Manager.~~

DISCLAIMER

~~3(e). Unless otherwise provided in the Contract Documents, electronic files furnished pursuant to this Article are not Contract Documents. No representation is made by the Owner or Construction Manager as to the accuracy, completeness, or condition of the electronic files that may be furnished pursuant to this Clause 3, and differences may exist between these files and the paper Contract Documents due to corruption, viruses, or other anomalies. In the event of a discrepancy, the hard copies of Contract Documents shall govern. The Contractor accepts responsibility for any and all loss or damage arising from the copying, loading or use of such electronic data by the Contractor and agrees to waive any such claims against the Owner or Construction Manager.~~

USE BY OTHERS

~~3(f). If during the course of performing the Work the Contractor transfers electronic files furnished pursuant to this Clause 3 to a third party, the Contractor agrees to obtain written confirmation that such third party agrees to the terms and conditions set forth in this Clause 3 prior to transfer thereof and as a condition of their use.~~

SPECIFICATIONS VARIED BY LAWS

~~4. The Contractor shall furnish, without extra charge, all work and materials not mentioned or shown, but generally included under this class of contract, necessary for the proper execution and completion of the Work, and also any work or materials of the kind herein contracted for, or required to conform the Building and the Work to all laws, ordinances, orders, rules and regulations of all Municipal Departments, the Board of Fire Underwriters and all Municipal, State, Federal and other authorities having jurisdiction (collectively, "Rules and Regulations").~~

MEASUREMENTS VARIED BY JOB CONDITIONS

~~5. Dimensions on plans are to be followed in preference to scale measurements, and all measurements must be checked at the Site before the Work is executed. No extra charge shall be made for changes necessitated by variations in the actual condition of the Site from what is shown on plans. Contractor represents that it has examined the Site, noted and ascertained the construction, materials, work, existing conditions at the Site and the nature and location of the Work. All work affected or governed thereby or required for the thorough and satisfactory completion of its Work, whether indicated and specified or not, and regardless of quantity estimated, shall constitute part of this Agreement and shall be performed by the Contractor without extra charge. As to conditions that were not constructed at the time of Contractor's execution of this Agreement, Contractor shall conduct a diligent review of all such conditions prior to performance of any Work that may be affected thereby. Contractor shall provide Construction Manager with written notice of any variations in the actual condition of the Site from that to be expected pursuant to the Contract Documents before proceeding with any Work affected thereby and promptly upon conclusion of such diligent review. Contractor's failure to provide timely written notice of any such variations, or Contractor's failure to discover any variations that with the exercise of appropriate care it should have discovered, shall be construed as its acceptance of the Site conditions, its agreement that there are no substantive variations between the actual Site conditions and the Site conditions identified in the Contract Documents, and shall preclude Contractor from any extension of time or adjustment in the Contract Price related thereto.~~

DECISIONS AS TO QUALITY/PERFORMANCE/PROGRESS

~~6. The Construction Manager shall decide all questions which may arise as to the performance, quantity, quality, acceptability, fitness and rate of progress of the Work or materials furnished under this Agreement, which decisions shall be final and binding. The Contractor agrees and acknowledges that the Construction Manager has the right, in its sole discretion, to make revisions, changes, adjustments, and sequencing alterations to the Project schedule from time to time as necessary and the Contractor expressly agrees and acknowledges that it shall be bound to, and abide by, such revisions, changes, adjustments, and sequencing alterations to the Project schedule, and that it will adjust and conform its Work accordingly, at its cost, to meet all completion dates of this Agreement as set forth herein. Upon notice from the Construction Manager, the Contractor agrees to commence, proceed with and complete the Work promptly and diligently under the direction of the Construction Manager, in compliance with all job schedules of the Construction Manager as the same may be amended from time to time. Time is of the essence of this Agreement. No extension of time will be valid without the Construction Manager's written consent. The Contractor may be held liable for all damages, costs, losses and expenses resulting directly or consequentially from its failure to meet required time limits.~~

INDEMNITY

~~7. To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the Owner, Construction Manager, such other Indemnitees as may be defined herein, and their respective~~

~~parent companies, corporations, members, limited liability companies and/or partnerships and their owned, controlled, associated, affiliated and subsidiary companies, corporations, members, limited liability companies, and/or partnerships, and the respective agents, consultants, principals, members, partners, servants, officers, stockholders, directors and employees thereof, from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively, "Claims"), arising out of or resulting from the acts or omissions of Contractor or anyone for whose acts Contractor may be liable in connection with the Contract Documents, the performance of, or failure to perform, the Work, or the Contractor's operations, including the performance of the obligations set forth in this Clause. To the fullest extent permitted by law, Contractor's duty to indemnify the Indemnitees shall arise whether or not caused in part by the active or passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnitee. The Contractor acknowledges that specific consideration has been received by it for this indemnification and that same shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefit payable by or for the Contractor or any subcontractor and/or delegates under Workers Compensation acts or other employee benefits acts. As used in this paragraph, "Contractor" shall mean Contractor and its representatives, employees, servants, agents, subcontractors, delegates, or suppliers. The Contractor acknowledges that it will participate in and be bound by any judicial, administrative or legislative proceeding wherein the Contractor's participation and presence are demanded or summoned by the Owner or the Construction Manager, provided that said proceedings involve a common question of law or fact, or indemnification.~~

INSURANCE

~~8. Prior to commencement of any Work under this Agreement, and until completion and final acceptance of the Work, the Contractor and each of Contractor's subcontractors shall, at its own expense, maintain the insurance coverage and limits of liability stated in the attached Insurance Rider. In the event of a conflict between the Insurance Rider and this Agreement, the provision that imposes the greater obligation on the Contractor shall apply. Such insurance shall include:~~

- ~~— (a) Commercial General Liability insurance, including, without limitation, products and completed operations and containing no "X", "C", or "U" exclusions if excavation and/or demolition is to be provided;~~
- ~~— (b) Statutory Worker's Compensation and Disability Insurance; and~~
- ~~— (c) Business Automobile Liability insurance.~~

~~All such coverage shall have limits in accordance with the attached Insurance Rider (which may be satisfied in part by umbrella insurance in following form) and shall be provided and maintained by insurance companies with AM Best ratings of not less than A-VIII, and shall be in a form acceptable to Construction Manager. Contractor shall, upon request, provide complete copies of all such insurance policies, including all endorsements thereto to Construction Manager. All such insurance shall be provided without deductibles or self-insured retentions.~~

~~Contractor shall deliver certificates of insurance satisfactory to Construction Manager evidencing Contractor's procurement of all required insurance within 3 days of execution of this Agreement, and prior to the performance of any Work, which certificate shall expressly identify the Owner, Owner's Lender, Construction Manager and all other Indemnitees named in this Agreement (hereinafter referred to as "Additional Insureds") as additional insureds.~~

~~In addition, Contractor shall provide any and all other insurance protection required by the Construction Manager or the Owner and specified in the Contract Documents.~~

SIGNS

~~9. Contractor shall not place any signs, billboards or posters on any portion of the Site, any building on the Site (referred to herein as "Building"), the property or fences (temporary or permanent) surrounding the same, except upon prior written permission received from the Construction Manager and the Owner, and then only of a size, material, color and type and at a location approved by the Construction Manager and the Owner.~~

TOOL SHEDS

~~10. If so required by Construction Manager, the Contractor shall, at its own cost, provide, erect and maintain, at locations designated by the Construction Manager, fireproof tool sheds for storing the Contractor's tools, materials and equipment. The Contractor shall relocate its tool sheds as requested by the Construction Manager at the Contractor's own cost. The Owner or Construction Manager will not be responsible for any clothing, tools, materials or equipment lost, damaged, stolen or destroyed. The Contractor hereby, on behalf of itself and any of its insurance carriers, successors, assignees, subcontractors, suppliers and vendors, waives and relinquishes any and all rights of subrogation arising in any way from or related to this Agreement or the Project, including but not limited to claims against the Construction Manager, the Owner, the Architect, the Architect's consultants, separate contractors, and any of their subcontractors, sub-subcontractors, agents and employees. The Contractor shall require of the Contractor's subcontractors, agents and employees, by appropriate written agreements, similar waivers in favor of the parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation provided hereunder shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.~~

CONDITION OF SITE AND ADJACENT PROPERTY

~~11. The Contractor shall examine all premises and buildings adjoining or in close proximity to the Site (including, for the purposes hereof, streets and sidewalks) and ascertain before beginning Work, the depth of cellars, materials and construction of the buildings thereon, and shall be governed thereby for the necessary thorough, safe and satisfactory execution of all Work called for herein, whether indicated on drawings and/or specified, or not, and all work and protective measures necessary to keep and leave such premises and buildings in the same condition as they were before commencing Work shall be done without any addition to the Contract Price. Wherever any parts of the present adjoining buildings interfere with or are interfered with by the Work, the Contractor shall make whatever changes are made necessary thereby or which are necessary to timely and properly complete the Work in an orderly manner, whether or not shown on the drawings or called for in the specifications, at no additional cost. The Contractor, before commencing work on such premises shall make a written report of the conditions as found at that time, noting particularly any defects in evidence or conditions that will impact the Work, taking dated photographs of the exteriors, and, if necessary, dated photographs of interiors, and shall deliver to the Construction Manager a copy of the written report of the examination and of all photographs. The Contractor shall invite the Construction Manager, the Owner and the owners of the adjoining properties and buildings to be present during such examination. If the Contractor fails to make the examination and report as herein specified, or fails to discover any defects in evidence or conditions that will impact the Work, which with the exercise of appropriate care it should have discovered, it will be deemed that said buildings and premises are in good condition, and all claims for damages, repairs and replacements must be treated by the Contractor as though said buildings and properties were in good condition before it began work.~~

INSPECTION

~~12. The Contractor shall provide sufficient, proper and safe facilities at all times for the inspection of the Work by Architect, the Owner, Construction Manager, Owner's Lenders, Municipal and/or State inspectors, and all other authorities having jurisdiction over the Project, and the authorized representatives of each. If any Work is covered up without the approval of the Construction Manager, it must, if required by the Construction Manager, be uncovered for inspection at the Contractor's expense. The Contractor shall afford and provide at all times to the Architect, the Owner, the Construction Manager and their representatives satisfactory evidence of the quality of materials used, complete information in writing as to where materials to be used in the performance of this Agreement are being manufactured or assembled, and full and free access to all shops and manufactories for the purpose of informing themselves as to the general condition and progress of the materials herein contracted to be used or installed. The Contractor shall instruct such suppliers and manufacturers to give full and accurate information in writing directly to the Construction Manager on any questions concerning quality, performance, delivery status, and such other data as may be requested by the Construction Manager. Nothing set forth herein shall limit or excuse the Contractor's obligation to provide materials, labor and services in accordance with the Contract Documents.~~

