IN THE SUPREME COURT OF THE STATE OF NEVADA

SR CONSTRUCTION, INC., A NEVADA DOMESTIC CORPORATION,

Appellant,

vs.

PEEK BROTHERS CONSTRUCTION, INC., A NEVADA DOMESTIC CORPORATION,

Respondents.

Supreme Court No.: 82786

JOINT APPENDIX
VOLUME 4

Noah G. Allison (NV Bar 6202)
Heather Caliguire Fleming (NV Bar 14492)
The Allison Law Firm Chtd.
3191 E. Warm Springs Rd.
Las Vegas, Nevada 89120
(702) 933-4444
noah@allisonnevada.com
heather@allisonnevada.com

Nathan J. Aman (NV Bar 8354)
Emilee N. Hammond (NV Bar 14626)
Viloria, Oliphant, Oster & Aman L.L.P.
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
naman@renonvlaw.com
ehammond@renonvlaw.com

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EXHIBIT "3"

FULLY EXECUTED

AIA® Document A133™ – 2009

07/21/2020

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

AGREEMENT made as of the 6th day of May in the year 2020
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status and address)

Sparks Family Medical Center, Inc. c/o
Universal Health Services of Delaware367 South Gulph Road
King of Prussia, PA 19406

and the Construction Manager:
(Name, legal status and address)

SR Construction, Inc.
3579 Red Rock Street
Las Vegas, Nevada 89103

for the following Project:
(Name and address or location)

Northern Nevada Sierra Medical Center
625 Innovation Drive
Reno, Nevada 89511

The Architect:
(Name, legal status and address)

ESa Architects.
1033 Demonbreun Street, Suite 800
Nashville, Tennessee 37203
615-329-9445

The Owner's Designated Representative:
(Name, address and other information)

Sean Applegate, MS, CHFM
Sr. Regional Project Manager
Universal Health Services, Inc.

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

The Construction Manager's Designated Representative:
(Name, address and other information)

Bret Loughridge
President
SR Construction, Inc.
3579 Red Rock Street
702-877-6111

The Architect's Designated Representative:
(Name, address and other information)

Matt Childress
ESa Architects.
1033 Demonbreun Street, Suite 800
Nashville, Tennessee 37203
615-329-9445

The Owner and Construction Manager agree as follows.

TABLE OF ARTICLES

ARTICLE 1 GENERAL PROVISIONS

§ 1.1 The Contract Documents

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.

§ 1.2 Relationship of the Parties

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

§ 1.3 General Conditions

For the Preconstruction Phase, AIA Document A201™–2017, General Conditions of the Contract for Construction, shall apply only as specifically provided in this Agreement. For the Construction Phase, the general conditions of the contract shall be as set forth in A201–2017, which document is incorporated herein by reference. The term "Contractor" as used in A201–2017 shall mean the Construction Manager.

ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

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

§ 2.1 Preconstruction Phase

§ 2.1.1 The Construction Manager shall provide a preliminary evaluation of the Owner's program, schedule and construction budget requirements, each in terms of the other.

§ 2.1.2 Consultation

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

2.1.2.1 If the Project will involve building information modeling ("BIM"), the Owner, Construction Manager and Architect/Engineer shall jointly develop a BIM Execution Plan for Owner's review and approval. The BIM Execution Plan shall be consistent with the Owner's AIA A201-2017 General Conditions section 1.8 BIM Use and Reliance; and shall be completed to a level of LOD 400 at a minimum. Upon the Owner's approval of the BIM Execution Plan, if any, the BIM Execution Plan shall become a Contract Document.

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

§ 2.1.4 Phased Construction

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

§ 2.1.5 Preliminary Cost Estimates

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

§ 2.1.5.2 As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at appropriate intervals agreed to by the Owner, Construction Manager and Architect, estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for the Architect's review and the Owner's approval. The Construction Manager shall inform the Owner and Architect when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action.

§ 2.1.6 Subcontractors and Suppliers
The Construction Manager shall develop bidders' interest in the Project.

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

§ 2.1.8 Extent of Responsibility
The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Architect and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require.

§ 2.1.9 Notices and Compliance with Laws
The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and quasi-governmental authorities for inclusion in the Contract Documents.

§ 2.2 Guaranteed Maximum Price Proposal and Contract Time
§ 2.2.1 At a time to be mutually agreed upon by the Owner and the Construction Manager and in consultation with the Architect, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee. In the A201, references to the "Contract Sum" shall refer to the Guaranteed Maximum Price upon the Owner's acceptance of the Guaranteed Maximum Price proposal.

§ 2.2.2 To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include the following:

.1 A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
.2 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal, including assumptions under Section 2.2.2, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
.3 A statement of the proposed Guaranteed Maximum Price, including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee;
.4 The anticipated date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based; and
.5 A date by which the Owner must accept the Guaranteed Maximum Price.

§ 2.2.4 Construction Manager's Contingency Fund - In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its contingency for the Construction Manager's exclusive use to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order. The

Construction Manager shall notify the Owner at least monthly of the nature and amounts applied from the Construction Contingency. Contractor's Construction Contingency is available for construction and coordination issues and must be spent in accordance with Article 6 of this Agreement and shall be appropriately reviewed with the Owner. .

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal. In the event the Owner and Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, a copy of which the Owner shall provide to the Architect. The Guaranteed Maximum Price Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

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

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

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

§ 2.3 Construction Phase

§ 2.3.1 General

§ 2.3.1.1 For purposes of Section 8.1.2 of A201–2017, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

§ 2.3.1.2 The Construction Phase shall commence upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal or the Owner's issuance of a Notice to Proceed, whichever occurs earlier.

2.3.1.3 Weather Day Allowance. The Contract Time, Guaranteed Maximum Price and the Construction Manager's overall schedule will include and accommodate an allowance of work days, to be set forth in the Guaranteed Maximum Price Amendment, anticipated to be lost for adverse weather impacts on the critical path and throughout the entire schedule. The weather days should be established from local knowledge and using reasonable documentation, and include 30 year construction averages from the National Oceanic and Atmospheric Administration (NOAA).

