FIXED PRICE CONSTRUCTION AGREEMENT

BETWEEN OWNER AND CONTRACTOR

This FIXED PRICE CONSTRUCTION CONTRACT BETWEEN OWNER AND CONTRACTOR (the "Contract" or “Agreement”) is made and entered into by and between El Paso County Hospital District d/b/a University Medical Center of El Paso, a political subdivision of the State of Texas (the "Owner") and TBD (the "Contractor"), collectively referred to as “Parties”). This Contract is executed under seal and shall be effective on the date executed by the last party to execute it (“Effective Date”).

This Contract is for the construction of a project identified as the General Contractor TBD (the "Project") as more fully described in the bid documents, RFP TBD attached hereto as EXHIBIT A.

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements stated herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties agree:

1. **DOCUMENTS INCORPORATED BY REFERENCE**

This Contract includes the bid documents, RFP TBD and the plans and specifications for the Project issued therewith, all of which are attached hereto as EXHIBIT A and Exhibit B TBD Proposal dated TBD, both Exhibits are hereby incorporated herein by reference and made a part hereof.

Change Orders issued hereafter, and any other amendments executed by the Owner and the Contractor, shall become and be a part of this Contract. Documents not included or expressly contemplated in this Paragraph 1 or Paragraph 27,do not, and shall not, form any part of this Contract.

1. **REPRESENTATIONS OF THE CONTRACTOR**

In order to induce the Owner to execute this Contract and recognizing that the Owner is relying thereon, the Contractor, by executing this Contract, makes the following express representations to the Owner:

1. The Contractor is fully qualified to act as the contractor for the Project and has, and shall maintain, any and all licenses, permits or other authorizations necessary to act as the contractor for, and to construct, the Project;
2. The Contractor has become familiar with the Project site and the local conditions under which the Project is to be constructed and operated;
3. The Contractor has received, reviewed and carefully examined all of the documents which make up this Contract, including, but not limited to, the plans and specifications, and has found them in all respects to be complete, accurate, adequate, consistent, coordinated and sufficient for construction.

# **INTENT AND INTERPRETATION**

With respect to the intent and interpretation of this Contract, the Owner and the Contractor agree as follows:

1. This Contract, together with the Contractor's and surety's performance and payment bonds for the Project, if any, constitute the entire and exclusive agreements between the Parties with reference to the Project, and this Contract supersedes any and all discussions, communications, representations, understandings, negotiations, or agreements, except as this Contract may be amended from time to time by both Parties. This Contract also supersedes any bid documents;
2. Anything that may be required, reasonably implied or inferred by the documents that make up this Contract, or any one or more of them, shall be provided by the Contractor for the Contract Price;
3. Nothing contained in this Contract shall create, nor be interpreted to create, privity or any other relationship whatsoever between the Owner and any person except the Contractor. Contractor shall not be included in any employee retirement or fringe benefit plan, and will not be covered by Owner's Worker's Compensation Coverage. Owner will not withhold monies for State or Federal Income Tax or Social Security Payments, and the fees stipulated herein shall be paid in full to Contractor without deductions of any kind. Contractor shall be responsible for payment of Social Security and State and Federal Income Taxes;
4. When a word, term, or phrase is used in this Contract, it shall be interpreted or construed first, as defined herein; second, if not defined, according to its generally accepted meaning in the construction industry; and third, if there is no generally accepted meaning in the construction industry, according to its common and customary usage;
5. The words "include", "included", or "including", as used in this Contract, shall be deemed to be followed by the phrase, "without limitation";
6. The specification herein of any act, failure, refusal, omission, event, occurrence or condition as constituting a material breach of this Contract shall not imply that any other, nonspecified act, failure, refusal, omission, event, occurrence or condition shall be deemed not to constitute a material breach of this Contract.
7. The Contractor shall have a continuing duty to read, examine, review, compare and contrast each of the documents which make-up this Contract, shop drawings, and other submittals and shall give written notice to the Owner of any conflict, ambiguity, error or omission which the contractor may find with respect to these documents before proceeding with the affected work. The express or implied approval by the Owner of any shop drawings or other submittals shall not relieve the Contractor of the continuing duties imposed hereby, nor shall any such approval be evidence of the contractor's compliance with this Contract.
8. In the event of any conflict, discrepancy, or inconsistency among any of the documents that make up this Contract, the following shall control:
   1. As between figures given on plans and scaled measurements, the figures shall govern;
   2. As between large-scale plans and small-scale plans, the large-scale plan shall govern;
   3. As between plans and specifications, the requirements of the specifications shall govern;
   4. As between this document and the plans or specifications, this document shall govern.
9. **OWNERSHIP OF THE DOCUMENTS THAT MAKE UP THE CONTRACT**

The documents that make up this Contract, and each of them, as well as any other documents furnished by the Owner, shall remain the property of the Owner. The Contractor shall have the right to keep one (1) copy of the Contract upon completion of the Project; provided, however, that in no event shall the Contractor use, or permit to be used, any portion or all of such Contract on other projects without the Owner's prior written authorization.

#### CONTRACTOR'S PERFORMANCE

The Contractor shall perform all of the work required, implied or reasonably inferable from this Contract including, but not limited to, the following:

1. Construction of the Project;
2. The furnishing of any required surety bonds and insurance;
3. The provision or furnishing, and prompt payment therefor, of labor, supervision, services, materials, supplies, equipment, fixtures, appliances, facilities, tools, transportation, storage, fuel, or additional light, required for construction and all necessary building permits and other permits required for the construction of the Project;
4. The creation and submission to the Owner of detailed and comprehensive as-built drawings depicting all as-built construction in an electronic format acceptable to the Owner. Said as-built drawings shall be submitted to the Owner upon final completion of the Project and receipt of same by the Owner shall be a condition precedent to final payment to the Contractor.
5. After the Contract has been executed, to the extent permitted by applicable law, the Owner may consider a formal request for the substitution of products in place of those specified only under the conditions set for the in this Contract, provided, however, in no event shall any substitution, change or modification of products result in a material failure to meet published requirements or specifications for bidding on the Project, or violate any statute applicable to public, competitive bidding for public works. By making requests for substitutions, the Contractor:
   1. represents that the Contractor has personally investigated the proposed substitute product and determined that it is equal or superior in all respects to that specified;
   2. represents that the Contractor will provide the same warranty for the substitution that the Contractor would for that specified;
   3. certifies that the cost data presented is complete and includes all related costs under the contract except redesign costs, and waives all claims for additional costs related to the substitution which subsequently become apparent; and
   4. will coordinate the installation of the accepted substitute, making such changes as may be required for the work to be complete in all respects.

## **TIME FOR CONTRACTOR'S PERFORMANCE**

The Contractor shall commence the performance of this Contract upon receipt of materials and shall diligently continue its performance to and until final completion of the Project.

1. The Contractor shall pay the Owner the sum of Five Hundred Dollars ($500.00) per day for each and every calendar day of unexcused delay in achieving Substantial Completion beyond the date set forth herein for Substantial Completion. Any sums due and payable hereunder by the Contractor shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Owner, estimated at the time of executing this Contract. When the Owner reasonably believes that Substantial Completion will be inexcusably delayed, the Owner shall be entitled, but not required, to withhold from any amounts otherwise due the Contractor an amount then believed by the Owner to be adequate to recover liquidated damages applicable to such delays. If and when the Contractor overcomes the delay in achieving Substantial completion, or any part thereof, for which the Owner has withheld payment, the Owner shall promptly release to the Contractor those funds withheld, but no longer applicable, as liquidated damages,.
2. The term "Substantial Completion", as used herein, shall mean that point at which, as certified in writing by the Owner the Project is at a level of completion in strict compliance with this Contract such that the Owner or its designee can enjoy beneficial use or occupancy and can use or operate it in all respects, for its intended purpose. Partial use or occupancy of the Project shall not result in the Project being deemed substantially complete, and such partial use or occupancy shall not be evidence of Substantial Completion.
3. All limitations of time set forth herein are material and are of the essence of this Contract.