MATERIALS AND EQUIPMENT

~~13. All materials and equipment are to be new and of the best quality of the kind specified unless used or lesser quality material or equipment is expressly specified in writing, and the Contractor shall, if required by the Construction Manager, furnish satisfactory evidence of the kind and quality of materials and equipment. The Contractor shall, if required by the Construction Manager, obtain the manufacturer's written recommendation identifying the use intended and stating that the material and equipment is designed and appropriate for the use intended. Such materials and equipment shall not be subject to any conditional bill of sale, security agreement, financing statement, chattel mortgage, or any other claim, lien or encumbrance. Materials and equipment shall be promptly delivered and distributed where Construction Manager may require or direct, as needed for the uninterrupted, orderly and speedy progress and completion of the Work, and so as not to encumber the Site unreasonably. The Contractor shall, if required by the Construction Manager, cause the materials (1) to be manufactured in advance; (2) to be warehoused either at the factory or elsewhere, as directed by the Construction Manager, and Construction Manager shall be provided with a bill of sale in connection with same and the materials shall be marked as required by the Construction Manager and segregated from materials unrelated to the Project; (3) to be delivered to the Site promptly when so instructed by the Construction Manager; and (4) to be relocated or removed from the Site at the cost of the Contractor. Care must be exercised by the Contractor against overloading any parts of floors, roofs, scaffolding and other installations. All materials delivered at the Site which are to form a part of the Work herein specified shall not be removed without the written consent of the Construction Manager, but the Contractor will have the right to and shall remove all its surplus material after completion of the Work.~~

LABOR

~~14. All Work is to be done in the best manner and by persons skilled in the type of work to be performed. All labor employed under this Agreement shall, at the option of the Construction Manager, to the extent permitted by law, be union and/or that recognized by, and in harmony with, the local Building Trades Employers' Association or equivalent and Contractor shall not employ any labor which may cause dissension with other workers on the Site, by whomsoever employed. With respect to any and all union labor directly employed by the Contractor, and/or its Subcontractors of every tier for this Project, Contractor agrees that all union laborers are to be paid only for hours actually worked on the Project. For the avoidance of doubt, only actual hours worked by union laborers for this Project are to be recorded on time sheets provided with the Contractor's requisitions. The Contractor shall promptly, and without cost to the Owner or the Construction Manager, resolve all labor disputes at the Site relating to its Work, including lockouts. Contractor shall be liable to Owner and Construction Manager for all additional costs~~

~~and expenses incurred as a result of any lockout attributable to Contractor. Upon request of the Construction Manager, which request may be made in its sole discretion and as a condition precedent to the receipt of payment hereunder, the Contractor shall promptly provide written evidence from all union benefits funds that represent workers employed by the Contractor on the Project that Contractor is current with respect to payments to said union benefits funds. The Contractor shall give the Work constant attention and supervision through a responsible representative or superintendent, and any necessary assistants. Such representative shall be authorized to act for the Contractor in all matters relating to the Work, and all directions given him shall be as binding as if given to the Contractor. The Contractor shall also keep a competent foreman at the Site while Work is in progress, and enforce strict discipline among its employees and subcontractors, including requiring compliance with the Construction Manager's regulations with regard to fires, smoking, safety and other hazards. At any time when Contractor, its employees, subcontractors, suppliers or anyone for whom Contractor is responsible physically is present at the Site, they promptly shall comply with all applicable terms and conditions of the Project safety program, which may be amended from time to time ("**Safety Program**"). Contractor shall be responsible for compliance with all applicable Federal, State and local safety, health and environmental statutes, rules, regulations and orders and all other Legal Requirements including, without limitation, the Construction Safety Act of 1969, the Williams-Steiger Occupation Safety and Health Act, all amendments thereto and all State and local equivalents thereof. Contractor acknowledges that all such applicable statutes, rules, regulations, orders and Legal Requirements are a minimum standard, and that Contractor shall take such additional and other actions as are required under the Safety Program and as otherwise are necessary and prudent. If hazardous substances, of a type of use of which an employer is required by law to notify its employees, are being used or to be used on the site of the Project by the Contractor, the Contractor's subcontractors or anyone directly or indirectly employed by them, the Contractor shall, prior to use of such substance by any employees on the site, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site. Contractor acknowledges that all costs regarding its compliance with this Clause are included within the Contract Price. Contractor shall designate a responsible member of its organization at the Site whose duties shall include, without limitation, the prevention of accidents, enforcement of all applicable statutes, rules, regulations, orders and Legal Requirements, and compliance with the Safety Program. The Construction Manager and the Owner are given the right to require the Contractor to remove immediately any employee, subcontractor or agent of Contractor or any of Contractor's subcontractors employed at the Site whom the Construction Manager deems incompetent or a hindrance to the proper progress of the Work, and such person shall not again be employed in the Work without the prior written consent of the Construction Manager. The removal of any of the Contractor's employees, subcontractors or agents shall not excuse its obligation to timely and properly complete its Work. The Contractor warrants, represents and agrees that it will not assign any individual to perform Work under this Agreement who is an unauthorized alien under the Immigration Reform and Control Act of 1986 or its implementing regulations. In the event any employee of the Contractor working under this Agreement is discovered to be an unauthorized alien, the Contractor will immediately remove this individual from the Project and replace that individual with one who is not an unauthorized alien. The Contractor shall acquire, assess and maintain I-9 forms for all its employees and those of its subcontractors.~~

PROTECTION OF WORK AND EQUIPMENT

~~15. The Contractor during the construction of its Work and while it is working on the Site in any capacity, and until the completion of the Project, shall protect its Work and its materials on the Site, all adjacent property and all tools, plants, equipment and other appliances for the Contractor's use or incidental thereto for the execution of the Work, whether furnished by the Contractor or Construction Manager, from rain, water, frost and the elements and from all other kinds of damage which may be caused in any manner whatsoever, and the Contractor shall be entirely responsible for any loss or damage done to said Work, materials, tools, plant, equipment and other appliances in any manner aforementioned, except to the extent covered by Builders Risk Insurance, less the Builder's Risk deductible which will be borne by Contractor. Contractor hereby agrees that it will not hold the Indemnitees responsible for any such loss or damage.~~

UN SOUND WORK OR MATERIALS

~~16. The Contractor, upon receiving notice from the Construction Manager that the Contractor has furnished (i) inferior, improper or unsound elements of the Work, materials (including equipment) or (ii) elements of the Work, including materials or equipment, not in strict compliance with the requirements of the Contract Documents, will, within twenty-four (24) hours, proceed to remove such Work, materials or equipment and make good all other work or materials damaged thereby, and, at the option of the Construction Manager, the Contractor shall immediately replace such Work, materials or equipment with Work or materials as specified in the Contract Documents. The removal, replacement and repair, the cost of which shall be borne by Contractor, shall be performed during "off hours" or overtime with manpower sufficient, in the judgment of the Construction Manager, so as not to interrupt or delay the Project schedule and so as to avoid disturbance to any occupants of any completed elements of the Project. If the Contractor does not communicate its intention in writing to the Construction Manager to remove and make good such unsound Work within twenty-four (24) hours of written notice from the Construction Manager, and commence removal and remediation as soon as practicable thereafter (but not later than three days), the Construction Manager may remove such unsound Work, make such repairs, and/or may store the material or equipment, all at the expense of the Contractor which may be offset from the Contract Price or otherwise affirmatively recovered from the Contractor. The Construction Manager may, upon ten (10) days written notice, sell such removed materials or equipment at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs and expenses that should~~

~~have been borne by the Contractor and all expenses of the sale. The Construction Manager and/or the Owner shall have the authority at all times, until final completion and acceptance of the Work, to inspect and reject elements of the Work, including materials and equipment, which in its or their judgment are not in conformity with the Contract Documents, and its or their decision in regard to compliance, character and value of Work shall be final and conclusive on all parties. If the Construction Manager permits unsound or non-compliant elements of the Work, including materials or equipment, to remain in place, the Owner shall be allowed the difference in value between the unsound or non-compliant elements of Work and the Owner and/or Construction Manager shall, at their election, have the right to have those elements of the Work repaired or replaced, as well as the damage caused thereby, at the expense of the Contractor, at any time within one year after the completion of the entire Project, or within such longer period as may be covered by any guaranty. Neither payments made to the Contractor, nor any other acts of the Construction Manager or the Owner, shall be construed as evidence of acceptance of unsound elements of the Work or the waiver or estoppel of any rights and remedies allowed to the Construction Manager or Owner based on such unsound elements of the Work. Any expense incurred by the Construction Manager and/or Owner in connection with the foregoing, shall be borne by the Contractor, and the Construction Manager may withhold money due to the Contractor or recover money already paid to the Contractor, to the extent of such expense.~~

FITTING OF THIS WORK WITH OTHER WORK

~~17. The Contractor will furnish all labor, implements, tools, scaffolding, rigging, hoisting and other items required to carry on its Work, in the approved and most up-to-date manner, and shall, as directed by the Construction Manager in writing, arrange for and pay for the necessary incidental cutting of woodwork, brick, stone, masonry, plaster, cement, iron, metal or other material for the installation of its Work. Contractor will do all patching in connection therewith. The Contractor will, if required by Construction Manager, do all necessary cutting, fitting and patching of its own Work that may be required to make the several parts come together properly, and fit the Work to receive or be received by work of other contractors shown upon, or reasonably implied by, the drawings and specifications. The Contractor shall not endanger any work by cutting, digging or otherwise. In laying out its Work, Contractor shall also examine the work installed by others and the shop drawings of the work to be installed by others prior to the beginning of the installation of its own Work. If the Contractor begins its Work, the starting of such Work shall be conclusively deemed to mean that it accepts all preceding work as suitable and proper to receive its Work, unless it has notified the Construction Manager in writing to the contrary before starting and Construction Manager has agreed to same in writing. In the event of failure of the Contractor and another contractor to agree as to the extent of cooperation to be exhibited or of work to be done by either, to insure the carrying out of their respective agreements, such disagreement shall be resolved by the Construction Manager whose decision shall be final and binding upon all parties.~~

RUBBISH REMOVAL

~~18. Except as may be otherwise provided in Rider A, the Contractor shall at all times keep the Site free from accumulation of waste materials or rubbish caused by its employees or Work and, at the completion of the Work, it shall remove all its tools, scaffolding and surplus materials. The Contractor shall daily, or less frequently as the Construction Manager may require, collect its rubbish at places where directed by the Construction Manager.~~

COMPLIANCE WITH LAW

~~19. The Contractor shall procure and pay for all permits for its Work, governmental fees, inspections, licenses, approvals, certificates and authorizations necessary to the prosecution and completion of its Work and deliver evidence of the same to the Construction Manager. Everything shall be done in strict accordance with all Rules and Regulations. Where drawings and specifications conflict with the law, the law is to be followed. The Contractor shall promptly notify the Construction Manager, the respective departments or official bodies when its Work is ready for inspection and shall, at once, do everything required to remove any violations and to obtain approvals of the authorities mentioned above without additional cost to the Construction Manager. The Contractor warrants and represents that (i) the Contractor has not been declared not responsible by any governmental agency, (ii) the Contractor has not been debarred, suspended or otherwise disqualified from bidding, proposing, contracting or subcontracting by any governmental agency, (iii) there are no pending proceedings relating to the Contractor's responsibility or qualification to be awarded any contract, (iv) neither the Contractor nor any principal of the Contractor has been convicted of a felony in any federal, state or local court by plea or verdict of guilty, (v) neither the Contractor nor any principal of the Contractor has pending before any Federal or state grand jury or court an indictment or information for the commission of a crime that has not been favorably terminated and (vi) neither the Contractor nor any principal of the Contractor is the subject of a pending investigation by any grand jury, commission, committee or other agency or authority of the Federal or any state or municipal government in connection with the commission or alleged commission of a crime. Should any part of this warranty and representation change during the Contractor's performance of the Work, it shall notify the Construction Manager in writing of any such change within three (3) business days of the date of any such change. The Contractor's failure to notify the Construction Manager of any such change in its status shall be a material breach of this Agreement.~~