The Construction Manager shall notify the Owner in writing of any days lost due to adverse weather beyond a reasonable weather day allowance (together with dates, description of work activities impacted, etc.) and at each construction meeting, and shall review and justify to the Owner that the adverse weather delayed the critical path.

If adverse weather conditions that are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time (e.g. greater than 20% of reasonable estimates), could not have been reasonably anticipated and had an adverse effect on the scheduled construction. The contractor is usually entitled to additional contract time, but not additional compensation for weather delays and would apply under the Delay section of this Contract.

§ 2.3.2 Administration

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain bids, subject to those person or entities that meet financial requirements and that would enter subcontracts acceptable to the Construction Manager. The Construction Manager shall obtain bids from at a minimum of three (3) Subcontractors and from suppliers of materials or equipment fabricated especially for the Work and shall deliver such bids to the Owner and Architect. The Owner shall then determine, with the advice of the Construction Manager and the Architect, which bids will be accepted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

The Construction Manager shall at the commencement of procurement provide the Owner with a detailed list of prequalified and preapproved subcontractors for Owners review and approval. Construction Manager shall endeavor to obtain a minimum of three (3) bids for each trade as may be available in the region where the project is located. Notwithstanding this requirement, if the Construction Manager and owner determines that pre-selecting a subcontractor to be a key Trade Partner is in the best interest of the project, Construction Manager shall make such recommendation of award to the Owner for its review and approval. Owner requires a competitive process for onboarding Trade Partners which shall be reviewed and approved prior to any bidding.

2.3.2.1.1The Construction Manager shall request in writing any potential trades which the Construction Manager may Self-Perform Work ("SPW"). UHS shall give approval for trades in which the Construction Manager may self-perform work; potential trades may include Framing, Drywall, Concrete, Panelized exterior/interior walls, Firestopping, Doors/Frames/Hardware, Acoustical Ceilings, and Specialties. If Construction Manager is authorized to SPW, the Construction Manager will obtain a minimum of 3 sealed bids which are opened in front of a UHS designated representative. If Construction manager does not obtain at least 3 qualified bids, the SPW will not be allowed.

The Construction Manager shall not be entitled to any savings for SPW as set forth in Section 5.2.1, and 100% of all savings shall be reverted to the Owner.

For clarity, Construction Manager's fee shall be assessed on SPW.

2.3.2.1.2 If Construction Manager does SPW, Construction Manager shall:

A. Inform the Owner of the price, scope, and agreed contract terms prior to the bid process.
B. Provide three sealed bids if proposal on a stipulated sum basis
C. Bid all material with a minimum of 3 vendors
D. Provide time in the schedule to allow the Owner the right to reject any self-perform bid proposal that does not meet criteria above.

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

§ 2.3.2.3 Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost plus fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive

the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 below.

§ 2.3.2.4 If the Construction Manager recommends a specific bidder that may be considered a "related party" according to Section 6.10, then the Construction Manager shall promptly notify the Owner in writing of such relationship and notify the Owner of the specific nature of the contemplated transaction, according to Section 6.10.2.

§ 2.3.2.5 The Construction Manager shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the Owner and Architect.

§ 2.3.2.6 Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work and submittal schedule in accordance with Section 3.10 of A201–2017.

§ 2.3.2.7 The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information required by the Owner. The Construction Manager shall also keep, and make available to the Owner and Architect, a daily log containing a record for each day of weather, portions of the Work in progress, number of workers on site, identification of equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the Owner The Construction Manager, its contractors and subcontractors are responsible for the safety of the site, their personnel, and for the safe prosecution of the work on the Project. The Owner shall in no way be held responsible for providing Safety oversight for the work of the Construction Manager and its Contractors and Subcontractors. The Owner shall require that Contractor's performing work directly for the Owner are required to adhere to the Construction Manager's project safety requirements.

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

§ 2.4 Professional Services

Section 3.12.10 of A201–2017 shall apply to both the Preconstruction and Construction Phases.

§ 2.5 Hazardous Materials

Section 10.3 of A201–2017 shall apply to both the Preconstruction and Construction Phases.

ARTICLE 3 OWNER'S RESPONSIBILITIES

§ 3.1 Information and Services Required of the Owner

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

§ 3.1.2 Prior to the execution of the Guaranteed Maximum Price Amendment, the Construction Manager may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Construction Manager may only request such evidence if (1) the Owner fails to make payments to the Construction Manager as the Contract Documents require, (2) a change in the Work materially changes the Contract Sum, or (3) the Construction Manager identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager and Architect.

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

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

§ 3.1.4.1 The Owner shall furnish tests, inspections and reports required by law and as otherwise agreed to by the parties, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

§ 3.1.4.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§ 3.1.4.3 The Owner, when such services are requested, shall furnish services of geotechnical engineers, which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

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

§ 3.2 Owner's Designated Representative

The Owner shall identify a representative authorized to act on behalf of the Owner with respect to the Project. The Owner's representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201–2017, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

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

§ 3.3 Architect

The Owner shall retain an Architect to provide services, duties and responsibilities as described in AIA Document B133™–2014, Standard Form of Agreement Between Owner and Architect, Construction Manager as Constructor Edition. The Owner shall provide the Construction Manager a copy of the executed agreement between the Owner and the Architect, and any further modifications to the agreement.

ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

§ 4.1 Compensation

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

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

(Insert amount of, or basis for, compensation and include a list of reimbursable cost items, as applicable.)

The Construction Manager shall be paid for its direct personnel expense per Section 4.1.4 below not to exceed in the aggregate of $2,331,341 , unless authorized in writing by the Owner or by Addendum.