# **FIXED PRICE AND CONTRACT PAYMENTS**

1. The Owner shall pay, and the Contractor shall accept, as full and complete payment for the Contractor's timely performance of its obligations hereunder the fixed price as follows TBD ($TBD).

The price set forth in this Subparagraph 7(A) shall constitute the Contract Price, which shall not be modified except by Change Order as provided in this Contract.

1. Within ten (10) calendar days of the effective date hereof, the Contractor shall prepare and present to the Owner the Contractor's Schedule of Values apportioning the Contract Price among the different elements of the Project for purposes of periodic and final payment (the “Schedule of Values”). The Contractor's Schedule of Values shall be presented in whatever format, with such detail, and backed up with whatever supporting information the Owner requests. The Contractor shall not imbalance its Schedule of Values nor artificially inflate any element thereof. The violation of this provision by the Contractor shall constitute a material breach of this Contract. The Contractor's Schedule of Values will be utilized for the Contractor's Payment Requests but shall only be so utilized after it has been acknowledged in writing by the Owner.
2. The Owner shall pay the Contract Price to the Contractor in accordance with the procedures set forth in this Paragraph 7. On or before the 5th day of each month after commencement of performance, but no more frequently than once monthly, the Contractor may submit a payment request (“Payment Request”) for the period ending the 25th day of the month. Said Payment Request shall be in such format and include whatever supporting information as may be required by the Project Manager, the Owner, or both. Therein, the Contractor may request payment for ninety-five percent (95%) of that part of the Contract Price allocable to the Contract requirements properly provided, labor, materials and equipment properly incorporated in the Project, and materials or equipment necessary for the Project and properly stored at the Project site (or elsewhere if offsite storage is approved in writing by the Owner), less the total amount the previously payments received from the Owner. Any payment on account of stored materials or equipment will be subject to the Contractor providing written proof that the Owner has title to such materials or equipment and that they are fully insured against loss or damage. Each such Payment Request shall be signed by the Contractor and shall constitute the Contractor's representation that the quantity of work has reached the level for which payment is requested, that the work has been properly installed or performed in strict compliance with this Contract, and that the Contractor knows of no reason why payment should not be made as requested. Thereafter, the Project Manager shall review the Payment Request and may also review the work at the Project site or elsewhere to determine whether the quantity and quality of the work is as represented in the Payment Request and is as required by this Contract.
3. The Project Manager shall approve in writing the amount that, in the opinion of the Project Manager, is properly owing to the Contractor. The Owner shall make payment to the contractor within forty-five (45) days following the Owner's written approval of each Payment Request. The amount of each such payment shall be the amount approved for payment by the Project Manager less such amounts, if any, otherwise owing by the Contractor to the Owner or which the Owner shall have the right to withhold as authorized by this Contract. The Project Manager's approval of the Contractor's Payment Requests shall not preclude the Owner from the exercise of any of its rights as set forth in Subparagraph 7(of herein below. The submission by the Contractor of a Payment Request also constitutes an affirmative representation and warranty that all work for which the Owner has previously paid is free and clear of any lien, claim, or other encumbrance of any person whatsoever. As a condition precedent to payment, the Contractor shall, if required by the Owner, also furnish to the Owner properly executed waivers of lien, in a form acceptable to the Owner, from all subcontractors, materialmen, suppliers or others having lien rights, wherein said subcontractors, materialmen, suppliers or others having lien rights, shall acknowledge receipt of all sums due pursuant to all prior Payment requests and waivers and relinquish any liens, lien rights or other claims relating to the Project site. Furthermore, the Contractor warrants and represents that, upon payment of the Payment Request submitted, title to all work included in such payment shall be vested in the Owner.
4. When payment is received from the Owner, the Contractor shall within five (5) days pay all subcontractors, materialmen, laborers and suppliers the amounts they are due for the work covered by such payment. In the event the Owner becomes informed that the Contractor has not paid a subcontractor, materialman, laborer, or supplier as provided herein, the Owner shall have the right, but not the duty, to issue future checks and payment to the Contractor of amounts otherwise due hereunder naming the Contractor and any such subcontractor, materialman, laborer, or supplier as joint payees. Such joint check procedure, if employed by the Owner, shall create no rights in favor of any person or entity beyond the right of the named payees to payment of the check and shall not be deemed to commit the Owner to repeat the procedure in the future.
5. Neither payment to the Contractor, utilization of the Project for any purpose by the Owner, nor any other act or omission by the Owner shall be interpreted or construed as an acceptance of any work of the Contractor not strictly in compliance with this Contract.
6. The Owner shall have the right to refuse to make payment and, if necessary, may demand the return of a portion or all of the amount previously paid to the Contractor due to:

(l) The quality of a portion, or all, of the Contractor's work not being in accordance with the requirements of this Contract;

* 1. The quantity of the Contractor's work not being as represented in the Contractor's Payment Request, or otherwise;
  2. The Contractor's rate of progress being such that, in the Owner's opinion, substantial or final completion, or both, may be inexcusably delayed;
  3. The Contractor's failure to use Contract funds, previously paid to the Contractor by the Owner, to pay Contractor's Project-related obligations including, but not limited to, subcontractors, laborers and material and equipment suppliers;
  4. Claims made, or likely to be made, against the Owner or its property;
  5. Loss caused by the Contractor; or
  6. The Contractor's failure or refusal to perform any of its obligations to the Owner.

In the event that the Owner makes written demand upon the Contractor for amounts previously paid by the Owner as contemplated in this Subparagraph 7(F), the Contractor shall promptly comply with such demand within ten (10) business days of receipt of Owner’s written demand.