LIENS

~~20. If at any time, there shall be evidence of any lien or claim pertaining to elements of the Work for which, if established, the Construction Manager or Owner might become liable, or the Site or Project might be encumbered, or which should, in any event, be charged to the Contractor, or should any lien, demand, claim, suit or encumbrance be placed or filed by any person or entity employed by or claiming to be employed by or through Contractor, at any tier, Contractor shall have such lien, demand, claim, suit or~~

~~encumbrance satisfied, removed, withdrawn or discharged to Construction Manager's satisfaction within ten (10) days following notification from Construction Manager or Owner, failing which the Construction Manager shall have the right to cause such lien, demand, claim, suit or encumbrance satisfied, removed, withdrawn or discharged and to retain, out of any payment due or thereafter to become due to the Contractor, an amount sufficient to indemnify the Owner and the Construction Manager against such lien or claim, including bond premiums and legal fees and costs, and to apply the same in such manner as the Owner or Construction Manager deems proper to secure protection and/or satisfy or discharge all such claims or liens. Should there prove to be any such lien or claim after all payments are made to the Contractor, it shall repay the Owner through Construction Manager, upon demand, all sums which it may be compelled to pay in discharging such lien or claim, including any and all legal fees, costs and other charges.~~

PATENTS

~~21. The Contractor will not use or install any copyrighted or patented article contrary to the rights of the copyright or patent holder, and agrees to indemnify and save the Indemnitees harmless from any claim and against all damage which the Indemnitees may sustain by reason of the use or installation of such copyrighted or patented article, and at its own cost and expense to defend any action, whenever instituted, brought against the Indemnitees or their respective successors or assigns, founded upon the claim that any such article, or any part thereof, infringes any such copyright or patent except to the extent that such copyrighted or patented article is required by the Contract Documents. In the event of any such claim or damage, the Construction Manager may withhold from any payment due or thereafter to become due to the Contractor, an amount sufficient in its judgment to protect and indemnify the Indemnitees for any such claim or damage, or the Construction Manager may require the Contractor to furnish a surety bond satisfactory to the Construction Manager providing for such protection and indemnity, which bond shall be furnished by the Contractor at its own cost and expense, within five (5) days after written demand has been made therefor. The Contractor shall pay all royalties, fees and other claims in connection with copyrighted or patented articles which it uses under this Agreement. In the event of any injunction or legal action serving to stop the Work, the Construction Manager may, at its option, permit the Contractor to substitute such other articles of like kind as will make it possible to proceed with and complete the Work, and all cost and expenses occasioned thereby shall be borne by the Contractor.~~

ASSIGNMENT

~~22. (a) The interests, rights, powers, duties and liabilities of the parties hereto shall be binding upon, and shall inure to the benefit of, the respective successors and assignees of the parties; but the Contractor shall not assign or transfer its interest in this Agreement or assign or transfer any right it may have under the same or the proceeds payable hereunder or any part hereof, or subcontract or delegate to others the Work or any part thereof, unless the written consent thereto of the Construction Manager is first procured, and any assignment or subcontract made in violation of this provision shall be null and void. Any such subcontract shall provide that it is subject to the provisions of this Agreement and shall provide that the Owner and/or Construction Manager have all the rights and remedies against the subcontractor that the Owner and/or Construction Manager have against the Contractor under this Agreement and shall expressly incorporate all such provisions as far as the same are applicable and no such subcontract shall be valid without the consent of the Construction Manager endorsed thereon. The Contractor agrees that it is as fully responsible to the Construction Manager and/or the Owner for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by them, as it is for the acts and omissions of persons directly employed by it. Nothing contained in this Agreement shall create any contractual relationship between any subcontractor and the Construction Manager or Owner, or create any obligation on the part of the Construction Manager or Owner to pay or to see to the payment of any sum to any subcontractor. The Contractor (and its successors and assigns) hereby assigns to Owner and/or Construction Manager all of its interest in any subcontracts and purchase orders now existing or hereinafter entered into by the Contractor for performance of any part of the Work, which assignment shall be effective upon acceptance by Owner or Construction Manager in writing and only as to those subcontracts and purchase orders which Owner or Construction Manager designates in writing. It is agreed and understood that Owner or Construction Manager may accept said assignment at any time during the course of construction prior to final completion. It is further agreed that all subcontracts and purchase orders shall provide that they are freely assignable by the Contractor to Owner and Construction Manager and by Construction Manager or the Owner and its assignees without the approval or consent of the subcontractor or supplier.~~

~~(b) The Contractor acknowledges and agrees that the Construction Manager and Owner shall have the right to assign this Agreement to any party designated by the Construction Manager or the Owner ("Contract Assignee"), and upon and after any such assignment Contractor shall render full performance hereof to such Contract Assignee and such Contract Assignee shall succeed to all of the Owner's or Construction Manager's rights hereunder and shall perform all of the Owner's or Construction Manager's obligations hereunder arising from and after such assignment. Any such assignment shall be effective upon the delivery of a notice of such election to the Contractor. Upon such assignment, the Contractor shall agree to any amendments or modifications to this Agreement which are reasonably requested by the Contract Assignee's Lender, provided that such amendments and modifications do not materially reduce the Contractor's rights, or materially increase the Contractor's obligations, under this Agreement. Further, upon such assignment, no amendments or modifications hereto, nor any waiver of Owner's or Construction Manager's rights hereunder or any release of the Contractor's~~

~~obligations hereunder, by amendment or change order or otherwise, shall bind or be effective against the Owner or Construction Manager or any Contract Assignee except if the Owner or Construction Manager shall have consented to the same in writing. Upon an assignment of this Agreement by the Owner or Construction Manager, the Owner and Construction Manager, as applicable, shall be deemed released from any and all liability under this Agreement provided that the Contract Assignee thereunder is acceptable to the Contractor, in the exercise of its reasonable judgment.~~

TIME OF ESSENCE

~~23. The Contractor shall commence and complete the Work and deliveries of material and equipment at the times established by the Owner in a Project schedule, which the Owner and/or the Construction Manager shall be free to modify in their own discretion (the "Project Schedule"). When the dates for the commencement or completion of specific elements of the Work, or the making of deliveries, are not specified in the Project Schedule, such elements of the Work, deliveries or part of the same, shall be commenced on three (3) days notice from the Owner or Construction Manager and shall be prosecuted and completed with all possible diligence and speed or as otherwise directed by the Owner or Construction Manager. The time stated in this Agreement for the commencement, prosecution and completion of the Work and the deliveries and installation of material and equipment and completion of elements of the Work, as stated in the Project Schedule, as such may be modified, shall be deemed "of the essence" to this Agreement. Further, with respect to Work being performed in an existing building, the Contractor recognizes that the Work under this Agreement is part of a program of construction, including the work of many others, to renovate and develop the Project situated in an existing building with dated installations and concealed conditions that may affect the Work. Given the complexity of the Project, the nature of the Site, and high quality of the work required of all entities, among other factors, the Contractor agrees, without claim of any description, to afford the Owner and/or the Construction Manager the discretion to modify the Project Schedule, without any increase to the Contract Price, consistent with the prompt and cost-efficient completion of the entire Project as determined by the Owner and/or Construction Manager, consistent with the Contract Documents, but subject, however, to all of the aforementioned conditions and considerations that may or will affect the progress of the Work. The Contractor recognizes that the economic viability of the Project is dependent upon substantial completion and final completion of the Work being achieved on or before the date(s) specified in this Agreement. The Contractor agrees to take all necessary steps to perform the Work in a manner, which will enable such dates to be achieved.~~

COOPERATION WITH OTHER CONTRACTORS

~~24. The Contractor must keep itself informed of the conditions at the Site, so as not to delay the delivery of materials or the installation of the Work called for in this Agreement. It is expressly agreed that the Contractor must cooperate with and extend every possible facility to other contractors employed at the Site, and must afford all other contractors reasonable opportunity for the introduction and storage of their materials and execution of their work. The Contractor recognizes that efficient construction of the Project requires that all the Work thereon be coordinated and therefore agrees to accept the determination of the Owner and/or Construction Manager as to the time when Work of the Contractor shall begin and the manner in which it shall progress in connection with other work involved in the said construction. It further agrees that the direction of the Owner and/or Construction Manager with respect thereto shall be complied with fully and promptly.~~

SCHEDULE IMPACTS

DELAYS

~~25. (a) Should the Contractor incur any delay, hindrance, interference, acceleration, suspension or other schedule disruption of whatever kind or nature (hereinafter collectively referred to as a Schedule Disruption), then Contractor shall be entitled only to a time extension for such period of time for which Contractor is not responsible either in whole or in part. It is a condition precedent to any request for a time extension that Contractor submits a critical path analysis which demonstrates the net impact of any schedule impact on the critical path of Contractor. Under no circumstances will Contractor be entitled to recover any monies of whatever kind or nature, which arise out of or relate to any Schedule Disruption, it being especially acknowledged by Contractor that Schedule Disruptions may occur for any of a myriad of reasons and Contractor has agreed to assume the risk thereof and that all costs associated therewith are included in the Contract Price.~~

STRIKES

~~(b) Should the Contractor be delayed by general strikes throughout the trade or a lockout, then time for the completion of the Work shall be extended for a period equivalent to the time lost, or the Owner shall, at its option, have the right to terminate this Agreement and to employ other contractors to finish the Work and provide the materials therefor, and to pay the Contractor pro rata for materials and Work already supplied, or, alternatively, the Contract Price, reduced by the cost to the Owner of completing the Work for which provision is made herein, whichever is less.~~

NOTICE OF DELAY

~~(c) No cause of delay of the Contractor's Work shall be deemed a valid excuse for the Contractor's failure to start, perform or complete the Work or deliveries at the times specified, unless the cause of such delay is beyond the Contractor's control and arose without its fault or negligence, in whole or in part, and the Contractor has notified the Construction Manager and Owner in writing of the alleged cause of delay within three (3) days after the commencement thereof.~~