§ 4.1.3 If the Preconstruction Phase services covered by this Agreement have not been completed within(4) (Four) months of the date of this Agreement, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably adjusted.

§ 4.1.4 Compensation based on Direct Personnel Expense includes the direct salaries of the Construction Manager's personnel providing Preconstruction Phase services on the Project and the Construction Manager's costs for the mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions. Preconstruction rates will be reimbursed at the rates set forth in Exhibit (xx). For ease of calculations, the UHS billable rate for labor should begin with raw salary and increased by applicable taxes, benefits, and holiday/vacation/sick. These rates shall be consistent with UHS Standard Business Terms.

§ 4.2 Payments

§ 4.2.1 Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed.

§ 4.2.2 Payments are due and payable upon presentation of the Construction Manager's invoice. Amounts unpaid ( ) days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Construction Manager.
(Insert rate of monthly or annual interest agreed upon.)

0 % Zero

ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

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

§ 5.1.1 The Construction Manager's Fee:
(State a lump sum, percentage of Cost of the Work or other provision for determining the Construction Manager's Fee.)

Shall be two and three quarters percent (2.75%) of the Cost of the Work

§ 5.1.2 The method of adjustment of the Construction Manager's Fee for changes in the Work:

The fee for changes in the work will be the same fee enumerated in 5.1.1. above.

§ 5.1.3 Limitations, if any, on a Subcontractor's overhead and profit for increases in the cost of its portion of the Work:

Shall Not be Less Than 10% and Not More Than 15% Combined Total for Overhead & Profit on Change Orders, unless otherwise approved by Owner

§ 5.1.4 Rental rates for Construction Manager-owned equipment shall not exceed Eighty percent (80 %) of the standard rates as listed in the regionally adjusted AED Greenbook.

§ 5.1.5 Unit prices, if any: None
(Identify and state the unit price; state the quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price per Unit ($0.00)

§ 5.2 Guaranteed Maximum Price

§ 5.2.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as it is amended from time to time. To the extent the Cost of the Work exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.
(Insert specific provisions if the Construction Manager is to participate in any savings.)

All savings within the GMP shall be refunded to the Owner.

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

§ 5.3 Changes in the Work

§ 5.3.1 The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The Architect may make minor changes in the Work as provided in Section 7.4 of AIA Document A201–2017, General Conditions of the Contract for Construction. The Construction Manager shall be entitled to an equitable adjustment in the Contract Time as a result of changes in the Work.

§ 5.3.2 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price Amendment may be determined by any of the methods listed in Section 7.3.3 of AIA Document A201–2017, General Conditions of the Contract for Construction.

§ 5.3.3 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of AIA Document A201–2017 and the term "costs" as used in Section 7.3.4 of AIA Document A201–2017 shall have the meanings assigned to them in AIA Document A201–2017 and shall not be modified by Sections 5.1 and 5.2, Sections 6.1 through 6.7, and Section 6.8 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.4 In calculating adjustments to the Guaranteed Maximum Price, the terms "cost" and "costs" as used in the above-referenced provisions of AIA Document A201–2017 shall mean the Cost of the Work as defined in Sections 6.1 to 6.7 of this Agreement and the term "fee" shall mean the Construction Manager's Fee as defined in Section 5.1 of this Agreement.

§ 5.3.5 If no specific provision is made in Section 5.1.2 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.2 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the same basis that was used to establish the Fee for the original Work, and the Guaranteed Maximum Price shall be adjusted accordingly.

ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

§ 6.1 Costs to Be Reimbursed

§ 6.1.1 The term Cost of the Work shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.7.

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

§ 6.2 Labor Costs

§ 6.2.1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's prior approval, at off-site workshops.

§ 6.2.2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's prior approval.
(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal or other offices shall be included in the Cost of the Work, identify as a separate staff summary in Section 11.5 or as in Exhibit (xx), the personnel to be included, whether for all or only part of their time, and the rates at which their time will be charged to the Work..)

§ 6.2.3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3. For ease of calculations, the UHS billable rate for labor should begin with raw salary (annual salary divided by 2080 hours) and the billable rate for the burden items outlined in this section shall be fixed at forty-one percent (41 %) of substantiated and verified payroll for applicable taxes, benefits, and holiday/vacation/sick Substantiated payroll shall be hours worked properly charged to the project times the base salary rate of each employee. Audit shall be limited to verifying payroll hours and base salary rate of each employee once rates are approved.

§ 6.2.5 Bonuses, profit sharing, incentive compensation and any other discretionary payments shall not be directly reimbursable and are not considered cost of the work. Any bonus, profit sharing and incentives should be included in the fee

§ 6.3 Subcontract Costs

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

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

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

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

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

§ 6.5.1 Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Construction Manager shall mean fair market value.

§ 6.5.2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, dismantling and removal. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval. If the total rental or lease of equipment is estimated to be

beyond the purchase price of said equipment, Construction Manager shall purchase equipment and return it to the owner at the completion of the Project.

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

§ 6.5.4 Costs of document reproductions, facsimile transmissions and long-distance telephone calls, postage and parcel delivery charges, telephone service and internet service at the site and reasonable petty cash expenses of the site office.

§ 6.5.5 That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work.

§ 6.5.6 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval.

6.5.7 Unless and to the extent that the Contract Documents require the Owner to provide them, Construction Manager's costs of temporary utilities as necessary for the Construction Manager to perform its Work including, but not limited to gas, water, electricity, sewer, connection fees, and utility consumptions charges.

6.5.8 Renderings, physical models, mock-ups, professional photography, and presentation materials requested by the Owner.

§ 6.6 Miscellaneous Costs

§ 6.6.1 Premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract. Self-insurance for either full or partial amounts of the coverages required by the Contract Documents, with the Owner's prior approval. The Construction Manager shall be reimbursed for its insurance outlined in Section 8 Insurance and as Exhibit (xx) and must adhere to UHS Standard Business Terms.