1. If within forty five (45) days from the date payment to the Contractor is due, the Owner, without cause or basis hereunder, fails to pay the Contractor any amounts then due and payable to the Contractor, the Contractor shall have the right to cease work until receipt of proper payment after first providing ten (10) days' written notice of its intent to cease work to the Owner. Payments not made when due shall be subject to late charges of the lesser of (a) one and one half percent (1.5%) per month of the overdue amount of (b) the maximum amount permitted under applicable law.
2. When Substantial Completion has been achieved, the Contractor shall notify the Owner and the Project Manager in writing and shall furnish to the Project Manager a listing of those matters yet to be finished. The Project Manager will thereupon conduct an inspection to confirm that the work is in fact substantially complete. Upon its conformation that the Contractor's work is substantially complete, the Project Manager will so notify the Owner and Contractor in writing and will therein set forth the date of Substantial Completion. If the Project Manager, through its inspection, finds that the Contractor's work is not substantially complete, and is required to repeat all, or any portion, of its Substantial Completion inspection, the Contractor shall bear the cost of such repeat inspection(s) which cost may be deducted by the Owner from any payment then or thereafter due to the Contractor. Guarantees and equipment warranties required by this Contract shall commence on the date of Substantial Completion. Upon Substantial Completion, the Owner shall pay the Contractor an amount sufficient to increase total payments to the Contractor to ninety­ five percent (95%) of the Contract Price less any amounts attributable to liquidated damages, and less the reasonable costs as determined by the Owner for completing all incomplete work, correcting and bringing into conformance all defective and nonconforming work, and handling any outstanding or threatened claims;
3. When the Project is finally complete and the Contractor is ready for a final inspection, it shall notify the Owner and the Project Manager thereof in writing. Thereupon, the Project Manager will perform a final inspection of the Project. If the Project Manager confirms that the Project is complete in full accordance with this Contract and that the Contractor has performed all of its obligations to the Owner hereunder, the Project Manager will furnish a final Approval for Payment to the Owner certifying to the Owner that the Project is complete and the Contractor is entitled to the remainder of the unpaid Contract Price, less any amount withheld pursuant to this Contract. If the Project Manager is unable to issue its final Approval for Payment and is required to repeat its final inspection of the Project, the Contractor shall bear the cost of such repeat inspection(s), which costs may be deducted by the Owner from the Contractor's final payment;
4. If the Contractor fails to achieve final completion within thirty (30) days of the date of Substantial Completion, the Contractor shall pay the Owner the sum of Five Hundred Dollars ($500.00) per day for each and every calendar day of unexcused delay in achieving final completion beyond the date set forth herein for final completion of the work. Any sums due and payable hereunder by the Contractor shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Owner, estimated at or before the time of executing this Contract. When the Owner reasonably believes that final completion will be inexcusably delayed, the Owner shall be entitled, but not required, to withhold from any amounts otherwise due the Contractor an amount then believed by the Owner to be adequate to recover liquidated damages applicable to such delays. If and when the Contractor overcomes the delay in achieving final completion, or any part thereof, for which the Owner has withheld payment, the Owner shall promptly release to the Contractor those funds withheld, but no longer applicable, as liquidated damages;
5. Prior to being entitled to receive final payment, and as a condition precedent thereto, the Contractor shall furnish the Owner, in the form and manner required by Owner, if any, with a copy to the Project Manager:
   1. An affidavit that all of the Contractor's obligations to subcontractors, laborers, equipment or material suppliers, or other third parties in connection with the Project, have been paid or otherwise satisfied;
   2. If required by the Owner, separate releases of lien or lien waivers from each subcontractor, lower tier subcontractor, laborer, supplier or other person or entity who has, or might have a claim against the Owner or the Owner's property;
   3. If applicable, consent(s) of surety to final payment;
   4. All product warranties, operating manuals, instruction manuals and other record documents, drawings and things customarily required of the Contractor, or expressly required herein, as a part of or prior to Project closeout;
6. The Owner shall, subject to its rights set forth in Subparagraph 7(F) above, make final payment of all sums due the Contractor within forty-five (45) days of the Owner's approval and execution of a final Approval for Payment.
7. **INFORMATION AND MATERIAL SUPPLIED BY THE OWNER**
8. If appropriate, the Owner shall furnish to the Contractor, prior to the execution of this Contract, any and all written and tangible material in its possession concerning conditions below ground at the site of the Project. Such written and tangible material is furnished to the Contractor only in order to make complete disclosure of such material as being in the possession of the Owner and for no other purpose. By furnishing such material, the Owner does not represent, warrant, or guarantee its accuracy either in whole, in part, implicitly or explicitly, or at all, and shall have no liability therefor. The Owner shall also furnish, if appropriate, the legal description of the Project site, and any required survey;
9. The Owner shall obtain all required authorizations, approvals, easements, and the like excluding the building permit and other permits or fees required of the Contractor by this Contract, or permits and fees customarily the responsibility of the Contractor.
10. The Owner will provide the Contractor one copy of the complete Contract. The Contractor will be charged, and shall pay the Owner, a reasonable fee per additional copy of the Contract that it may require.
11. The Owner shall furnish twenty-five (25) copies of Drawings and Project Manuals to Contractor at no cost. Additional sets will be furnished at the cost of reproduction, postage and handling.

## **CEASE AND DESIST ORDER**

In the event the Contractor fails or refused to perform the work as required herein, the Owner may instruct the Contractor to cease and desist from performing further work in whole or in part. Upon receipt of such instruction, the Contractor shall immediately cease and desist as instructed by the Owner and shall not proceed further until the cause for the Owner's instructions has been corrected, no longer exists, or the Owner instructs that the work may resume. In the event the Owner issues such instructions to cease and desist, and in the further event that the Contractor fails and refuses within seven (7) days of receipt of same to provide adequate assurance to the Owner that the cause of such instructions will be eliminated or corrected, then the Owner shall have the right, but not the obligation, to carry out the work with its own forces, or with the forces of another contractor, and the Contractor shall be fully responsible and liable for the cost of performing such work by the Owner. The rights set forth herein are in addition to, and without prejudice to, any other rights or remedies the Owner may have against the Contractor.

1. **DUTIES, OBLIGATIONS AND RESPONSIBILITIES OF THE CONTRACTOR**

In addition to any and all other duties, obligations and responsibilities of the Contractor set forth in this Contract, the Contractor shall have and perform the following duties, obligations and responsibilities to the Owner:

1. The Contractor is again reminded of its continuing duties set forth in Subparagraph 3(G) that are by reference hereby incorporated in this Subparagraph 10(A). The Contractor shall not perform work without adequate plans and specifications, or, as appropriate, approved shop drawings, or other submittals. If the Contractor performs work knowing or believing it involves an error, inconsistency or omission in the Contract without first providing written notice to the Project Manager and Owner, the Contractor shall be responsible for such work and pay the cost of correcting same;
2. All work shall strictly conform to the requirements of this Contract;
3. The work shall be strictly supervised, the Contractor bearing full responsibility for any and all acts or omissions of those engaged in the work on behalf of the Contractor;
4. The Contractor hereby warrants that all labor furnished under this Contract shall be competent to perform the tasks undertaken, that the product of such labor shall yield only first-class results, that all materials and equipment provided shall be new and of high quality, that the completed work will be complete, of high quality, without defects, and that all work strictly complies with the requirements of this Contract. Any work not strictly complying with the requirements of this Subparagraph shall constitute a breach of the Contractor's warranty;
5. The Contractor shall obtain and pay for all required permits, fees and licenses customarily obtained by the Contractor. The Contractor shall comply with all legal requirements applicable to the work;
6. The Contractor shall employ and maintain at the Project site only competent supervisory personnel. Key supervisory personnel assigned by the Contractor to this Project are as follows:

**Name Function**

TBD TBD

So long as the individuals named above remain actively employed or retained by the Contractor, they shall perform the functions indicated next to their names unless the Owner agrees to the contrary in writing. In the event one or more individuals not listed above subsequently assumes one or more of those functions listed above, the Contractor shall be bound by the provisions of this Subparagraph 10(F) as though such individual had been listed above.