~~Within ten (10) calendar days after the inception of the cause or causes of the delay, the Contractor shall provide Construction Manager and Owner, in writing, with a detailed explanation of the nature and extent of the delay that identifies the following: (i) the nature of the impact; (ii) the duration of the impact, including the first and last day of the impact, if known; (iii) a critical path method schedule analysis of the impact based upon the Contractor's last approved schedule, including a fragnet; (iv) an itemized statement of the time impact, or if Contractor does not have information necessary to provide a time impact analysis, a reasonable estimate of the time impact; and (v) all actions taken by Contractor to mitigate the delay caused by any such impact. In the event there is any material change in the delay, Contractor shall submit to Construction Manager and Owner an update of its earlier narrative within twenty (20) days of such material change. Contractor's timely satisfaction of all of the requirements set forth herein is a condition precedent to its entitlement to any right or remedy regarding the delay of its Work and its failure to satisfy all said requirements constitutes an express waiver of any such entitlement.~~

~~ADDITIONAL LABOR~~

~~(d) Should the Contractor fail, refuse or neglect to supply a sufficiency of workmen or to deliver the materials with such promptness as to prevent the delay in the progress of the Work, or fail in any respect to diligently commence and prosecute the Work and proceed to the point to which the Contractor should have proceeded hereunder, or if the different parts thereof are not commenced, prosecuted, finished, delivered or installed on time as herein specified or if the Contractor shall fail in the performance of any of the covenants of this Agreement, the Owner and/or Construction Manager shall have the right to direct the Contractor, upon three (3) days' written notice, at the Contractor's cost and expense, to furnish such additional labor and to expedite deliveries of materials (or the Owner or Construction Manager may furnish such labor and expedite such deliveries at the cost of the Contractor), which labor or expediting shall, in the Owner's or Construction Manager's opinion, be sufficient to speed up and complete the Work as herein provided.~~

~~OVERTIME~~

~~(e) To the extent that the Contractor has impacted its Work and/or the Project and additional labor necessary to expedite the Work is not available, then the Construction Manager shall have the right to direct the Contractor, at the latter's own cost and expense, to work overtime or resequence the Work to such an extent as will be sufficient, in the Owner's or Construction Manager's opinion, to speed up and complete the Work as herein provided. No charges or damages for lost productivity or efficiency shall be permitted, and Contractor has anticipated the risk of same in the Contract Price.~~

~~REMEDIES OF OWNER AND CONSTRUCTION MANAGER~~

~~(f) The Contractor agrees that if it delays the timely progress of the Work, or otherwise fails, refuses or neglects to perform this Agreement in accordance with its terms, so as to cause loss or damage to the Construction Manager and/or the Owner or to other contractors, then it shall reimburse the Owner and Construction Manager and such other contractors for such loss. The Contractor's liabilities for any breach of its obligations hereunder, whether or not relating to delay, shall include, but not be limited to (a) damages and other delay costs payable by the Construction Manager to the Owner, including all or a portion of any liquidated damages assessed by the Owner against the Construction Manager in proportion to the Contractor's share of the responsibility for such delay; (b) the Construction Manager's increased costs of performance, such as extended general conditions and increased performance costs, resulting from Contractor-caused delays or improper Work (plus overhead markup of 15%); (c) warranty and re-work costs (plus overhead markup of 15%); (d) liability to third parties; (e) attorneys fees and related costs incurred by the Construction Manager in any proceeding against the Contractor or its sureties to enforce any of the Construction Manager's rights as provided herein (including, without limitation, the attorneys fees and related costs arising from trial, arbitration or appeal, confirmation of such arbitration by the appropriate court, and enforcement of the confirmation and/or any judgments); and (f) costs of compliance, expense and damages, including but not limited to fines and penalties assessed against the Construction Manager incurred as a result of violations of safety or any other laws rules, codes or relations by the Contractor. The Contractor and its surety, if any, shall, in addition to liability to the Owner, be liable to the Construction Manager for all damages caused, directly or indirectly, to the Construction Manager by the Contractor's default, without regard to any cap of liability, or waiver of damages by the Owner in favor of the Construction Manager under Construction Manager's contract with the Owner. In addition to the foregoing, the Construction Manager and Owner shall have the right, after three (3) days' written notice to the Contractor if the Contractor has failed to commence to cure, to provide any such labor, additional labor, overtime labor and materials and to deduct the cost thereof from any moneys then due or thereafter to become due to the Contractor. Permission by the Construction Manager or Owner for delayed finishing shall not be construed as a waiver of the Construction Manager's or the Owner's right to be compensated by the Contractor for damage resulting from any such delay.~~

~~TERMINATION FOR CONTRACTOR DEFAULT~~

~~26. If the Contractor shall fail to comply with any of the provisions or obligations under this Agreement or if the Contractor or any of its officers should be indicted or the subject of a governmental investigation (or if a subcontractor of Contractor or any of its officers has been indicted or the subject of a governmental investigation and Contractor does not terminate its subcontract with the subcontractor after instructions~~

~~from Owner or Construction Manager to do so), Owner or Construction Manager shall have the right after three (3) days' written notice to the Contractor, to terminate in whole or in part Contractor's employment under this Agreement and to take possession of the Contractor's materials, tools, plant, equipment and appliances used or to be used for the construction, whether on or off the Site, (and for that purpose to enter the premises of the Contractor) and to cause the entire remaining Work to be finished and the materials therefor to be furnished by another contractor or contractors as the Owner or Construction Manager deems fit; and the Contractor shall not be entitled to any further payment unless and until all the Work specified in this Agreement shall be finished and then accepted by the Owner, at which time, if the unpaid balance of the amount to be paid under this Agreement shall exceed the expense incurred by the Owner and/or Construction Manager in finishing the Work, including overhead, attorneys' fees and damages incurred through the default of the Contractor, such excess shall be paid to the Contractor, but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Construction Manager if prior to Substantial Completion of the Work or to the Owner if after Substantial Completion of the Work. In the event of any such termination, Contractor shall comply with all directives of the Construction Manager or Owner with respect to Contractor's activities on the Site, if any are permitted, and Contractor shall cooperate fully, as requested by the Construction Manager or Owner, to facilitate the efficient completion of Contractor's obligations hereunder. Should Contractor continue to perform Work following a termination, and should Owner or Construction Manager be willing to permit Contractor to do so, Contractor shall be deemed a volunteer with respect to any Work that was the subject of a termination, and Construction Manager's or Owner's willingness to permit Contractor to continue to perform such Work shall not be deemed a revocation of the termination. After the Work has been completed, the Contractor may remove such materials, tools, plant, equipment and appliances as remain, but neither the Construction Manager nor the Owner shall be liable for anything that has been lost, stolen, destroyed, worn or used. In addition, without terminating this Agreement, the Owner or Construction Manager may, under the circumstances set forth above, terminate the Contractor's right to proceed with any part of the Work or with the furnishing of any part of the labor and/or materials.~~

~~TERMINATION FOR CONVENIENCE~~

~~27. Owner or Construction Manager may terminate this Agreement in whole or in part, including orders placed pursuant to this Agreement, for convenience without cause at any time, upon three (3) days prior written notice to Contractor. In the event the Agreement is terminated for convenience by Construction Manager, Owner will pay the lesser of: (a) actual value of Work (based on approved schedule of values) earned up to the date of termination plus reasonable, actual, documented demobilization costs; or (b) actual costs incurred by Contractor together with a reasonable markup for profit in accordance with the Contract Documents. Upon such a termination, Construction Manager and/or the Owner will have no further obligation to Contractor nor shall Construction Manager and/or the Owner be obligated to pay for (and Contractor hereby waives) any lost profits on Work not performed, lost bond capacity or other type of expenses or damages. If the Owner or the Construction Manager terminates this Agreement pursuant to the provision entitled "Termination for Contractor Default" and it is ultimately decided by a court of law that Contractor has not failed to comply with any of the provisions of this Agreement or should not have had this Agreement terminated for default, whether or not as the result of the Contractor or any of its officers being indicted or the subject of a governmental investigation or as a result of failure to terminate its subcontractor as the result of the subcontractor of Contractor or any of its officers having been indicted or the subject of a governmental investigation, such termination shall be treated as a Termination for Convenience pursuant to this Clause and Contractor shall have no further or additional recourse in connection with such termination.~~

~~PERFORMANCE BOND AND PAYMENT BOND OR SUBGUARD~~

~~28. The Owner and Construction Manager have the right to request performance and payment bonds on or before the execution of this Agreement. The Contractor, on or before the execution of this Agreement, shall furnish to the Owner and/or Construction Manager performance and payment bonds issued by a surety company satisfactory to the Construction Manager and the Owner, and in form satisfactory to the Construction Manager and the Owner, guaranteeing the due and prompt performance of all of the terms of this Agreement on the part of the Contractor to be performed, and the prompt payment of all amounts to be paid by the Contractor for labor and materials. The performance and payment bonds shall name the Construction Manager and the Owner and the Lender as obligees (together with others to be designated by the Owner and/or Construction Manager), in penal amounts equal to the Contract Price of this Agreement, including any amendments thereto, and shall include language expressly acknowledging that the bonds shall remain in force and effect notwithstanding any assignment, conversion or novation of this Agreement. The terms of the bonds, and the surety issuing the bonds, must be U.S. Treasury-rated with a single bond limit equal to the proposed penal amount. The bonds shall expressly incorporate the terms of this Agreement, and the incorporated Contract Documents, and provide that the surety's obligations and liabilities shall be co-extensive with those of the Contractor, and that the surety shall expressly agree to join in, and to be bound by, any arbitration or legal action involving the Owner and/or the Construction Manager arising from the Project. Cost of performance and payment bonds has been included in Contract Price, provided that if such cost has been provided as an alternate, the cost of such alternate will be added to Contract Price by change order. Should the Project be enrolled in a Subcontractor Default Insurance Program ("Subguard"), Contractor shall timely provide the requisite documentation for enrollment into said program and promptly cooperate with the requirements of the Subguard provider. In the event that the Contractor fails to furnish the bonds as aforesaid and/or fails to qualify for enrollment in the Subguard program, the Construction Manager shall have the option of declaring the Contractor to be in default and exercising any or all of the rights set forth in this Agreement. Bonds shall be written at standard rates of surety companies authorized to do business in the State in which the Site is located.~~

BANKRUPTCY

~~29. If the Contractor shall be adjudged a bankrupt or becomes Insolvent, or if any petition under the Bankruptcy Code of the United States is filed by or against the Contractor, or if it should make an assignment for the benefit of creditors, or if a receiver of the Contractor's property should be appointed, or if any judgment is taken against the Contractor and execution is issued thereon, or if the property of the Contractor passes into the hands of any legal representative, then and in any of these events, the Owner and/or Construction Manager may, at their option, terminate this Agreement and the employment of the Contractor, with the same rights and privileges set forth in the provision hereof entitled "Termination for Contractor Default".~~

ACCELERATION OF PERFORMANCE

~~30. If the Owner or the Construction Manager shall desire the Work of the Contractor hereunder to be performed with greater speed than is herein contracted for other than for reasons for which Contractor is responsible in whole or in part, the Contractor shall, without affecting or abridging the rights of the Owner or Construction Manager set forth in any Article hereof, upon receipt of a written order from the Owner or Construction Manager, employ overtime labor as so ordered. Direct cost of the premium time for all labor utilized by the Contractor in such overtime Work as shown on the time slips checked and approved each day by the Owner or Construction Manager shall be paid by Owner to the Contractor, but no profit, overhead, supervision costs, commission or other costs shall be paid and in lieu thereof Contractor shall be paid a ten percent (10%) markup on the direct cost to be paid hereunder. No charges or damages for lost productivity or efficiency shall be permitted, and Contractor has anticipated the risk of same and included all costs associated therewith in the Contract Price.~~