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

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

§ 6.6.4 Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.4.3 of AIA Document A201–2017 or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

§ 6.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Construction Manager's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of AIA Document A201–2017 or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

§ 6.6.6 Costs for electronic equipment and software, including licenses for software, directly related to the Work with the Owner's prior approval shall be reimbursed as a general condition and not as a unit cost per hour on supervisory staff.

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

§ 6.6.8 Legal, mediation and arbitration costs, including attorneys' fees, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager after the execution of this Agreement in the performance of the Work and with the Owner's prior approval, which shall not be unreasonably withheld.

§ 6.6.9 Subject to the Owner's prior approval, expenses incurred in accordance with the Construction Manager's standard written personnel policy for relocation and temporary living allowances of the Construction Manager's personnel required for the Work.

§ 6.6.10 The deductible portion of any losses under policies of Builder's Risk unless the Construction Manager or subcontractor is at fault in which the entity responsible for the loss would be responsible for the deductible. Notwithstanding, and for purposes of the NNSMC project, wherein the Construction Manager has furnished the Builder's Risk Insurance Policy, the deductible portion to be paid by the party responsible for the loss shall be limited to $10,000 for general damage claims and $25,000 for claims involving water damage. For claims against the policy where the deductible is partially paid by the party causing the loss, the balance of the deductible shall otherwise be a reimbursable expense.

§ 6.7 Other Costs and Emergencies

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

§ 6.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of AIA Document A201–2017.

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

§ 6.7.4 The costs described in Sections 6.1 through 6.7 shall be included in the Cost of the Work, notwithstanding any provision of AIA Document A201–2017 or other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.8.

§ 6.8 Costs Not to Be Reimbursed

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

.1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Section 6.2, or as may be provided in Article 11;

.2 Expenses of the Construction Manager's principal office and offices other than the site office;

.3 Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.7;

.4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;

.5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;

.6 Any cost not specifically and expressly described in Sections 6.1 to 6.7;

.7 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded; and

.8 Costs for services incurred during the Preconstruction Phase.

§ 6.9 Discounts, Rebates and Refunds

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

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

§ 6.10 Related Party Transactions

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

§ 6.10.2 If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3. If the Owner fails to authorize the transaction, the Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3.

§ 6.11 Accounting Records

The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda and other data relating to this Contract. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law.

ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES

§ 7.1 Progress Payments

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

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

The Construction Manager shall, during the last week of each month, meet with the Architect and Owner (and/or other parties designated in writing by the Owner) to review and approve the draft Application for Payment submitted under Section 9.3.1 of A201. The approved draft will then be updated into a formal Application for Payment and submitted to the Owner for payment.

§ 7.1.3 Provided that an Application for Payment is received by the Owner not later than the 1st day of a month, the Owner shall make payment of the certified amount to the Construction Manager not later than the 1st day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than thirty (30) days after the Architect receives the Application for Payment.

(Federal, state or local laws may require payment within a certain period of time.)

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager's Fee, plus payrolls for the period covered by the present Application for Payment.

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

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

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

- **.1** Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of AIA Document A201–2017;
- **.2** Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
- **.3** Subtract 5% retainage;
- **.4** add Construction Manager's Fee, General Conditions, General Requirements, and cost for Permits (for all of which no retention shall be held) The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 and consistent with 7.1.8 below
- **.5** Subtract the aggregate of previous payments made by the Owner;
- **.6** Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- **.7** Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201–2017.

§ 7.1.8 The Owner and Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments to Subcontractors and the Construction Manager shall execute subcontracts in accordance with those agreements. All subcontracts and SPW shall be structured to hold retainage at 5% in conformance with NRS..

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

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

audits and verifications, if required by the Owner, will be performed by the Owner's auditors acting in the sole interest of the Owner.

§ 7.2 Final Payment

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

.1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201–2017, and to satisfy other requirements, if any, which extend beyond final payment;

.2 the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment; and

.3 a final Certificate for Payment has been issued by the Architect.

The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A201–2017. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document A201–2017. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting.

§ 7.2.3 If the Owner's auditors report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount without seeking an initial decision pursuant to Section 15.2 of A201–2017. A request for mediation shall be made by the Construction Manager within 30 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to request mediation within this 30-day period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.4 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1.1 and not excluded by Section 6.8 to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings as provided in Section 5.2.1, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of AIA Document A201–2017.
(State bonding requirements, if any, and limits of liability for insurance required in Article 11 of AIA Document A201–2017.)

UHS prefers standard Contractor liability insurance and does not use CCIP or OCIP insurance products. The Construction Manager will adhere to UHS insurance requirements for small and large projects summarized in the UHS standard insurance requirements for Contractors.

UHS does not typically require Payment and Performance bonds on projects, but may consider bonding the entire project or individual bonding at the Subcontractor level if Contractor and UHS deem appropriate due to higher risk

profile, limited contractors, etc. In these cases, Construction Manager shall include the cost of Labor & Material Payment and Performance Bonds on certain trade work line items within the GMP with approval from the Owner.

On a case by case basis, UHS and the Construction Manager will evaluate subcontractor default insurance programs or similar programs, UHS will ultimately decide if subcontractor default insurance is appropriate.

Builder's Risk insurance coverage will be evaluated on a case by case basis; however most new greenfield projects require the Construction Manager to carry Builders Risk. UHS traditionally carries Builder's Risk for renovations or projects that tie directly into an active facility.

Type of Insurance or Bond	Limit of Liability or Bond Amount ($0.00)

ARTICLE 9 DISPUTE RESOLUTION

§ 9.1 Any Claim between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in this Article 9 and Article 15 of A201–2017. However, for Claims arising from or relating to the Construction Manager's Preconstruction Phase services, no decision by the Initial Decision Maker shall be required as a condition precedent to mediation or binding dispute resolution, and Section 9.3 of this Agreement shall not apply.