1. The Contractor shall provide the critical path scheduling and periodic updating thereof and other necessary schedules in the interest of completing the Project in the most expeditious and economical manner (hereinafter referred to as the "Progress Schedules"). The Progress Schedules shall include appropriate milestone appropriate milestone dates ("Milestone Dates") for the completion of certain key items of the work to assist the Owner in the monitoring of progress of the work in accordance with the Progress Schedules. With fifteen (15) days after the execution of this Agreement, the Contractor shall prepare and submit for the Owner's acceptance the Progress Schedules for the work. The Progress Schedules shall be related to the construction for all aspects of the work required by the construction documents. These schedules shall indicate the dates for the starting and completion of the various stages of construction and shall be revised as required by the conditions of the work, subject to the Owner's acceptance. If required by the Owner, the Contractor shall also prepare and furnish project cash flow projections, manning charts for all key trades and schedules for the purchase and delivery of all equipment and materials, together with periodic updating thereof. Strict compliance with the requirements of this Subparagraph 10(G) shall be a condition precedent to payment to the Contractor, and failure by the Contractor to strictly comply with said requirements shall constitute a material breach of this Contract.
2. The Contractor shall keep an updated copy of this Contract at the site. Additionally, the Contractor shall keep a copy of approved shop drawings and other submittals. All of these items shall be available to the Owner and the Project Manager at all regular business hours. Upon final completion of the work, all of these items shall be finally updated and provided to the Owner and shall become the property of the Owner;
3. Shop drawings and other submittals from the Contractor do not constitute a part of the Contract. The Contractor shall not do any work requiring shop drawings or other submittals unless such shall have been approved in writing by the Project Manager All work requiring approved shop drawings or other submittals shall be done in strict compliance with such approved documents. However, approval by the Project Manager or the Owner shall not be evidence that work installed pursuant thereto conforms with the requirements of this Contract. The Owner and the Project Manager shall have no duty to review partial submittals or incomplete submittals. The Contractor shall maintain a submittal log which shall include, at a minimum, the date of each submittal, the date of any resubmittal, the date of any approval or rejection, and the reason for any approval or rejection. The Contractor shall have the duty to carefully review, inspect and examine any and all submittals before submission of same to the Owner or the Project Manager;
4. The Contractor shall maintain the Project site in a reasonably clean condition during performance of the work. Upon final completion, the Contractor shall thoroughly clean the Project site of all debris, trash and excess materials or equipment;
5. At all times relevant to this Contract, the Contract shall permit the Owner and the Project Manager to enter upon the Project site and to review or inspect the work without formality or other procedure.
6. Owner will have a separate entity perform commissioning services on this project. The Contractor will work closely with the commissioning agent during all phases of the contract. The commissioning agent will work directly for the owner.
7. **INDEMNITY**

THE CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS OWNER AND ITS AFFILIATES, SUBSIDIARIES, RELATED ENTITIES AND THE OFFICERS, DIRECTORS, AND EMPLOYEES THEREOF, FROM AND AGAINST CLAIMS, LIABILITIES, LOSSES, DAMAGES, COST OR EXPENSE (INCLUDING BUT NOT LIMITED TO REASONABLE ATTORNEY FEES) ARISING OUT OF, RESULTING FROM OR OCCURING IN CONNECTION WITH THE PERFORMANCE OF THE WORK UNDER THIS AGREEMENT THAT IS 1) ATTRIBUTABLE TO ANY BODILY OR PERSONAL INJURY, SICKNESS, DISEASES OR DEATH OF ANY PERSON OR ANY DAMAGE OR INJURY TO OR DESTRUCTION OF REAL OR PERSONAL PROPERTY INCLUDING THE LOSS OF USE THEREOF, AND 2) ONLY TO THE EXTENT CAUSED BY ANY NEGLIGENT, STRICT LIABILITY OR OTHER ACT OR OMISSION OF THE CONTRACTOR, ANY SUBCONTRACTOR OR SUPPLIER, THEIR RESPECTIVE AGENTS OR EMPLOYEES OR ANY OTHER PARTY FOR WHOM ANY OF THEM MAY BE LIABLE REGARDLESS OF WHETHER SUCH IS CAUSED IN PART BY ANY NEGLIGENT, STRICT LIABILITY OR OTHER ACT OR OMISSION OF A PARTY OR PARTIES INDEMNIFIED HEREUNDER, INCLUDING THE OWNER. THE FOREGOING INDEMNIFICATION OBLIGATION SHALL NOT BE LIMITED IN ANY WAY BY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFITS ACTS OR OTHER EMPLOYEE BENEFIT ACTS.

1. **THE PROJECT ARCHITECT**

The Architect for this Project is TBD (the "Architect"). In the event the Owner should find it necessary or convenient to replace the Architect, the Owner shall retain a replacement Architect and the role of the replacement architect shall be the same as the role of the Architect. Unless otherwise directed by the Owner in writing, the Architect will perform those duties and discharge those responsibilities allocated to the Architect in this Contract. The duties, obligations and responsibilities of the Architect shall include, but are not limited to, the following:

1. Unless otherwise directed by the Owner in writing, the Architect shall act as the Owner's agent from the Effective Date of this Contract until final payment has been made, to the extent expressly set forth in this Contract;
2. When requested by the Contractor in writing the Architect shall render interpretations necessary for the proper execution or progress of the work;
3. THE DUTIES, OBLIGATIONS AND RESPONSIBILITIES OF THE CONTRACTOR UNDER THIS CONTRACT SHALL IN NO MANNER WHATSOEVER BE CHANGED, ALTERED, DISCHARGED, RELEASED, OR SATISFIED BY ANY DUTY, OBLIGATION OR RESPONSIBILITY OF THE ARCHITECT. THE CONTRACTOR IS NOT A THIRD-PARTY BENEFICIARY OF ANY CONTRACT BY AND BETWEEN THE OWNER AND THE ARCHITECT. IT IS EXPRESSLY ACKNOWLEDGED AND AGREED THAT THE DUTIES OF THE CONTRACTOR TO THE OWNER ARE INDEPENDENT OF, AND ARE NOT DIMINISHED BY, ANY DUTIES OF THE ARCHITECT TO THE OWNER.
4. **CLAIMS BY THE CONTRACTOR**

Claims by the Contractor against the Owner are subject to the following terms and conditions:

1. All Contractor claims against the Owner shall be initiated by a written claim submitted to the Owner and the Project Manager. Such claim shall be received by the Owner and the Project Manager no later than seven (7) calendar days after the event, or the first appearance of the circumstances, causing the claim, and same shall set forth in detail all known facts and circumstances supporting the claim;
2. The Contractor and the Owner shall continue their performance hereunder regardless of the existence of any claims submitted by the Contractor;
3. In the event the Contractor discovers previously concealed and unknown site conditions which are materially at variance from those typically and ordinarily encountered in the general geographical location of the Project, the Contract Price shall be modified, either upward or downward, upon the written claim make by either party within seven (7) calendar days after the first appearance to such party of the circumstances. As a condition precedent to the Owner having any liability to the Contractor due to concealed and unknown conditions, the Contractor must give the Owner and the Project Manager written notice of, and an opportunity to observe, such condition prior to disturbing it. The failure by the Contractor to give the written notice and make the claim as provided by this Subparagraph 13(C) shall constitute a waiver by the Contractor of any rights arising out of or relating to such concealed and unknown condition;
4. In the event the Contractor seeks to make a claim for an increase in the Contract Price, as a condition precedent to any liability of the Owner therefore, the Contractor shall strictly comply with the requirements of Subparagraph 13(A) above and such claim shall be made by the Contractor before proceeding to execute any additional or changed work. Failure of the condition precedent to occur shall constitute a waiver by the Contractor of any claim for additional compensation;
5. In connection with any claim by the Contractor against the Owner for compensation in excess of the Contract Price, any liability of the Owner for the Contractor's cost shall be strictly limited to direct cost incurred by the Contractor and shall in no event include indirect cost or consequential damages of the Contractor. The Owner shall not be liable to the Contractor for claims of third-parties including subcontractors, unless and until liability of the Contractor has been established therefor in a court of competent jurisdiction; and
6. In the event the Contractor should be delayed in performing any task which at the time of the delay is then critical, or which during the delay becomes critical, as the sole result of any act or omission by the Owner or someone acting in the Owner behalf, or by Owner-authorized Change Orders, unusually bad weather not capable of being reasonably anticipated, fire or other Acts of God, the date for achieving Substantial Completion, or, as applicable, final completion, shall be appropriately adjusted by the Owner upon the written claim of the Contractor to the Owner and the Project Manager. Extension of time shall be the Contractor's sole remedy for any such delay. A task is critical within the meaning of this Subparagraph 13(F) if, and only if, said task is on the critical path of the Project schedule so that a delay in performing such task will delay the ultimate completion of the Project. Any claim for an extension of time by the Contractor shall strictly comply with the requirements of Subparagraph 13(A) above. If the Contractor fails to make such claim as required in this Subparagraph 13(F), any claim for an extension of time shall be waived.
7. **SUBCONTRACTORS**

Upon execution of this Contract, the Contractor shall identify to the Owner and the Project Manager in writing, those parties intended as subcontractors on the Project. The Owner shall, in writing, state any objections the Owner may have to one or more of such subcontractors. The Contractor shall not enter into a subcontract with an intended subcontractor with reference to whom the Owner reasonably objects. All subcontracts shall afford the Contractor rights against the subcontractor which correspond to those rights afforded to the Owner against the Contractor herein, including those rights of Contract termination as set forth hereinbelow.