NO WAIVER

~~31. The failure of the Construction Manager or Owner to insist in any one or more instances upon a strict compliance with any provision of this Agreement, or to exercise any option herein conferred, shall not be construed as a waiver or relinquishment of the right of the Construction Manager or Owner thereafter to require a compliance with such provision of this Agreement, or a waiver of the right of the Construction Manager or Owner thereafter to exercise such option, but such provision or option will remain in full force and effect.~~

GUARANTY

~~32. The Contractor hereby agrees to repair and make good any damage, defects or fault in its Work that may appear within one (1) year after completion, or within such longer period as may be provided in the specifications, guaranty, Contract Documents or other writing, as the result of imperfect or defective Work or materials furnished by the Contractor (even if such defects or imperfections be latent) or Work or materials at variance with what is specified. All materials furnished or installed (except where otherwise expressly specified in any of the Contract Documents) shall be subject to a guaranty of one (1) year from the date of (a) completion of the entire Project, (b) the making of final payment by or on behalf of the Owner to the Contractor, (c) the issuance of a final Certificate of Occupancy, or (d) the discontinuance of the use of permanently installed Work for temporary construction purposes, whichever is latest. Contractor hereby agrees to make any and all repairs which may become necessary, during the guaranty period, on account of faulty materials furnished or faulty workmanship performed, and the guaranty period, within three (3) days from receipt of written notice, without cost to and to the satisfaction of the Owner and/or Construction Manager. If the Owner or Construction Manager determines that an emergency exists which requires more immediate action than the Contractor is able to provide, the Owner or Construction Manager may, without sending any notice to the Contractor, perform or cause to be performed such repairs or replacements, in which event the Contractor shall compensate the Owner for the cost thereof, on demand. Any repairs or replacements that the Contractor is required to make pursuant to this paragraph shall be prosecuted to completion by the Contractor even if such repairs or replacements may not be completed until after the expiration of the Guaranty period. The Guaranty period shall, with respect to any repair or replacement, continue until the later of the expiration of the Guaranty period and one (1) year from final acceptance by Owner of such repair or replacement. All rights acquired by the Owner through guaranties by the Contractor shall inure to the benefit of the Owner, the Construction Manager, and their respective successors and assigns. In addition to the foregoing, any equipment warranties secured by the Contractor, including those in excess of one (1) year, and any bond or guaranty which may be required under the plans or specifications, shall also inure to the benefit of the Owner, the Construction Manager, and their respective successors and assigns. The Contractor shall strictly comply with all warranty requirements of the Contract Documents applicable to the Work, and warrants to the Owner and Construction Manager that materials and equipment furnished under this Agreement will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. This warranty shall be in addition to and not in limitation of any other warranty, guaranty or other remedy required by law or by the Contract Documents.~~

PAYROLL AND SALES TAXES

~~33. The Contractor hereby accepts exclusive liability and shall, defend, indemnify and hold the Construction Manager and Owner harmless for the payment of contributions pursuant to any Unemployment Insurance Law, Retirement Benefits Law and any other or similar Social Security Law or Payroll or Income Tax now or hereafter enacted by any City, State or Federal Government or any subdivision of either, levied or based upon the payroll of the Contractor for employees partly or wholly engaged in the Work covered by this Agreement. The Contractor agrees to furnish all necessary information to enable the Construction Manager and Owner to comply fully with all the requirements of~~

~~such laws. All sales and use taxes are included in the Contract Price and are to be paid by the Contractor. In the event that any law is or has been passed, or any rule or regulation pursuant thereof is enacted, which requires the Construction Manager or Owner to pay, either directly or indirectly, the amount of any such tax, or should any such law, rule or regulation direct the Construction Manager or Owner to collect the same, or make the Construction Manager or Owner liable for the collection thereof, or make the Construction Manager or Owner responsible therefor, it is covenanted and agreed that the Contractor shall fully and completely make all payments therefor, and shall fully and completely defend, indemnify and save the Construction Manager and Owner harmless from any and all such taxes. It is further agreed that the Owner or Construction Manager shall have the right to deduct the amount of any and all such taxes from the Contract Price at any time the Owner or Construction Manager may, in their individual, sole discretion, deem it advisable, to the end that the Construction Manager and Owner may not be under liability therefor whatsoever, it being agreed that the Owner and/or Construction Manager shall have the right to deduct any and all such moneys from the next payments due under this Agreement and from the retained percentages. If any Sales Tax provides any exemption from tax for capital improvements, Owner agrees to provide Contractor with the necessary certification and Contractor agrees not to charge tax with respect to the furnishing of labor and/or materials as long as said exemption provision is in effect. The Contractor shall not employ any individuals as independent contractors on the Project; all subcontractors shall be incorporated entities or limited liability companies.~~

CONTRACT PRICE NOT ADJUSTED FOR RISING COSTS

~~34. The Owner agrees to pay the sum herein set forth in current funds for such Work and materials, and in the manner and at the times herein set forth. All prices upon which the Contract Price was based shall be firm for the duration of the Work. Said sum is intended to include all increases in cost, foreseen or unforeseen, including, without limiting the generality of the foregoing, taxes, labor and materials, all of which is to be borne solely by the Contractor. All loss or damage arising from any of the Work performed under this Agreement through unforeseen or unusual obstructions, difficulties or delays which may be encountered in the prosecution of same or through the action of the elements shall be borne by the Contractor. It is mutually agreed between the parties hereto that no payment made under this Agreement, shall be conclusive evidence of the performance of this Agreement, either wholly or in part, nor shall it be construed to be an acceptance of defective Work or improper material, or an approval of any of the items in any requisition made or bill rendered. All bills or requests for payments must be presented in writing.~~

SCHEDULE OF VALUES

~~35. (a) Prior to the commencement of Work, Contractor shall prepare and submit to Owner, for Owner's approval, a written "Schedule of Values" furnishing a complete, detailed and itemized breakdown of the various divisions of the Work, including values for materials and labor. The total of this cost breakdown shall be equal to the Contract Price. The Schedule of Values shall allocate the Contract Price to the various elements of the Work. The Schedule of Values shall be used for determining periodic payments under this Agreement.~~

~~(b). Prior to commencement of the Work, the Contractor shall submit to the Owner a written schedule of subcontractors, suppliers and vendors identifying and listing each and every person, firm, corporation, trustee, union, governmental authority, or other entity the Contractor intends to utilize or to whom Contractor expects to incur a liability for or in connection with its performance of any part of the Work, including on such schedule their name, business address, telephone number, fax number, email address, name of primary contract person, their scope of work, and identifying which items or categories of Work the subcontractor, supplier or vendor will provide. Receipt of such a schedule shall be an express condition precedent to the Owner's obligation to make any payment to the Contractor. The Contractor shall submit to the Owner an updated schedule of subcontractors, suppliers and vendors promptly after making any change or addition to the persons or entities it intends to utilize or to which it expects to incur liability and after approval of the Contractor's schedule of values, specifying the item(s) on such schedule of values that each subcontractor, supplier and vendor will provide. The Contractor shall incorporate by reference all terms of this Agreement into any subcontract or purchase order and shall provide the Owner with a copy of any such subcontract or purchase order within fifteen (15) days of its execution or issuance or three (3) business days before any employee of such subcontractor enters the Project site, whichever occurs first.~~

PROGRESS PAYMENTS

~~36. (a) On or before the 20th day of each calendar month the Contractor shall forward to the Construction Manager, for its approval, a written statement in draft showing the amount due or to become due and including anticipated Work through the last day of that calendar month. Contractor shall finalize and submit its application for payment (each a "requisition") within the time directed by the Contractor and shall attach to each such requisition an acknowledgment of payment to the date of the last advance, a partial waiver and release of liens and claims, as well as a statement of any back charges and credits to which the Owner is entitled, a sworn statement of any claim for charges or extras due to the Contractor, such claim not to be valid unless made at the time and in the manner aforesaid, a sworn statement setting forth all amounts, if any, owed by Contractor to its subcontractors and suppliers, and a Schedule of Values showing the percentages of the various divisions of Work completed, including values for materials and labor. All requisitions shall be made on and in compliance with Construction Manager's standard form of Contractor's requisition and shall be subject to the terms thereof, including the submission of sworn statements from Contractor's subcontractors and vendors. Provided that the Contractor fully complies with its obligations under this Clause 36(a), the Owner, on or about the final day of~~

~~the following calendar month, shall remit to the Contractor 90% of the amount so requisitioned by the Contractor in the month prior to the month of payment and as approved by the Owner. In addition to retainage of 10%, the Owner shall also retain a sum sufficient, in its opinion, to complete the Work in accordance with the terms of this Agreement. Moreover, in each instance of requisition prior to completion, the Contractor shall certify to the Construction Manager that the cost of the Work remaining to be done under this Agreement does not exceed 90% of the balance of the Contract Price unpaid. In no event will the Owner be required to pay in excess of 90% of the Contract Price prior to the completion of all the Work the Contractor is obligated to perform under this Agreement.~~

- ~~(b) Contractor acknowledges and agrees that, Construction Manager is acting only as agent for Owner and Construction Manager is not liable to Contractor for payment hereunder.~~
- ~~(c) The Owner agrees, in consideration of the complete and proper performance of the Work by Contractor in accordance with the terms and provisions hereof, to pay or cause to be paid to Contractor the Contract Price. Contractor understands that all payments to the Contractor will be provided by the Owner through the Construction Manager, as agent of the Owner, from a special Owner source created for the specific funding of this Project. No payment, whether a progress or final payment, will be made to Contractor until that fund comes into existence. It shall be a condition precedent to payment that said fund shall have been created and funded. It shall be a condition precedent to payment that Construction Manager as Owner's agent has received from Owner any and all monies owed to Contractor hereunder. Notwithstanding anything set forth in this Agreement to the contrary, the Contract acknowledges and agrees that the Construction Manager has no obligation to render any payment to Contractor for any Work performed in accordance with this Agreement and that the Construction Manager does not owe any financial or fiduciary duty to the Contractor.~~
- ~~(d) The timing of the Construction Manager's payments to Contractor shall be conditioned upon the Construction Manager having first received from the Owner funds to pay for the work performed by Contractor and the Construction Manager, as Owner's agent, shall remit payments within (10) days after receipt by the Construction Manager of funds from the Owner for the work of Contractor for which payment is owed.~~