§ 9.2 For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201–2017, the method of binding dispute resolution shall be as follows:
(Check the appropriate box. If the Owner and Construction Manager do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)

[X] Arbitration pursuant to Section 15.4 of AIA Document A201–2017

[ ] Litigation in a court of competent jurisdiction

[ ] Other: *(Specify)*

§ 9.3 Initial Decision Maker

The Architect will serve as the Initial Decision Maker pursuant to Section 15.2 of AIA Document A201–2017 for Claims arising from or relating to the Construction Manager's Construction Phase services, unless the parties appoint below another individual, not a party to the Agreement, to serve as the Initial Decision Maker.
(If the parties mutually agree, insert the name, address and other contact information of the Initial Decision Maker, if other than the Architect.)

ARTICLE 10 TERMINATION OR SUSPENSION

§ 10.1 Termination Prior to Establishment of the Guaranteed Maximum Price

§ 10.1.1 Prior to the execution of the Guaranteed Maximum Price Amendment, the Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause, and the Construction Manager may terminate this Agreement, upon not less than seven days' written notice to the Owner, for the reasons set forth in Section 14.1.1 of A201–2017.

§ 10.1.2 In the event of termination of this Agreement pursuant to Section 10.1.1, the Construction Manager shall be equitably compensated for Preconstruction Phase services performed prior to receipt of a notice of termination. In no

event shall the Construction Manager's compensation under this Section exceed the compensation set forth in Section 4.1.

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

.1 Take the Cost of the Work incurred by the Construction Manager to the date of termination; plus equitable compensation for any demobilization costs incurred by the Construction Manager.

.2 Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion; and

.3 Subtract the aggregate of previous payments made by the Owner for Construction Phase services.

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

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

§ 10.2 Termination Subsequent to Establishing Guaranteed Maximum Price

Following execution of the Guaranteed Maximum Price Amendment and subject to the provisions of Section 10.2.1 and 10.2.2 below, the Contract may be terminated as provided in Article 14 of AIA Document A201–2017.

§ 10.2.1 If the Owner terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager pursuant to Sections 14.2 and 14.4 of A201–2017 shall not exceed the amount the Construction Manager would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager under Section 14.1.3 of A201–2017 shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, utilizing as necessary a reasonable estimate of the Cost of the Work for Work not actually completed.

§ 10.3 Suspension

The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201–2017. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of AIA Document A201–2017, except tbat the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1 and 5.3.5 of this Agreement.

ARTICLE 11 MISCELLANEOUS PROVISIONS

§ 11.1 Terms in this Agreement shall have the same meaning as those in A201–2017.

§ 11.2 Ownership and Use of Documents
Section 1.5 of A201–2017 shall apply to both the Preconstruction and Construction Phases.

§ 11.3 Governing Law
Section 13.1 of A201–2017 shall apply to both the Preconstruction and Construction Phases.

§ 11.4 Assignment
The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement. Neither the Owner nor the Construction Manager shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement. Except as provided in Section 13.2.2 of A201–2017, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 11.5 Other provisions:

ARTICLE 12 SCOPE OF THE AGREEMENT

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

§ 12.2 The following documents comprise the Agreement:

.1 AIA Document A133–2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

.2 AIA Document A201–2017, General Conditions of the Contract for Construction

.3 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed, or the following:

.4 AIA Document E202™–2008, Building Information Modeling Protocol Exhibit, if completed, or the following:

.5 Other documents:
(List other documents, if any, forming part of the Agreement.)

Include Billing rates, Equipment Rate Schedules, Insurance Certifications, etc in this section.

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

DocuSigned by:
Mark Darcy
20EA916A5BD24C8...
OWNER *(Signature)*

Mark D'Arcy Vice President, Design & Construction
(Printed name and title)

DocuSigned by:
Bret Loughridge
F7E0D8440C5744A...
CONSTRUCTION MANAGER *(Signature)*

Bret Loughridge President
(Printed name and title)

Additions and Deletions Report for
AIA® Document A133™ – 2009

This Additions and Deletions Report, as defined on page 1 of the associated document, reproduces below all text the author has added to the standard form AIA document in order to complete it, as well as any text the author may have added to or deleted from the original AIA text. Added text is shown underlined. Deleted text is indicated with a horizontal line through the original AIA text.

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PAGE 1

AGREEMENT made as of the 6th day of May in the year 2020

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Sparks Family Medical Center, Inc. c/o
Universal Health Services of Delaware367 South Gulph Road
King of Prussia, PA 19406

...

SR Construction, Inc.
3579 Red Rock Street
Las Vegas, Nevada 89103

...

Northern Nevada Sierra Medical Center
625 Innovation Drive
Reno, Nevada 89511

...

(Name, legal status and address)

ESa Architects.
1033 Demonbreun Street, Suite 800
Nashville, Tennessee 37203
615-329-9445

...

(Name, address and other information)

Sean Applegate, MS, CHFM
Sr. Regional Project Manager
Universal Health Services, Inc.

PAGE 2

Bret Loughridge
President
SR Construction, Inc.
3579 Red Rock Street

702-877-6111

...

Matt Childress
ESa Architects.
1033 Demonbreun Street, Suite 800
Nashville, Tennessee 37203
615-329-9445
PAGE 3

For the Preconstruction Phase, AIA Document ~~A201™–2007,~~ A201™–2017, General Conditions of the Contract for Construction, shall apply only as specifically provided in this Agreement. For the Construction Phase, the general conditions of the contract shall be as set forth in ~~A201–2007,~~ A201–2017, which document is incorporated herein by reference. The term "Contractor" as used in ~~A201–2007~~ A201–2017 shall mean the Construction Manager.
PAGE 4

2.1.2.1 If the Project will involve building information modeling ("BIM"), the Owner, Construction Manager and Architect/Engineer shall jointly develop a BIM Execution Plan for Owner's review and approval. The BIM Execution Plan shall be consistent with the Owner's AIA A201-2017 General Conditions section 1.8 BIM Use and Reliance; and shall be completed to a level of LOD 400 at a minimum. Upon the Owner's approval of the BIM Execution Plan, if any, the BIM Execution Plan shall become a Contract Document.