1. **CHANGE ORDERS**

One or more changes to the work within the general scope of this Contract may be ordered by a Change Order. The Contractor shall proceed with any such changes, and same shall be accomplished in strict accordance with the following terms and conditions:

1. “Change Order” shall mean a written order to the Contractor executed by the Owner and the Project Manager after execution of this Contract, directing a change in the work and may include a change in the Contract Price or the time for the Contractor's performance, or any combination thereof;
2. Any change in the Contract Price resulting from a Change Order shall be determined as follows:
   1. By mutual agreement between the Owner and the Contractor as evidenced by (a) the change in the Contract Price being set forth in the Change Order, (b) such change in the Contract Price, together with any conditions or requirements relating thereto, being initialed by both parties and (c) the Contractor's execution of the Change Order; or
   2. If no mutual agreement occurs between the Owner and the Contractor, the change in the Contract Price, if any, shall be derived by determining the reasonable actual cost incurred or savings achieved, resulting from revisions in the work. Such reasonable actual costs or savings shall include a component for direct job-site overhead and profit but shall not include home-office overhead or other indirect costs or components. Any such costs or savings shall be documented in the format, and with such content and detail as the Owner or the Project Manager requires.
3. The execution of a Change Order by the Contractor shall constitute conclusive evidence of the Contractors' agreement to the ordered changes in the work, this Contract as thus amended, the Contract Price and the time for performance by the Contractor. The Contractor, by executing the Change Order, waives and forever releases any claim against the Owner for additional time or compensation for matter relating to or arising out of or resulting from the work included within or affected by the executed Change Order;
4. The Contractor shall notify and obtain the consent and approval of the Contractor's surety with reference to all Change Orders if such notice, consent or approval are required by the Owner, the Project Manager, the Contractor's surety, or by law. The Contractor's execution of the Change Order shall constitute the Contractor's warranty to the Owner that the surety has been notified of, and consents to, such Change Order and the surety shall be conclusively deemed to have been notified of such Change Order and to have expressly consented thereto.
5. **DISCOVERING AND CORRECTING DEFECTIVE OR INCOMPLETE WORK**
6. In the event that the Contractor covers, conceals or obscures its work in violation of this Contract or in violation of a directive from the Owner or the Project Manager, such work shall be uncovered and displayed for the Owner or Project Manager’s inspection upon request, and shall be reworked at no cost in time or money to the Owner.
7. If any of the work is covered, concealed or obscured in a manner not covered by Subparagraph l6(A) above, it shall, if directed by the Owner or the Project Manager be uncovered and displayed for the Owner or Project Manager’s inspection. If the uncovered work conforms strictly with this Contract, the costs incurred by the Contractor to uncover and subsequently, replace such work shall be borne by the Owner. Otherwise, such costs shall be borne by the Contractor.
8. The Contractor shall, at no cost in time or money to the Owner, correct work rejected by the Owner or by the Project Manager as defective or failing to conform to this Contract. Additionally, the Contractor shall reimburse the Owner for all testing, inspections and other expenses incurred as a result thereof.
9. In addition to its warranty obligations set forth elsewhere herein, the Contractor shall be specifically obligated to correct any and all defective or nonconforming work for a period of twelve (12) months following final completion upon written direction from the Owner.
10. The Owner may, but shall in no event be required to, choose to accept defective or nonconforming work. In such event, the Contract Price shall be reduced by the greater of (1) the reasonable costs of removing and correcting the defective or nonconforming work, and (2) the difference between the fair market value of the Project as constructed and the fair market value of the Project had it not been constructed in such a manner as to include defective or nonconforming work. If the remaining portion of the unpaid Contract Price, if any, is insufficient to compensate the Owner for the acceptance of defective or nonconforming work, the Contractor shall, upon written demand from the Owner, pay the Owner such remaining compensation for accepting defective or nonconforming work.

##### TERMINATION BY THE CONTRACTOR

If the Owner repeatedly fails to perform its material obligations to the Contractor for a period of thirty (30) days after receiving written notice from the Contractor of its intent to terminate hereunder, the Contractor may terminate performance under this Contract by written notice to the Owner and the Project Manager. In such event, the Contractor shall be entitled to recover from the Owner as though the Owner had terminated the Contractor's performance under this Contract for convenience pursuant to Subparagraph 19(A) hereunder.

#### OWNER'S RIGHT TO SUSPEND CONTRACTOR'S PERFORMANCE

1. The Owner shall have the right at any time to direct the Contractor to suspend its performance, or any designated part thereof, for any reason whatsoever, or without reason, for a cumulative period of up to thirty (30) calendar days. If any such suspension is directed by the Owner, the Contractor shall immediately comply with same;
2. In the event the Owner directs a suspension of performance under this Paragraph 18**,** through no fault of the Contractor, the Owner shall pay the Contractor as full compensation for such suspension the Contractor's reasonable costs, actually incurred and paid, of:
   1. demobilization and remobilization, including such costs paid to subcontractors;
   2. preserving and protecting work in place;
   3. storage of materials or equipment purchased for the Project, including insurance thereon; and
   4. performing in a later, or during a longer, time frame than that contemplated by this Contract.

#### TERMINATION BY THE OWNER

The Owner may terminate this Contract in accordance with the following terms and conditions:

1. The Owner may, for any reason whatsoever, terminate performance under this Contract by the Contractor for convenience. The Owner shall give written notice of such termination to the Contractor specifying when termination becomes effective. The Contractor shall incur no further obligations in connection with the work and the Contractor shall stop work when such termination becomes effective. The Contractor shall also terminate outstanding orders and subcontracts. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders. The Owner may direct the Contractor to assign the Contractor's right, title and interest under termination orders or subcontracts to the Owner or its designee. The Contractor shall transfer title and deliver to the Owner such completed or partially completed work and materials, equipment, parts, fixtures, information and Contract rights as the Contractor has. When terminated for convenience, the Contractor shall be compensated as follows:
   1. The Contractor shall submit a termination claim to the Owner and the Project Manager specifying the amounts due because of the termination for convenience together with costs, pricing or other data required by the Owner or the Project Manager. If the Contractor fails to file a termination claim within one (1) year from the effective date of termination, the Owner shall pay the Contractor, an amount derived in accordance with Subparagraph (3) below;
   2. The Owner and the Contractor may agree to the compensation, if any, due to the Contractor hereunder; and
   3. Absent agreement to the amount due to the Contractor, the Owner shall pay the Contractor the following amounts:
      1. Contract prices for labor, materials, equipment and other services accepted under this Contract;
      2. Reasonable costs incurred in preparing to perform and in performing the terminated portion of the work, and in terminating the Contractor's performance, plus a fair and reasonable allowance for direct job-site overhead and profit thereon (such profit shall not include anticipated profit or consequential damages); provided however, that if it appears that the Contractor would have not profited or would have sustained a loss if the entire Contractor would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss, if any; and
      3. Reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Subparagraph l9(A) of this Paragraph. These costs shall not include amounts paid in accordance with other provisions hereof.