WITHHOLDING OF PAYMENT; SATISFACTION OF CLAIMS

- ~~(e) The Owner and or Construction Manager may withhold payment to the Contractor on account of (1) the failure of the Contractor to comply fully with any requirements of this Agreement, including, without limitation, the failure of the Contractor to make payments to subcontractors or for material or labor, (2) the failure of the Contractor to prevent the filing of liens or claims, or to avoid the reasonable probability of the filing of liens or claims, against the Owner, the Construction Manager, the Project or the Contractor, (3) the failure of the Contractor to make payments to union fringe benefit funds, and (4) damage to another contractor by reason of any act or failure to act of the Contractor. In addition, in its sole discretion, the Owner and/or Construction Manager may cause the proceeds of any payment payable hereunder to the Contractor to be applied to the payment of any indebtedness owed or claimed or asserted by a third party to be owed by the Contractor, or by a sub-subcontractor or vendor of any tier to the Contractor, to any party who has performed Work or supplied materials or equipment used in or in connection with the performance of this Agreement, either directly to such party or by means of checks payable jointly to the Contractor and such party, if, in the reasonable judgment of the Construction Manager, such Work or such materials or equipment have been furnished on or related to the Project, unless the Contractor provides definitive documentary evidence satisfactory to the Construction Manager that it has previously paid such party therefor. In addition, if the Construction Manager reasonably believes that the performance by the Contractor of the Work to be performed hereunder has been or may be endangered because the Contractor will or may fail or has failed to pay for labor, fringes, materials, sub-subcontractor taxes, or any other contractual obligations of the Contractor, the Owner and/or Construction Manager shall have the right, at its election, but not the obligation, to cause payment on account of the Contract Sum to be made by means of checks payable either directly to the person, firm, corporation, trustee, union, governmental authority, or other entity to whom money is due or who claims money is due from the Contractor, or by check payable jointly to the Contractor and such person, firm, corporation, trustee, union, governmental authority, or other entity. Any and all payments made under this Clause shall be deemed to have been paid for and on behalf of the Contractor, and for the purpose of eliminating any bond, lien and/or other claims arising from the Project. The exercise or refraining from exercise of such right by the Owner or Construction Manager on any one occasion shall not obligate the Owner or Construction Manager to exercise such right on any other occasion or waive the right to exercise such right on any other occasion; nor shall such exercise or anything herein constitute or be deemed a guarantee or assumption by the Owner or Construction Manager of any obligation of the Contractor.~~

FINAL PAYMENT

- ~~(f) The balance owing to the Contractor under the terms of this Agreement shall be due and payable within sixty (60) days after the completion of all Work in this Agreement, including patching and the furnishing of missing material, acceptance thereof by the Owner, and receipt by the Construction Manager and Owner of: (i) all Contractor's "as built" drawings, records and related data; (ii) all guaranties and warranties to which the Owner is entitled hereunder or elsewhere in~~

~~the Contract Documents; (iii) all permits, licenses, approvals, certificates and authorizations required by any authority having jurisdiction; (iv) a general release from the Contractor on the Construction Manager Owner's standard form in favor of the Owner, Construction Manager and Project sureties, if any; (v) releases of lien from all subcontractors, vendors and union fringe benefit funds; and (vi) proof satisfactory to Construction Manager that all claims, including taxes, regarding the Work performed hereunder and any liens growing out of the same shall have been filed or recorded, have been released. Contractor's acceptance of Final Payment, in whole or part, shall constitute a waiver of any and all claims by Contractor regarding this Agreement. Payment of the Contract Price and/or any other sums for the Work or any portion thereof and/or any other amounts due or claimed to be due or claimed to be due to Contractor shall be made only from a special fund and a specific source, namely from payments made by Owner from time to time to the Construction Manager with respect to the work performed by Contractor and it shall be a condition precedent to payment that said fund be funded with monies due and owing to Contractor.~~

PROMPT PAYMENT ACT INAPPLICABLE

~~37. It is the intention of the parties that, to the extent not prohibited by Article 35-E of the General Business Law of the State of New York, commonly known as the "Prompt Payment Act" ("Prompt Payment Act"), or otherwise expressly provided in this Agreement, the terms and conditions of this Agreement shall supersede the provisions of the Prompt Payment Act in their entirety and, accordingly, (i) the Prompt Payment Act shall not apply to this Agreement, and (ii) the absence of a provision in this Agreement covering any matter addressed in the Prompt Payment Act shall not be construed to mean that the parties have agreed that the applicable provision in the Prompt Payment Act shall govern with respect to that matter.~~

~~Under no circumstances shall Construction Manager have any obligation for payment to Contractor. Contractor accepts the risk of nonpayment by the Owner, either directly or through disbursement by the Construction Manager, as material consideration for this Agreement.~~

TRUST FUNDS

~~38. Any and all funds payable to the Contractor hereunder are hereby declared to constitute trust funds in the hands of the Contractor, to be applied first to the payment of claims for or of: employment taxes, unemployment insurance and social security related to the Project, laborer's claims for daily and weekly wages, benefits and wage supplements, subcontractors, materialmen, architects, engineers and surveyors, arising out of the described Work, to claims for utilities furnished and taxes imposed, and to the payment of premiums on surety bonds and other bonds filed and premiums on insurance accruing during the construction of the described Work, before application to any other purpose. Whenever required by the Owner and/or Construction Manager, it shall be the duty of the Contractor to file with the Owner and/or Construction Manager a verified statement, in form satisfactory to the Owner and/or Construction Manager, certifying the amounts then due and owing from the Contractor for labor and materials furnished under the terms of this Agreement, setting forth therein the names of the persons whose charges or claims for labor, materials or supplies are unpaid, and the amount due each respectively.~~

CHANGES AND EXTRAS

~~39. The Owner or Construction Manager, without invalidating this Agreement, may order extra Work or make changes by altering, adding to or deducting from the Work, the Contract Price to be adjusted accordingly to the extent applicable. The amount set forth in any Change Order will be the full compensation to Contractor for all extra Work required regarding the Change Order, including for all acceleration, delay, loss of efficiency, inconvenience, increased supervision or other costs or expenses. The Contractor shall not make any alterations or omit anything, or perform additional or extra Work, except upon written order signed by the Owner. The Owner or Construction Manager shall at any time have the right to order extra Work to be performed on (a) Lump Sum Proposal, (b) Unit Prices, or (c) Time and Material Basis. No request for payment for extra Work will be honored unless accompanied by such written order. All such Work shall be executed under the provisions of this Agreement. The Owner's and/or Construction Manager's choice of the manner in which the extra Work is to proceed is described as follows:~~

~~—(a) Lump Sum Proposal~~

~~Prior to performing any work, the Contractor will within ten (10) days after receipt of the Owner's or Construction Manager's communication submit its Lump Sum Proposal. This Proposal will be itemized and segregated by labor and material for the various components of the Work. No aggregate labor total will be acceptable. The Contractor will furnish with its Proposal supporting data consisting of subcontractors' and vendors' signed proposals. The Contractor will be allowed a maximum mark-up of 15% for overhead and profit on labor performed by its own forces and material purchases. Subcontractors, likewise, will be permitted a maximum mark-up of 15% for overhead and profit on labor performed by their own forces and material purchases. The Contractor will be further allowed a maximum mark-up of: (a) 6% on all of its subcontractors' Work; and (b) 6% on equipment rented by the Contractor or subcontractor. In no case shall the aggregate mark-up for the Contractor and all of its tiered Subcontractors exceed 21% of the actual cost of the extra Work. A wholly owned subsidiary, sister, joint venture, related companies or a company in which the Contractor has a majority interest will not be considered as Subcontractor when calculating overhead and profit mark-ups. The Contractor may include in its labor proposal only those workmen and foremen directly involved in the Work. All other supervision is included in the 15% overhead and profit mark-up~~

~~allowed. Contractor will be entitled to payment for labor, union fringe benefits, insurance, unemployment insurance, social security and taxes paid on labor. No mark-up for overhead or profit will be allowed on social security, unemployment insurance or other insurances or premium time. Contractor's material costs will include invoiced costs, transportation, applicable sales or use taxes, actual rental costs or discounted local published rental rates. Use of small tools is included in the Contractor's mark-up for overhead and profit. Mark-up for overhead and profit as outlined above includes all other costs whatsoever beyond those enumerated. If any of the extra Work included in the Lump Sum Proposal is covered by Contract Unit Prices, the Owner or Construction Manager may elect to use these unit prices within the Lump Sum Proposal. No mark-up for overhead and profit may be applied to these unit prices. The entire value of the change will be the net difference of the Work to which will be applied the mark-up percentages for overhead and profit.~~

~~(b) Unit Prices:~~

~~Prior to performing any work, the Contractor will submit within ten (10) days after receipt of the Owner's or Construction Manager's communication its written proposal itemizing the quantities of each item of Work for which there is an applicable unit price contained in the Agreement. The quantities must be itemized in relation to each specific contract drawing. Unit prices will be applied to net differences of quantities of the same item.~~

~~(c) Time and Material:~~

~~Should the Owner or Construction Manager elect to have any extra Work performed on a time and material basis in lieu of Lump Sum Proposal or Unit Prices, and so notifies the Contractor in writing, the Contractor shall perform such Work at actual cost (without any charge for administration, clerical expense, supervision or superintendence of any nature whatever, including foremen, or the cost, use or rental of tools or plant) plus a maximum of 15% for overhead and profit. To this figure the Contractor may add Unemployment Insurance and Social Security taxes paid on labor required for the extra Work. Moreover, if the Contractor procures the performance of extra Work by others rather than its own employees, the Contractor shall not be entitled to greater payment than that to which it would have been entitled if it had itself furnished the labor and materials required in connection with the Work to be performed under this provision. The Contractor will submit to the Owner and Construction Manager daily time and material tickets. The time and materials tickets shall not be valid and Contractor shall not be entitled to payment for any such tickets unless they are signed by an authorized representative of the Owner or Construction Manager. These tickets will include the identification number assigned to this Work, the location and description of the Work, the classification of labor employed including workers' names and social security numbers, the material used, the equipment rented (not tools) and any other information ordered by the Owner and/or Construction Manager.~~

~~All markup for overhead and profit under (a) (b) and (c) above shall be inclusive of any and all costs and expenses including, but not limited to, all overhead of whatever kind or nature, and all supervision, management, administration, estimating or other costs.~~

~~(d) Procedure:~~

~~Where any such additional Work is ordered as provided in this Agreement, the Contractor shall, for such purposes, permit the Owner and/or Construction Manager to audit its books. The Contractor shall produce any and all data which the Owner and/or Construction Manager may request for the purpose of determining the correctness of the changes. The Contractor shall keep such full and detailed accounts as may be necessary to reflect its operations with respect to such changes and extras, and the system adopted shall be such as is satisfactory to the Owner and/or Construction Manager. The Owner, Construction Manager, their agents and employees, shall be afforded access at all reasonable times to the Contractor's, subcontractors' and vendors' books, correspondence, instructions, receipts, vouchers, memoranda and records of all kinds, relating to all Work under this Agreement as well as to such changes and extras, and the Contractor shall preserve the same for a period of six (6) years after final payment hereunder. In regard to the foregoing and generally, the Contractor hereby authorizes the Owner and Construction Manager to check directly with its suppliers of labor and materials the charges for such labor, materials and other items appearing in the Contractor's bills rendered to the Owner, to confirm balances due and obtain sworn statements and waivers of lien and agrees to provide Owner or Construction Manager with all documentation and consent forms necessary to obtain this information.~~