§ 2.1.3 When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically (typically monthly) update a Project schedule for the Architect's review and the Owner's acceptance. The Construction Manager shall obtain the Architect's approval for the portion of the Project schedule relating to the performance of the Architect's services. The Project schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' services, and the Owner's responsibilities and together with the Architect and Owner's consultants and representatives, identify items that could affect the Project's timely completion. The updated Project schedule shall include the following: submission of the Guaranteed Maximum Price proposal; components of the Work; times of commencement and completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered well in advance of construction; and the occupancy requirements of the Owner.
PAGE 5

The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and ~~quasi-governmental~~ quasi-governmental authorities for inclusion in the Contract Documents.

...

§ 2.2.1 At a time to be mutually agreed upon by the Owner and the Construction Manager and in consultation with the Architect, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee. In the A201, references to the "Contract Sum" shall refer to the Guaranteed Maximum Price upon the Owner's acceptance of the Guaranteed Maximum Price proposal.

...

§ 2.2.4 Construction Manager's Contingency Fund - In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its contingency for the Construction Manager's exclusive use to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order. The Construction Manager shall notify the Owner at least monthly of the nature and amounts applied from the Construction Contingency. Contractor's Construction Contingency is available for construction and coordination

issues and must be spent in accordance with Article 6 of this Agreement and shall be appropriately reviewed with the Owner. ,

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal. In the event ~~that~~ the Owner and Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.
PAGE 6

§ 2.3.1.1 For purposes of Section 8.1.2 of ~~A201–2007,~~ A201–2017, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

...

2.3.1.3 Weather Day Allowance. The Contract Time, Guaranteed Maximum Price and the Construction Manager's overall schedule will include and accommodate an allowance of work days, to be set forth in the Guaranteed Maximum Price Amendment, anticipated to be lost for adverse weather impacts on the critical path and throughout the entire schedule. The weather days should be established from local knowledge and using reasonable documentation, and include 30 year construction averages from the National Oceanic and Atmospheric Administration (NOAA).

The Construction Manager shall notify the Owner in writing of any days lost due to adverse weather beyond a reasonable weather day allowance (together with dates, description of work activities impacted, etc.) and at each construction meeting, and shall review and justify to the Owner that the adverse weather delayed the critical path.

If adverse weather conditions that are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time (e.g. greater than 20% of reasonable estimates), could not have been reasonably anticipated and had an adverse effect on the scheduled construction. The contractor is usually entitled to additional contract time, but not additional compensation for weather delays and would apply under the Delay section of this Contract.

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain ~~bids.~~ bids, subject to those person or entities that meet financial requirements and that would enter subcontracts acceptable to the Construction Manager. The Construction Manager shall obtain bids from at a minimum of three (3) Subcontractors and from suppliers of materials or equipment fabricated especially for the Work and shall deliver such bids to the Owner and Architect. The Owner shall then determine, with the advice of the Construction Manager and the Architect, which bids will be accepted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

The Construction Manager shall at the commencement of procurement provide the Owner with a detailed list of prequalified and preapproved subcontractors for Owners review and approval. Construction Manager shall endeavor to obtain a minimum of three (3) bids for each trade as may be available in the region where the project is located. Notwithstanding this requirement, if the Construction Manager and owner determines that pre-selecting a subcontractor to be a key Trade Partner is in the best interest of the project, Construction Manager shall make such recommendation of award to the Owner for its review and approval. Owner requires a competitive process for onboarding Trade Partners which shall be reviewed and approved prior to any bidding.

2.3.2.1.1The Construction Manager shall request in writing any potential trades which the Construction Manager may Self-Perform Work ("SPW"). UHS shall give approval for trades in which the Construction Manager may self-perform work; potential trades may include Framing, Drywall, Concrete, Panelized exterior/interior walls, Firestopping, Doors/Frames/Hardware, Acoustical Ceilings, and Specialties. If Construction Manager is authorized to SPW, the Construction Manager will obtain a minimum of 3 sealed bids which are opened in front of a UHS designated representative. If Construction manager does not obtain at least 3 qualified bids, the SPW will not be

allowed.

The Construction Manager shall not be entitled to any savings for SPW as set forth in Section 5.2.1, and 100% of all savings shall be reverted to the Owner.

For clarity, Construction Manager's fee shall be assessed on SPW.

2.3.2.1.2 If Construction Manager does SPW, Construction Manager shall:

A. Inform the Owner of the price, scope, and agreed contract terms prior to the bid process.
B. Provide three sealed bids if proposal on a stipulated sum basis
C. Bid all material with a minimum of 3 vendors
D. Provide time in the schedule to allow the Owner the right to reject any self-perform bid proposal that does not meet criteria above.

PAGE 7

§ 2.3.2.3 Subcontracts or other agreements shall conform to the applicable payment provisions of this ~~Agreement,~~ Agreement and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost plus fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 below.
PAGE 8

§ 2.3.2.6 Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work and submittal schedule in accordance with Section 3.10 of ~~A201–2007.~~ A201–2017.

§ 2.3.2.7 The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information required by the Owner. The Construction Manager shall also keep, and make available to the Owner and Architect, a daily log containing a record for each day of weather, portions of the Work in progress, number of workers on site, identification of equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the ~~Owner.~~ Owner The Construction Manager, its contractors and subcontractors are responsible for the safety of the site, their personnel, and for the safe prosecution of the work on the Project. The Owner shall in no way be held responsible for providing Safety oversight for the work of the Construction Manager and its Contractors and Subcontractors. The Owner shall require that Contractor's performing work directly for the Owner are required to adhere to the Construction Manager's project safety requirements.

...