The total sum to be paid the Contractor under this Subparagraph 19(A) shall not exceed the total Contract Price, as properly adjusted, reduced by the amount of payments otherwise made, and shall in no event include duplication of payment.

1. If the Contractor does not perform the work, or any part thereof, in a timely manner, supply adequate labor, supervisory personnel or proper equipment or materials, or if it fails to timely discharge its obligations for labor, equipment and materials, or proceeds to disobey applicable law, or otherwise commits a violation of a material provision of this Contract, then the Owner, in addition to any other rights it may have against the Contractor or others, may terminate the performance of the Contractor and assume possession of the Project site and of all materials and equipment at the site and may complete the work. In such case, the Contractor shall not be paid further until the work is complete. After final completion has been achieved, if any portion of the Contract Price, as it may be modified hereunder, remains after the cost to the Owner of completing the work, including all costs and expenses of every nature incurred, has been deducted by the Owner, such remainder shall belong to the Contractor. Otherwise, the Contractor shall pay and make whole the Owner for such cost. This obligation for payment shall survive the termination of the Contract. In the event the employment of the Contractor is terminated by the Owner for cause pursuant to this Subparagraph 19(B) and it is subsequently determined by Court of competent jurisdiction that such termination was without cause, such termination shall thereupon be deemed a Termination for Convenience under Subparagraph 19(A) and the provisions of Subparagraph 19(A) shall apply.
2. **INSURANCE**

The Contractor shall, at its sole expense, maintain in effect at all times during the full term of its work under this Contract, insurance coverage with limits not less than those set forth below. The Contractor's insurance carriers shall be acceptable to the Owner and licensed or admitted to conduct business in Texas and carry and A.M. Best Key rating of at least a VIII or better. None of the requirements contained herein as to types, limits or Owner's approval of insurance coverage to be maintained by Contractor is intended to and shall not in any manner limit, qualify or quantify the liabilities and obligations assumed by the Contractor under the contract documents or otherwise provided by law. In the event of any failure by the Contractor to comply with the provisions of this Paragraph 20, Owner may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to Contractor, purchase such insurance, at Contractor's expense, provided that Owner shall have no obligation to do so and if Owner shall do so, Contractor shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverage.

1. Workers' Compensation

Compensation Employer's Liability Statutory Limits

$1,000,000 each accident

$1,000,000 disease each employee

$1,000,000 disease policy limit

The policy shall include a waiver of subrogation in favor of the Owner and state that this insurance is primary insurance as regards any other insurance carried by the Owner, and that Owner's insurance is secondary and non-contributing.

1. Commercial General Liability

Bodily Injury/Property Damage (Occurrence Basis) $1,000,000 each occurrence

$3,000,000 general aggregate

$3,000,000 products/completed operations aggregate

This policy shall be endorsed to include the Owner as Additional Insured, include a waiver of subrogation in favor of the Owner, and state that this insurance is primary insurance a regards any other insurance carried by the Owner and that the Owner's insurance is secondary and non-contributing.

1. Business Automobile Policy

Bodily Injury and Property Damage $1,000,000 combined single limit

This policy shall be written on a standard form to cover all owned, hired and non-owned automobiles. This policy shall be endorsed to include the Owner as Additional Insured, include a waiver of subrogation in favor of the Owner, and state that this insurance is primary insurance a regards any other insurance carried by the Owner and that the Owner's insurance is secondary and non-contributing.

1. Umbrella Liability

Bodily Injury and Property Damage $10,000,000 each occurrence

(Occurrence Basis) $10,000,000 general aggregate

This policy shall be written on an "umbrella form" providing coverage in excess of the policies described in subparagraphs A, B, and C, hereinabove. This policy shall be endorsed to include the Owner as Additional Insured, include a waiver of subrogation in favor of the Owner, and state that this insurance is primary insurance a regards any other insurance carried by the Owner and that the Owner's insurance is secondary and non­ contributing.

1. The Contractor shall include provisions identical to Paragraphs 11 and 20 herein in each of its contracts with subcontractors and suppliers, with each subcontractor and supplier agreeing to indemnify and insure Owner to the same extent required of Contractor in this Contract. At the time this Contract is executed and returned to Owner, and prior to the commencement of any work, the Contractor shall submit Certificates of Insurance complying with this Contract. Such Certificates of Insurance shall state that Owner will be notified in writing sixty (60) days prior to cancellation, material change, or non-renewal of insurance. The above insurances shall be maintained throughout the term of the project and for a two (2) year period after the final completion of the Project.
2. **Required Property Insurance**: Unless otherwise provided, the Contractor shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk “all-risks” completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The Contractor’s property insurance coverage shall be no less than the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed and materials or equipment supplied by others (where reported to Contractor for coverage and confirmed by the insurance company). This insurance shall include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds. This insurance shall include the interests of mortgagees as loss payees. The property insurance shall be maintained until Substantial Completion, unless otherwise agreed in writing by the parties to this Agreement. Upon Substantial Completion of the Project, the Owner shall purchase and maintain insurance as provided in Paragraph 5 of this Section.
3. Causes of Loss.The insurance required by this Section shall provide coverage for direct physical loss or damage, and shall not exclude the risks of fire, explosion, theft, vandalism, malicious mischief, collapse, earth movement, flood, or windstorm. The insurance shall also provide coverage for ensuing loss or resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials. Sub-limits, if any, shall be designated in the policy or policies.
4. Specific Required Coverages.The insurance required by this Section shall provide coverage for loss or damage to falsework and other temporary structures, and to building systems from testing and startup. The insurance shall also cover debris removal, including demolition occasioned by enforcement of any applicable legal requirements, and reasonable compensation for the Architect’s and Contractor’s services and expenses required as a result of such insured loss, including claim preparation expenses. The insurance shall also cover portions of the Work stored off the site and portions of the Work in transit. Sub-limits, if any, shall be designated in the policy or policies.
5. If the Owner requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, or if the Owner requests higher limits of insurance for any risk sub-limited by the Contractor’s property insurance policy, the Contractor shall, if possible, include such insurance, and the cost thereof shall be charged to the Owner by appropriate Change Order.
6. Unless the parties agree otherwise, upon Substantial Completion, the Owner shall continue the insurance required by Paragraph 1 of this Section or, if necessary, replace the insurance policy required under Paragraph 1 with property insurance written for the total value of the Project that shall remain in effect until expiration of the period for correction of the Work set forth in this Agreement.
7. Deductibles and Self-Insured Retentions. If the insurance required by this Section is subject to deductibles or self-insured retentions, the Owner shall be responsible for all loss not covered because of such deductibles or retentions.
8. Occupancy or Use Prior to Substantial Completion. The Owner’s occupancy or use of any completed or partially completed portion of the Work prior to Substantial Completion shall not commence until the insurance company or companies providing the property insurance have consented in writing to the continuance of coverage. The Owner and the Contractor shall take no action with respect to partial occupancy or use that would cause cancellation, lapse, or reduction of insurance.
9. Insurance for Existing Structures. If the Work involves remodeling an existing structure or constructing an addition to an existing structure, the Owner shall purchase and maintain, until the expiration of the period for correction of Work as set forth in this Agreement, “all-risks” property insurance, on a replacement cost basis, protecting the existing structure against direct physical loss or damage from the causes of loss identified in this Section, notwithstanding the undertaking of the Work. The Owner shall be responsible for all co-insurance penalties and deductibles under such insurance.
10. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, subsubcontractors, agents, and employees, each of the other; (2) the Architect and Architect’s consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by this Section or the Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect’s consultants, Separate Contractors, subcontractors, and subsubcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.
11. If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with Paragraph 9 of this Section for damages caused by fire or other causes of loss covered by this separate property insurance.
12. Loss of Use, Business Interruption, and Delay in Completion Insurance. The Owner, at the Owner’s option, may purchase and maintain insurance that will protect the Owner against loss of use of the Owner’s property, or the inability to conduct normal operations, due to fire or other causes of loss. The Owner waives all rights of action against the Contractor and Architect for loss of use of the Owner’s property, due to fire or other hazards however caused.
13. Adjustment and Settlement of Insured Loss. A loss insured under the property insurance required by Paragraph 1 of this Section shall be adjusted by the Contractor as fiduciary and made payable to the Contractor as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause.
14. **SURETY BONDS**

The Contractor shall furnish separate performance and payment bonds to the Owner. Each bond shall set forth a penal sum in an amount not less than the Contract Price. Each bond furnished by the Contractor shall incorporate by reference the terms of this Contract as fully as though they were set forth verbatim in such bonds. In the event the Contract Price is adjusted by Change Order executed by the Contractor, the penal sum of both the performance bond and the payment bond shall be deemed increased by like amount. The performance and payment bonds furnished by the Contractor shall be in form suitable to the Owner and shall be executed by a surety, or sureties, reasonably acceptable to the Owner.