~~In the case of disagreement as to the amount to be paid or credited for extra or changed Work, or any change in the completion date related thereto, the Contractor shall promptly comply with the order, and payment to Contractor or credit to the Owner or Construction Manager shall be made in accordance with the contract payment provisions up to the reasonable estimated value of the change as determined by Owner or Construction Manager.~~

~~Unless and until the Owner or Construction Manager shall elect either the lump sum, the unit price method or time and material, the Contractor shall maintain and submit daily records of labor, material and equipment used in the Work which have been acknowledged thereon daily by the Construction Manager. In any event, Owner or Construction Manager shall have the right to order such changes in the Work to proceed promptly prior to the submission of any proposal and/or Owner's or Construction Manager's election.~~

~~The Construction Manager reserves the right to estimate value of change on contractor's behalf and~~

~~submit to the Owner for approval should contractor fail to provide pricing to Construction Manager within fourteen (14) days from date of a request for a change order proposal and Contractor agrees that any such estimate shall be final and binding upon it.~~

~~Any Work included in this Agreement shall be performed by the Contractor at no extra cost to the Construction Manager or Owner despite any order from the Construction Manager or Owner to the Contractor which might contemplate such Work as an extra.~~

~~Should there be a dispute or disagreement as to whether Contractor is entitled to an adjustment in price or schedule, Contractor shall proceed as directed by Construction Manager and shall not defer or delay compliance with such directive pending resolution of the dispute or disagreement.~~

~~Notwithstanding any other provision in this Agreement to the contrary, change orders may be signed on behalf of the Owner by an Officer, an Officer's nominee duly authorized in writing, or a Vice-President of the Construction Manager.~~

CONTRACT ALLOWANCES

~~40. Unless otherwise provided in the Contract Documents and provided that the materials and equipment selected is reasonably similar to that anticipated by the allowance:~~

- ~~a. Allowances shall cover the cost to the Contractor of materials and equipment delivered at the Site and all required taxes, less applicable trade discounts;~~
- ~~b. Contractor's cost for unloading and handling at the Site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Price but not in the allowances;~~
- ~~c. Whenever costs are more than or less than allowances, the Contract Price shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under item A above and (2) changes in Contractor's costs under item B above.~~

CONTRACTOR CLAIM

~~41. Subject to provisions of Clauses 36 of this Agreement, the Contractor shall give Construction Manager/Owner's Contract Administrator written notice within three (3) days after the happening of any event which the Contractor believes may give rise to a claim by the Contractor or its subcontractors for an increase in compensation or an extension of the time of performance. Within ten (10) days after the happening of such event, the Contractor shall supply Construction Manager/Owner's Contract Administrator with a statement supporting the claim, which statement shall include Contractor's detailed estimate of any change in compensation and the time of performance occasioned thereby. If requested by Construction Manager/Owner in writing, the Contractor shall substantiate its claim with payroll documents, paid invoices, receipts, records of performance and other documents satisfactory to Construction Manager/Owner's Contract Administrator and subject to Construction Manager/Owner verification. Construction Manager/Owner shall not be liable for, and the Contractor waives, any claim or potential claim of the Contractor of which the Contractor knew and which was not reported by the Contractor in accordance with the provisions of this Article. The Contractor agrees to continue performance of the Work during the time any claim hereunder is pending. Construction Manager/Owner shall not be bound to any adjustments in compensation or time performance for the Contractor's claim unless expressly agreed to by Construction Manager/Owner in writing.~~

NO DELAY BY CONTRACTOR

~~42. To the greatest extent permitted by law, notwithstanding the fact that a dispute, controversy or question shall have arisen in the interpretation of any provision of this Agreement, the performance of any Work, the delivery of any material, the payment of any moneys to the Contractor, or otherwise, the Contractor agrees that it will not directly or indirectly stop or delay any Work or part of its Work on its part required to be performed or stop or delay the delivery of any materials on its part required to be furnished hereunder, pending the determination of such dispute or controversy.~~

SCHEDULING

~~43. The scheduling of construction operations for the Project will be monitored by a method to be chosen by the Owner and/or Construction Manager. The Contractor, and its subcontractors, if required, shall furnish all scheduling information requested by the Owner or Construction Manager at such time and in such form and detail as requested for its particular trade.~~

~~Such information shall be furnished within two (2) weeks of the request and shall further be revised from time to time when requested either prior to and/or at any time during performance of its Work.~~

~~Information submitted by the Contractor or others, acceptance or approval by the Construction Manager or Owner, and the scheduling that may be developed and implemented by the Owner or Construction Manager shall not constitute the basis of any claim by Contractor or its subcontractors for damage or delay nor excuse the Contractor's performance as required herein.~~

NOTICES

~~44. A bill, statement, notice or other communication which one of the parties hereto desires to serve upon the other shall be deemed sufficiently given and rendered if personally delivered or sent by registered or certified mail, postage prepaid, return receipt requested, or sent by a nationally recognized overnight courier service addressed to the other party at the address set forth herein or to other such addresses as may be designated in writing by either party to the other in accordance with the provisions of this Clause. The time of the issuance of such bill, statement, notice or communication shall be deemed to be the time when the same was personally delivered or sent and each day's notice shall be construed to mean a period of twenty-four (24) hours from the time the notice was personally delivered or sent.~~

RIGHTS AND REMEDIES

~~45. All Rights and Remedies of Owner and Construction Manager under this Agreement shall be cumulative and shall be in addition to all other Rights and Remedies of Owner and/or Construction Manager provided by law. To the extent that the Construction Manager or Owner determines that in order to obtain a full and complete resolution of any matter in dispute it is necessary that Contractor and/or its surety be included in a dispute resolution proceeding, then the Contractor shall make no objection to its inclusion, and/or the inclusion of its surety, whether by joinder, consolidation or otherwise. This Agreement shall be interpreted in accordance with the laws of the State of New York, without regard to any choice or conflict of law provisions. Contractor waive all claims, whether in contract, tort or otherwise, it may have against the Construction Manager. Any action or claim arising hereunder which is not subject to arbitration shall be commenced in a court of competent jurisdiction located in the City, County and State of New York. The parties each waive all right to trial by jury in any action, proceeding or counterclaim arising out of or in any way relating to this Agreement. **THE PARTIES EXPRESSLY WAIVE A TRIAL BY JURY IN ANY LAWSUIT, ACTION, CLAIM PROCEEDING OR COUNTERCLAIM.** Notwithstanding the foregoing, and in consideration of \$100 paid to the Contractor, the receipt whereof is acknowledged as part of the Contract Price, the Owner and / or the Construction Manager, at its sole and exclusive option, shall have the right to have any dispute or claim, or part thereof, arising out of or in any way relating to this agreement submitted to arbitration. If any such claim involves or implicates a bond funded by Contractor, then the Surety on said bond agrees to arbitration. Any submission by Owner and or Construction Manager shall be in accordance with the Rules of the forum chosen to conduct the arbitration. The parties expressly agree that the Arbitrator shall not have authority to award multiple or punitive damages or attorney's fees, and that all costs and expenses of arbitration shall be borne equally. In the event that the Owner or the Construction Manager elects to submit any dispute to arbitration, Contractor shall dismiss any lawsuit or other proceeding involving in any way the matter submitted to arbitration. This provision shall be specifically enforceable by the Owner and/or Construction Manager. The Contractor shall include the requirements of this Paragraph 45 in all of its subcontracts, purchase orders and other agreements regarding this Work.~~

~~The party filing demand for arbitration must assert in the demand of all claims then known to that party on which arbitration is permitted to be demanded.~~

~~The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.~~

~~Neither Owner nor Construction Manager shall be liable for any indirect, consequential, multiple, exemplary, statutory or punitive damages either at law, in equity or by statute.~~

NO ORAL MODIFICATIONS

~~46. This Agreement, including all Contract Documents identified herein, constitutes the entire agreement between the parties. The Contractor affirms and agrees and represents and warrants that only the statements, representations and promises expressly contained in this Agreement have been relied upon by Contractor and have induced it to enter into this Agreement. No provision of this Agreement shall be changed or modified, nor shall this Agreement be discharged, in whole or in part, except by an agreement in writing signed by the party against whom the change, modification or discharge is claimed or sought to be enforced, nor shall any waiver of any of the conditions or provisions of this Agreement or of any of the rights of either of the parties hereunder be effective or binding unless such waiver shall be in writing and signed by the party claimed to have given, consented to or suffered the waiver. In the event any written change or modification is made as aforesaid, the Owner's and/or Construction Manager's rights and remedies under this Agreement and under any bond given to the Owner or Construction Manager, in accordance with the requirements of this Agreement, shall in no way be prejudiced or impaired, and the bond shall apply and be in full force and effect with respect to this Agreement as so changed and modified. Notwithstanding anything in this provision to the contrary, no such waiver, written change or modification of this Agreement shall be binding against Construction Manager and/or Owner unless signed by an Officer of Construction Manager and/or Owner, or a nominee of the Officer if Contractor has received an Officer's written authorization or a Corporate Resolution authorizing any such nominee to act on an Officer's behalf.~~

SAVING CLAUSE

~~47. If any of the provisions hereof shall contravene or be invalid under the laws of the jurisdiction where the Work is to be performed, such contravention or invalidity shall not invalidate the whole Agreement or any other provision thereof, but this Agreement shall be construed as if not containing the provisions held to be invalid, and the rights and obligations of the parties shall be enforced accordingly.~~

~~EQUAL OPPORTUNITY CLAUSE~~

~~48. In connection with the execution of this Agreement, the Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. Contractor shall use best efforts to hire both minority and female employees whenever qualified individuals apply for employment. The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during their employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In conjunction with this provision, the Contractor shall conduct its business in accordance with all federal, state and local laws and/or ordinances pertaining to programs concerning affirmative action and equal opportunity.~~

~~Contractor shall abide by the requirements of 41CFR 60-300.5(a) and 41 CFR 60-741.5(a). These regulations, respectively, prohibit discrimination against qualified protected veterans and individuals on the basis of disability and require affirmative action by covered prime contractors and subcontractors to employ and advance, in employment, qualified protected veterans and qualified individuals with disabilities.~~

~~EXCULPATION OF PARTNERS~~

~~49. No general or limited partner or shareholder of the Construction Manager or Owner or other holder of any equity interest in the Construction Manager or Owner shall be personally liable under this Agreement nor shall any other holder of any equity interest in any such party be personally liable for the performance of any such party's obligations under this Agreement. The liability of Owner for Owner's obligations under this Agreement shall be limited to Owner's interest in the Property, and the Contractor shall not look to any of Owner's other assets seeking either to enforce Owner's obligations under this Agreement or to satisfy a judgment for Owner's or Construction Manager's failure to perform such obligations. The Contractor will not enter into any agreements with third parties without the inclusion of any exculpatory clause similar to that set forth herein, limiting Owner's and Construction Manager's liability as provided herein.~~

~~HEADINGS~~

~~50. Headings used in this Agreement are inserted only as a matter of convenience and for reference, and they in no way define, limit or describe the scope or intent of this Agreement, nor do they in any way affect this Agreement.~~