Section 3.12.10 of ~~A201–2007~~ A201–2017 shall apply to both the Preconstruction and Construction Phases.

...

Section 10.3 of ~~A201–2007~~ A201–2017 shall apply to both the Preconstruction and Construction Phases.
PAGE 9

The Owner shall identify a representative authorized to act on behalf of the Owner with respect to the Project. The Owner's representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of ~~A201–2007,~~ A201–2017, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.
PAGE 10

The Construction Manager shall be paid for its direct personnel expense per Section 4.1.4 below not to exceed in the aggregate of $2,331,341 , unless authorized in writing by the Owner or by Addendum.

§ 4.1.3 If the Preconstruction Phase services covered by this Agreement have not been completed ~~within ( )~~ within(4) (Four) months of the date of this Agreement, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably adjusted.

§ 4.1.4 Compensation based on Direct Personnel Expense includes the direct salaries of the Construction Manager's personnel providing Preconstruction Phase services on the Project and the Construction Manager's costs for the mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions. Preconstruction rates will be reimbursed at the rates set forth in Exhibit (xx). For ease of calculations, the UHS billable rate for labor should begin with raw salary and increased by applicable taxes, benefits, and holiday/vacation/sick. These rates shall be consistent with UHS Standard Business Terms.

...

0 % Zero

...

Shall be two and three quarters percent (2.75%) of the Cost of the Work

...

The fee for changes in the work will be the same fee enumerated in 5.1.1. above.

...

Shall Not be Less Than 10% and Not More Than 15% Combined Total for Overhead & Profit on Change Orders, unless otherwise approved by Owner

§ 5.1.4 Rental rates for Construction Manager-owned equipment shall not exceed ~~percent (%) of the standard rate paid at the place of the Project.~~Eighty percent (80 %) of the standard rates as listed in the regionally adjusted AED Greenbook.

§ 5.1.5 Unit prices, if any: None

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All savings within the GMP shall be refunded to the Owner.

...

§ 5.3.1 The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The Architect may make minor changes in the Work as provided in Section 7.4 of AIA Document ~~A201–2007,~~ A201–2017, General Conditions of the Contract for Construction. The Construction Manager shall be entitled to an equitable adjustment in the Contract Time as a result of changes in the Work.

§ 5.3.2 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price Amendment may be determined by any of the methods listed in Section 7.3.3 of AIA Document ~~A201–2007,~~ A201–2017, General Conditions of the Contract for Construction.

§ 5.3.3 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of AIA Document ~~A201–2007~~ A201–2017 and the term "costs" as used in Section ~~7.3.7~~ 7.3.4 of AIA Document ~~A201–2007~~ A201–2017 shall have the meanings

assigned to them in AIA Document ~~A201–2007~~ A201–2017 and shall not be modified by Sections 5.1 and 5.2, Sections 6.1 through 6.7, and Section 6.8 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.4 In calculating adjustments to the Guaranteed Maximum Price, the terms "cost" and "costs" as used in the above-referenced provisions of AIA Document ~~A201–2007~~ A201–2017 shall mean the Cost of the Work as defined in Sections 6.1 to 6.7 of this Agreement and the term "fee" shall mean the Construction Manager's Fee as defined in Section 5.1 of this Agreement.

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(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal or other offices shall be included in the Cost of the Work, identify ~~in Section 11.5,~~ as a separate staff summary in Section 11.5 or as in Exhibit (xx), the personnel to be included, whether for all or only part of their time, and the rates at which their time will be charged to the ~~Work.)~~Work..)

...

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3. For ease of calculations, the UHS billable rate for labor should begin with raw salary (annual salary divided by 2080 hours) and the billable rate for the burden items outlined in this section shall be fixed at forty-one percent (41 %) of substantiated and verified payroll for applicable taxes, benefits, and holiday/vacation/sick Substantiated payroll shall be hours worked properly charged to the project times the base salary rate of each employee. Audit shall be limited to verifying payroll hours and base salary rate of each employee once rates are approved.

§ 6.2.5 Bonuses, profit sharing, incentive compensation and any other discretionary payments ~~paid to anyone hired by the Construction Manager or paid to any Subcontractor or vendor, with the Owner's prior approval.~~shall not be directly reimbursable and are not considered cost of the work. Any bonus, profit sharing and incentives should be included in the fee

...

§ 6.5.2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, dismantling and removal. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval. If the total rental or lease of equipment is estimated to be beyond the purchase price of said equipment, Construction Manager shall purchase equipment and return it to the owner at the completion of the Project.

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

§ 6.5.4 Costs of document reproductions, facsimile transmissions and long-distance telephone calls, postage and parcel delivery charges, telephone service and internet service at the site and reasonable petty cash expenses of the site office.

PAGE 13

6.5.7 Unless and to the extent that the Contract Documents require the Owner to provide them, Construction Manager's costs of temporary utilities as necessary for the Construction Manager to perform its Work including, but not limited to gas, water, electricity, sewer, connection fees, and utility consumptions charges.

6.5.8 Renderings, physical models, mock-ups, professional photography, and presentation materials requested by the Owner.

§ 6.6.1 Premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract. Self-insurance for either full or partial amounts of the coverages required by the Contract Documents, with the Owner's prior approval. The Construction Manager shall be reimbursed for its insurance outlined in Section 8 Insurance and as Exhibit (xx) and must adhere to UHS Standard Business Terms.

...

§ 6.6.4 Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section ~~13.5.3~~13.4.3 of AIA Document ~~A201–2007~~ A201–2017 or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

§ 6.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Construction Manager's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of AIA Document ~~A201–2007~~ A201–2017 or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

§ 6.6.6 Costs for electronic equipment and software, including licenses for software, directly related to the Work with the Owner's prior ~~approval.~~approval shall be reimbursed as a general condition and not as a unit cost per hour on supervisory staff.
PAGE 14

§ 6.6.10 The deductible portion of any losses under policies of Builder's Risk unless the Construction Manager or subcontractor is at fault in which the entity responsible for the loss would be responsible for the deductible. Notwithstanding, and for purposes of the NNSMC project, wherein the Construction Manager has furnished the Builder's Risk Insurance Policy, the deductible portion to be paid by the party responsible for the loss shall be limited to $10,000 for general damage claims and $25,000 for claims involving water damage. For claims against the policy where the deductible is partially paid by the party causing the loss, the balance of the deductible shall otherwise be a reimbursable expense.