1. **RIGHT OF OWNER TO AUDIT**

The Contractor grants to the Owner and its designated representatives the right to audit, for a period of up to six (6) years after Final Completion, all books, records, correspondence and notes maintained by the Contractor and any of its subcontractors with respect to work performed under this Agreement. A similar provision shall be included by Contractor in all subcontracts entered into in connection with this Agreement.

The Contractor shall keep full and accurate records to support all General Condition/Overhead Costs and Change Order pricing. Such records shall be open to inspection and subject to audit by the Owner, or any authorized representative for the Owner, during the course of the Work and until one year after the Final Payment Approval. The Owner shall be permitted to reproduce any and all such records. In those situations where contractor's records have been generated from computerized data, Contractor agrees to provide Owner's representatives with extracts of data files in computer readable format.

1. Records subject to audit include any records necessary to evaluate and verify general conditions/overhead costs.
2. In preparing lump sum quotes for change order work, the Contractor shall prepare a cost breakdown that provides sufficient detail for the Owner or Owner's Representative to determine that the quoted costs are reasonable and allowable and to verify that markups are properly calculated according to contract terms.
3. The Contractor shall keep full and accurate records of all costs incurred in connection with time and materials change order work. Such supporting evidence shall be subject to audit by Owner or Owner's agent to the extent necessary to permit adequate evaluation and verification of the costs.
4. The Contractor shall require all subcontractors, sub-subcontractors, insurance agents and material suppliers to comply with the provisions of this article.
5. Bond fees for all change order work will be limited to actual expense. The Owner shall seek reimbursement for any overstatement of bond fees on either lumps sum or time and material change orders. Final determination of actual bond expenses cannot be made until the work is completed. A review of all bond charges may be conducted at that time.

Retainage may be held up to 60 days after completion of the contract to allow sufficient time to conduct an audit.

1. **PREVAILING WAGE RATES AND APPRENTICESHIP PROGRAM**
2. The Contractor is aware that and hereby agrees that not less than the prevailing wage rates adopted by the El Paso County Hospital District Board of Managers and in effect as of the Effective Date of this Agreement shall be paid to all workers on the Project. The Contractor agrees to comply with all provisions relating to payment of prevailing wages as set forth on Exhibit TBD, attached hereto and by this reference is incorporated herein as part of this contract.
3. In accordance with the Order of the El Paso County Hospital District Board of Managers Establishing Apprenticeship Program adopted on December 11, 2001 the Contractor and all subcontractors hereby agree to comply with all provisions relating to the Apprenticeship Program as set forth on Exhibit TBD, attached hereto and by this reference is incorporated herein as part of this contract.
4. **APPLICABLE LAW**

The law is hereby agreed to be the law of the State of Texas and venue shall lie in El Paso County, Texas.

1. **SUCCESSORS AND ASSIGNS**

Each party binds itself, its successors, assigns, executors, administrators or other representatives to the other party hereto and to successors, assigns, executors, administrators or other representatives of such other party in connection with all terms and conditions of this Contract. The Contractor shall not assign this Contract without prior written consent of the Owner.

1. **MISCELLANEOUS**
2. Damages Limitations. Owner is a political subdivision of the State of Texas. As such, it is governed by the Texas Tort Claims Act, Chapter 101, Civil Practice and Remedies Code. The parties acknowledge and agree that Owner is limited to money damages in a maximum amount of $100,000 for each person and $300,000 for each single occurrence for bodily injury or death.
3. Texas Public Information Act. Owner is a political subdivision of the State of Texas and is governed by the Texas Public Information Act (“TPIA”), Chapter 552, Texas Government Code. The Parties acknowledge and agree that Owner shall only be obligated to perform its duties under this Agreement in compliance with the TPIA. To the extent to which some duties hereunder are not in conformity with the requirements of the TPIA, Owner shall be relieved of said duties without penalty or further liability. In the event either party receives a request under the TPIA for Confidential Information it shall immediately notify the other party and confer on whether disclosure should be opposed. It is expressly agreed that Owner may request a determination from the Attorney General of the State of Texas in regard to the application of the TPIA to the requested information and whether the information is to be made available to the public. It is further agreed that Owner, its officers and employees shall have the right to rely on the determinations of the Texas Attorney General, and that Owner, its officers and employees shall have no liability to Contractor for disclosure to the public in reliance on a decision by the Attorney General. Further, in the event that Texas Government Code Section 552.371 applies to the Agreement, the Parties agree to the following statement: “The requirements of Subchapter J, Chapter 552, Government Code, may apply to this contract [Agreement] and the contractor or vendor agrees that the contract [Agreement] can be terminated if the contractor or vendor knowingly or intentionally fails to comply with a requirement of that subchapter.” Nothing in this agreement shall require Owner or Contractor to violate the terms of the Public Information Act.
4. Funding Limitations. This Agreement is conditional upon, subject to and contingent upon funding being available for the term in question and Contractor shall have no cause of action against Owner in the event that Owner is unable to perform its obligation under this Agreement as a result of suspension, termination, withdrawal or failure of funding to Owner. In the event that Owner shall not obtain funding, this Agreement shall be terminated. Owner agrees that such termination shall be deemed a Termination for Convenience under Subparagraph 19(A) and the provisions of Subparagraph 19(A) shall apply.

Contractor further acknowledges that Owner is a political subdivision of the State of Texas, and as such adopts its budget according to the laws of the State of Texas for a period of one year beginning on October 1st and terminating on September 30th of each year. In the event that Owner does not include sufficient funds in its budget for any fiscal year during the term of this Agreement, for the payment of its obligations hereunder, Owner may terminate this Agreement without penalty or further payment, upon thirty (30) days written notice to Contractor. Owner shall remain obligated to pay Contractor for all services rendered prior to the effective date of notice of termination. Owner agrees that such termination shall be deemed a Termination for Convenience under Subparagraph 19(A) and the provisions of Subparagraph 19(A) shall apply.