~~OWNER'S BENEFICIAL USE AND OCCUPANCY~~

~~51. If, before final acceptance the Owner desires to occupy the Project or any part thereof which is completed or partly completed, or to place or install therein certain equipment and furnishings, then the Owner shall have the right to do so and the Contractor shall in no way interfere with or object to such occupancy by the Owner. Owner's beneficial use or occupancy of the Work, in whole or in part, shall not constitute its acceptance of said Work and shall not modify, mitigate or otherwise alter the Contractor's obligations, including any conditions precedent, regarding its Partial and Final Payments.~~

~~AFFIRMATIVE ACTION~~

~~52. The Owner and Construction Manager have a long-standing practice of encouraging the participation of minority and women owned firms in their business opportunities. Accordingly, the Contractor shall make every good faith effort to subcontract with minority and women owned firms in the performance under this Agreement. Additionally, the Owner and Construction Manager are Equal Employment Opportunity Employers and will expect Contractor and its subcontractors to secure minorities and women in the workforce to the maximum extent possible. This policy shall be supplemented by such specific goals and obligations imposed by governmental authorities and/or as otherwise specified in the Contract Documents.~~

~~LABOR AND MATERIALS TO BE FURNISHED BY CONTRACTOR~~

~~53. Contractor shall perform and furnish, as applicable, all labor, materials, equipment, tools, appliances, services, delivery, hoisting, scaffolding, permits, testing, engineering, layout, supervision, applicable taxes and insurance, coordination and all other operations required for the complete performance of all specified and related work stated herein, in accordance with the Contract Drawings, Specifications, Riders and other Contract Documents listed or referenced herein, all of which become part of this Agreement. Contractor's failure to perform any aspect of the Work in accordance with the Contract Documents shall render any such Work defective and constitute a material breach of this Agreement. Contractor shall be liable for all costs to remedy any such defect, including latent defects. The obligations set forth herein shall survive any expiration or earlier termination of this Agreement.~~

~~AVAILABILITY OF LABOR AND MATERIAL~~

~~54. The Contractor represents that it has sufficient manpower, equipment and materials available to expedite all phases of its Work schedule. Work in any area shall commence upon forty-eight (48) hours notice from the Construction Manager. Work shall proceed in sequence and direction as required by the Owner and/or Construction Manager and as provided for in the Time and Performance Section of Rider "A".~~

~~THIRD PARTY BENEFICIARIES~~

~~55. Construction Manager will be a third party beneficiary under this Agreement with respect to those provisions set forth herein expressly stated to benefit the Construction Manager; provided, however, in no~~

~~event shall any such designation or any provision in this Agreement be construed to create any privity between the Contractor and the Construction Manager, affect Construction Manager's protection from liability as an agent of Owner, or be deemed to create or give rise to any obligations or liabilities on the part of the Construction Manager.~~

EFFECTIVENESS OF THIS AGREEMENT

~~56. The Contractor agrees that this Agreement will not be binding upon the Owner until it is signed by the Owner or the Owner's authorized representative, and on behalf of the Owner, by an Officer of Construction Manager, or a nominee of the Officer if Contractor has received an Officer's written authorization or a Corporate Resolution authorizing any such nominee to act on an Officer's behalf, and redelivered to the Contractor. This Agreement, however, is binding on this Contractor from the moment it is signed by the Contractor and it constitutes an irrevocable offer by the Contractor which cannot be withdrawn or changed without the prior written consent of the Owner. Contractor further represents that this Agreement has been duly authorized by Contractor's Board of Directors, or applicable governing body, and that the individual signing this Agreement has likewise been duly authorized to do so.~~

CONTRACT PRICE

~~57. This Contractor shall perform all Work set forth herein for the Contract Price of **[insert] THOUSAND [insert] HUNDRED [insert] DOLLARS (\$[insert].00)** which Contract Price shall include all applicable taxes, overhead and profit.~~

CONTRACT DOCUMENTS

~~58. The "Contract Documents" are as follows:~~

- ~~_____ This Agreement~~
- ~~_____ All plans and specification issued by the Architect as the same may be revised _____~~
- ~~_____ The Solicitation for this Work, including all attached Appendices.~~

~~All previous bids, orders, proposals, letters, oral or written promises and understandings relating to the subject matter to this Agreement are hereby declared to be null and void. This Agreement is complete and shall not be interpreted by any reference to any previous bid, letter, proposal, document or understanding, written or oral, or other document or agreement except as specifically provided in this Agreement.~~

GENERAL WARRANTIES AND REPRESENTATIONS

~~59. Contractor warrants and represents that:~~

- ~~(a) _____ All Work will be of good quality, free from faults and defects and in conformity with the Contract Documents and Rules and Regulations. All Work not in conformity with these requirements, including substitutions not properly approved and authorized, will be considered defective and subject to Clause 16.~~
- ~~(b) _____ Contractor shall perform the Work in the best and most workmanlike manner, expeditiously and in conformity with the requirements of the Contract Documents. Contractor agrees that all guarantees and warranties made by Contractor's subcontractors and suppliers shall be for the benefit of the Owner and/or Construction Manager, that the Owner and/or Construction Manager may enforce such guarantees and warranties on their own behalf and in their own name, and that, upon request, Contractor will enforce, or assist Owner and/or Construction Manager in enforcing such guarantees and warranties.~~
- ~~(c) _____ Contractor shall furnish its best skill and judgment, employing first-class professional standards, and shall cooperate with the other parties involved in the Work in furthering the interests of Owner and/or Construction Manager.~~
- ~~(d) _____ Contractor has not provided, and shall not provide, directly or indirectly, funds or other consideration to any person or entity (including Owner and/or Construction Manager and their employees and agents) to improperly procure special or unusual treatment with respect to the Contract Documents, the Work, or for the purpose of otherwise improperly influencing the Contractor's relationship with the Owner and/or the Construction Manager. Contractor shall cause all of its officers, directors, employees, members, partners, agents, subcontractors and suppliers to comply with the restrictions contained in this Clause.~~
- ~~(e) _____ Contractor's financial condition is and shall remain sound and that Contractor is capable of performing the Work under this Agreement. Contractor shall be deemed to be in default of its obligations hereunder should a material adverse change in its financial condition affect the performance of its Work or obligations hereunder.~~

COOPERATION WITH LENDER

~~60. Contractor shall cooperate and cause its subcontractors to cooperate and abide by all reasonable requirements of any lender, other financial institution or government entity (including FHA which provides construction or permanent financing for the Project, as well as any consultant employed by any of them) (herein collectively called the "Lender"). Without limiting the generality of the foregoing, Contractor will supply or cause to be supplied all information and documentation requested by Construction Manager, Owner or Lender to comply with the requirements of Lender. Contractor also will provide to Construction Manager upon request copies of purchase orders and subcontracts covering labor, materials, equipment, or furnishings to be provided pursuant to this Contract, and the names of all parties with whom Contractor has subcontracted, or intends to do so. Lender will be entitled to receive copies of any notice from~~

~~Contractor of default on the part of Owner, and Lender will have the right (but not the obligation) to cure such default on behalf of Owner within a reasonable period of time after Owner's failure to do so. Lender may (but shall not be obligated to) assume Owner's rights and obligations hereunder following the occurrence and during the continuance of any default by Owner under its construction loan with Lender. Upon Construction Manager's, Owner's or Lender's request, Contractor will execute and deliver an amendment to this Agreement to reflect Contractor's obligations with respect to the construction or permanent financing after such financing has been arranged, including reasonable modifications to this Agreement requested by Lender, as well as Contractor's agreement to perform its obligations hereunder for the benefit of Lender if Owner defaults under the Construction Loan provided all payments and other obligations required hereunder to be made or performed by Owner are made or performed by Lender.~~

INSPECTION AND AUDIT

~~61. Contractor's records shall be subject to audit and such records shall include but not be limited to accounting records, written policies and procedures, subcontract files (including but not limited to proposals, bid recaps, etc), original estimates, estimating work sheets, correspondence, change order files (including documentation covering negotiated settlement), back-charge logs and supporting documentation, general ledger entries detailing cash and trade discounts earned, insurance rebates and dividends, and any other contractor records which may have a bearing on matters of interest to the Owner and/or Construction Manager in connection with the Contractor's work for the Owner and/or Construction Manager. All of the foregoing herein referred to as "records" shall be open to inspection and subject to audit and/or reproduction by Owner's and/or Construction Manager's agent or its authorized representative to the extent necessary to adequately permit evaluation and verification of: (a) Contractor compliance with the requirements of the Contract Documents, (b) Compliance with the Owner's and/or Construction Manager's business ethics policies, and (c) Compliance with provisions for pricing change orders, invoices or claims submitted by the Contractor or any of its payees.~~

~~Contractor shall require all payees including but not limited to subcontractors, sub-subcontractors, material and equipment suppliers to comply with the "Inspection and Audit" provisions. The Owner and/or Construction Manager's agent and/or its authorized representatives shall have access to the Contractor's facilities, shall be allowed to interview all current or former employees to discuss matters pertinent to the performance of this Agreement, shall have access to all necessary records and shall be provided adequate and appropriate work space, in order to conduct audits in compliance with the "Inspection and Audit" provisions. If an audit inspection or examination discloses overpricing and/or overcharges (of any nature) by the Contractor to the Owner and or Construction Manager, all such amounts shall be repaid and refunded by Contractor to Owner and or Construction Manager respectively unless otherwise agreed in writing. In the event such overpricing and/or overcharges are in excess of 1% of the total Contract Billings, the reasonable cost of the Owner and or Construction Manager's audit shall also be reimbursed to the Owner and or Construction Manager respectively. Any adjustments and/or payments required as a result of any such audit or inspection of the Contractor's invoices and/or records shall be made within a reasonable amount of time (not to exceed 90 days) from presentation of Owner and or Construction Manager's findings to Contractor.~~

~~For those contracts where the Contract Price is based on a fixed or lump-sum amount, the Owner's and or Construction Manager's right to audit shall be limited to invoicing and any allowances, upset limits, or contingencies, and change orders, unless otherwise specified.~~

SURVIVAL

~~62. The obligations of Contractor hereunder regarding insurance, indemnity, warranties, guarantees, discharge of liens, confidentiality, record keeping and retention, and cooperation with and defense of Construction Manager shall survive any expiration or earlier termination of this Agreement.~~

DRAFTING OF AGREEMENT

~~63. The parties acknowledge that they have participated in the drafting of the Contract Documents and the parties hereto expressly waive the defense of *contra proferentem* and agree that the Contract Documents, in whole or part, shall not be construed against any party as the drafter thereof.~~

APPRENTICESHIPS

~~64. The Design Builder and all of its Subcontractors shall participate in apprentice training programs that have been approved by the New York State Department of Labor in the trades of work it employs for not less than three years.~~

~~**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.~~

ACCEPTED:

_____	_____
Contractor	Owner, through its agent:
	Tishman {NAME OF ENTITY
	}(Construction Manager)
BY: _____	BY: _____
_____ (Signature)	_____ (Signature)

<hr/> <hr/> <p>(Print Name and Title)</p>	<hr/> <hr/> <p>(Print Name and Title)</p>
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