1. Severability. If any provision of this Agreement shall be construed to be illegal or invalid, it shall not affect the legality or validity of any other provisions hereof, and the illegal or invalid provision shall be deemed stricken and deleted here from to the same extent and effect as if never incorporated herein, but all other provisions shall continue to the extent that they substantially reflect the Agreement contemplated by the parties.
2. Enforcement. The terms and provisions contained in this Agreement shall inure to the benefit of and be binding upon the parties hereto and their heirs, respective successors in interest, legal representatives and assigns, except as otherwise herein expressly provided. No person or entity other than the parties, except governmental entities to the extent required by law or as otherwise herein expressly provided, shall be entitled to bring any action to enforce this Agreement, and the terms of this Agreement are intended solely for the benefit of, and to be enforceable only by, the parties or their respective successors in interest or assigns as permitted under this Agreement. The Parties agree to settle any dispute arising from or in connection with the Agreement through mutual agreement of the Parties, mediation, or non-binding arbitration. UMC cannot agree to binding arbitration. Any proposed binding dispute resolution process can only be entered into upon the mutual agreement of both Parties.
3. Authorization. All signatures to this Agreement warrant their authority to execute this document.
4. Waiver. Except as otherwise provided, no term or condition of this Agreement shall be waived except by written waiver of the waiving party. The forbearance or indulgence by a party in any regard whatsoever shall not constitute a waiver of the term or condition to be performed by the other party, and until complete performance by the other party of such term or condition, the forbearing party shall be entitled to invoke any remedy available under this Agreement or by law despite such forbearance or indulgence. The waiver by a party of any breach of any term or condition of this Agreement shall apply to and be limited to the specific instance involved and shall not be deemed to apply to any other instance or to any subsequent breach of the same or any other term or condition of the Agreement.
5. Compliance. Pursuant to Public Law 96-499, see. 952 (Sec. 1861 (v)(l) of the Social Security Act), the parties agree that: Contractor shall, until the expiration of four (4) years after the furnishing of the services under this Agreement, retain and make available, under written request by the secretary of the U.S. Department of Health and Human Services, or upon written request, by the U.S. Comptroller General, or any of their duly authorized representatives, the contract and books, documents and records of Contractor that are necessary to verify the nature and extent of the cost of the services under this Agreement. If Contractor carries out any of the duties of this Agreement through a subcontract, with a value or cost of $10,000.00 or more over a twelve (12) month period with a related organization, such subcontract shall contain a clause to the effect that, until the expiration of four (4) years after the furnishing of such services pursuant to such subcontract, the related organization shall retain and make available, upon written request by the Secretary of the U.S. Department of Health and Human Services, or upon written request by the U.S. Comptroller General, or any of their duly authorized representatives, the subcontract and books, documents or records of such organization that are necessary to verify the nature and extent of such costs of the subcontracted services. In the event of a request for access, Contractor agrees to notify Owner what response will be made to that request.

Contractor represents and warrants that it shall not contract with any individual(s) or entity that is excluded from participation under the Office of Inspector General ("OIG") or any other governmental program. Contractor shall notify Owner immediately in the event that Contractor or any individual(s) it contracts with, is excluded from participating under the OIG or any other governmental program.

Contractor represents and warrants that neither it nor its employees, agents, or assigns have been (a) convicted of a criminal offense related to healthcare (unless such person or entity has implemented a compliance program as part of an agreement with the federal government); or (b) listed by a federal agency as debarred, excluded or otherwise ineligible for federal program participation under 42 U.S.C. 1320a-7, the OIG List of Excluded Individuals/Entities and/or the General Services Administration ("GSA") list of debarred contractors.

Contractor shall notify Owner within three (3) business days of the time Contractor receives notice of any action being taken against Owner or its employees, agents, or assigns which could result in its exclusion from participating in the Federal health care programs. Contractor acknowledges that Owner may terminate this Agreement without penalty or further payment upon the resolution of a pending criminal charge or proposed disbarment or exclusion which results in a conviction, disbarment or exclusion of Contractor or its employees, agents, or assigns.

Contractor hereby acknowledges that Owner has adopted a Code of Conduct for the purpose of identifying and rectifying compliance issues as they may arise. Contractor hereby represents and warrants that it and its employees, agents, or assigns shall comply with the Code of Conduct and shall meet all applicable Owner compliance guidelines. The Code of Conduct can be accessed at umcelpaso.org.

The Parties acknowledge that each is subject to applicable federal and state laws and regulations, and policies and requirements of various accrediting organizations. Accordingly, each party will enforce compliance with all applicable laws, regulations, and requirements and will make available such information and records as may be reasonably requested in writing by the other party to facilitate its compliance, except for records that are confidential and privileged by law. Each party shall have or designate a Compliance Officer with whom compliance issues shall be coordinated.

The Parties shall, at all times during the term of this Agreement, satisfy all State and federal certifications, regulations, or licensure requirements and render services under this Agreement in compliance with all applicable statutes, regulations, standards, rules, and directives of State, federal, and other governmental and regulatory bodies having jurisdiction over each party. The Parties agree to give immediate written notice to the other in the case of suspension or revocation, or initiation of any proceeding that could result in any change in the status, suspension or revocation, of such licensure, certification, or registration. Evidence of such licensing, certification or registration, if applicable, shall be submitted to the requesting party upon request.

1. Tax Exempt Status. Owner is exempt from payment of taxes under Chapter 151, Texas Tax Code, known as Limited Sales, Excise and Use tax Act, for the purchase of tangible personal property. Vendor agrees to satisfy any and all tax obligations on property, fixtures or equipment provided under the Agreement and assessed by any jurisdiction and shall indemnify and hold harmless UMC for any assessments thereof.
2. Work on Campus of UMC. When Contractor personnel, agents, or assigns will routinely be present at any UMC-operated facility, Contractor personnel shall be cleared through the UMC’s human resources and occupational health departments pursuant to UMC policies prior to providing services at said facilities. Such policies include but are not limited to: H-3-48 (Screening of Associates for Exclusion from Government Programs); H-4-5 (New Associate, Contract Personnel, and Volunteer Orientation); IC-OH-076.6 (Hospital Influenza Vaccination); and IC-OH-025 (Tuberculosis Screening of Healthcare Workers). In addition, Contractor acknowledges UMC’s Code of Conduct (accessible at http://www.umcelpaso.org) and its applicability to Vendor.
3. Pursuant to Chapter 2271, Texas Government Code, Contractor represents and warrants that Contractor does not boycott Israel and will not boycott Israel during the term of this Agreement.
4. If applicable, pursuant to Chapter 2274, Texas Government Code, Contractor represents and warrants that Contractor: (1) does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association; (2) will not discriminate during the term of the Agreement against a firearm entity or firearm trade association; (3) does not boycott energy companies; and (4) will not boycott energy companies during the term of the Agreement.
5. Contractor represents that it is not a company engaged in business with Iran, Sudan or a foreign terrorist organization as defined under Chapter 2252, Texas Government Code, and that it is not on a list prepared and maintained by the Comptroller of Public Accounts of the State of Texas under Texas Government Code Sections 2252.153 or 2270.0201.
6. If applicable, pursuant to Texas Government Code Chapter 2252 and 1 Texas Administrative Code Section 46.1, Contractor acknowledges that, as a condition precedent to execution by UMC, Contractor must disclose appropriate interested parties on Texas Ethics Commission Form 1295, which can be accessed at <https://www.ethics.state.tx.us/filinginfo/1295/>.

O. Waiver of Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to the Contract. This mutual waiver include (1) damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons, and (2) damages incurred by the Contractor for principal offices expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from Work. This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Articles 17-19. Nothing contained in this Section 26.0 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

1. **EXHIBITS**

Exhibits that are included in this Agreement are as follows:

IN WITNESS WHEREOF, the parties have hereunto set their hands.

**OWNER - EL PASO COUNTY HOSPITAL DISTRICT D/B/A UNIVERSITY MEDICAL CENTER OF EL PASO**

|  |  |  |
| --- | --- | --- |
| R. JACOB CINTRON | Date: | \_ |
| President and Chief Executive Officer |  |  |
| *REVIEWED BY LEGAL DEPARTMENT* |  |  |
| Legal Counsel | Date: |  |
| **CONTRACTOR** |  |  |
| Name  Title | Date: |  |