...

§ 6.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of AIA Document ~~A201–2007.~~A201–2017.

...

§ 6.7.4 The costs described in Sections 6.1 through 6.7 shall be included in the Cost of the Work, notwithstanding any provision of AIA Document ~~A201–2007~~ A201–2017 or other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.8.

§ 6.8 ~~Costs Not To Be Reimbursed~~Costs Not to Be Reimbursed
PAGE 15

The Construction Manager shall, during the last week of each month, meet with the Architect and Owner (and/or other parties designated in writing by the Owner) to review and approve the draft Application for Payment submitted under Section 9.3.1 of A201. The approved draft will then be updated into a formal Application for Payment and submitted to the Owner for payment.

§ 7.1.3 Provided that an Application for Payment is received by the ~~Architect~~ Owner not later than the 1st day of a month, the Owner shall make payment of the certified amount to the Construction Manager not later than the 1st day of the following month. If an Application for Payment is received by the Architect after the application date fixed

above, payment shall be made by the Owner not later than ~~(~~—thirty (30) days after the Architect receives the Application for Payment.

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

...

.1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of AIA Document ~~A201–2007,~~A201–2017;

...

~~.3 Add the Construction Manager's Fee, less retainage of —percent (— %).~~ Subtract 5% retainage;

.4 add Construction Manager's Fee, General Conditions, General Requirements, and cost for Permits (for all of which no retention shall be held) The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 ~~or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;~~

~~.4 Subtract retainage of —percent (— %) from that portion of the Work that the Construction Manager self-performs;~~and consistent with 7.1.8 below

...

.7 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document ~~A201–2007.~~A201–2017.

§ 7.1.8 The Owner and Construction Manager shall agree upon ~~(1)~~ a mutually acceptable procedure for review and approval of payments to Subcontractors and ~~(2)~~ the ~~percentage of retainage held on Subcontracts, and the~~ Construction Manager shall execute subcontracts in accordance with those agreements. All subcontracts and SPW shall be structured to hold retainage at 5% in conformance with NRS..

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.1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of AIA Document ~~A201–2007,~~ A201–2017, and to satisfy other requirements, if any, which extend beyond final payment;

...

§ 7.2.2 The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document ~~A201–2007.~~A201–2017. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document ~~A201–2007.~~A201–2017. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting.

§ 7.2.3 If the Owner's auditors report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount without seeking an initial decision pursuant to Section 15.2 of ~~A201–2007,~~ A201–2017. A request for mediation shall be made by the Construction Manager within 30 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to request mediation within this 30-day period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

...

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of AIA Document ~~A201–2007,~~A201–2017. *(State bonding requirements, if any, and limits of liability for insurance required in Article 11 of AIA ~~Document A201–2007,~~)Document A201–2017.)*

UHS prefers standard Contractor liability insurance and does not use CCIP or OCIP insurance products. The Construction Manager will adhere to UHS insurance requirements for small and large projects summarized in the UHS standard insurance requirements for Contractors.

UHS does not typically require Payment and Performance bonds on projects, but may consider bonding the entire project or individual bonding at the Subcontractor level if Contractor and UHS deem appropriate due to higher risk profile, limited contractors, etc. In these cases, Construction Manager shall include the cost of Labor & Material Payment and Performance Bonds on certain trade work line items within the GMP with approval from the Owner.

On a case by case basis, UHS and the Construction Manager will evaluate subcontractor default insurance programs or similar programs, UHS will ultimately decide if subcontractor default insurance is appropriate.

Builder's Risk insurance coverage will be evaluated on a case by case basis; however most new greenfield projects require the Construction Manager to carry Builders Risk. UHS traditionally carries Builder's Risk for renovations or projects that tie directly into an active facility.

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§ 9.1 Any Claim between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in this Article 9 and Article 15 of ~~A201–2007,~~ A201–2017. However, for Claims arising from or relating to the Construction Manager's Preconstruction Phase services, no decision by the Initial Decision Maker shall be required as a condition precedent to mediation or binding dispute resolution, and Section 9.3 of this Agreement shall not apply.

§ 9.2 For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document ~~A201–2007,~~ A201–2017, the method of binding dispute resolution shall be as follows:

...

[X] Arbitration pursuant to Section 15.4 of AIA Document ~~A201–2007~~A201–2017

...

The Architect will serve as the Initial Decision Maker pursuant to Section 15.2 of AIA Document ~~A201–2007~~ A201–2017 for Claims arising from or relating to the Construction Manager's Construction Phase services, unless the parties appoint below another individual, not a party to the Agreement, to serve as the Initial Decision Maker.

...

§ 10.1.1 Prior to the execution of the Guaranteed Maximum Price Amendment, the Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause, and the Construction Manager may terminate this Agreement, upon not less than seven days' written notice to the Owner, for the reasons set forth in Section 14.1.1 of ~~A201–2007.~~A201–2017.
PAGE 19

.1 Take the Cost of the Work incurred by the Construction Manager to the date of termination; plus equitable compensation for any demobilization costs incurred by the Construction Manager.

...

Following execution of the Guaranteed Maximum Price Amendment and subject to the provisions of Section 10.2.1 and 10.2.2 below, the Contract may be terminated as provided in Article 14 of AIA Document ~~A201–2007.~~A201–2017.

§ 10.2.1 If the Owner terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager pursuant to Sections 14.2 and 14.4 of ~~A201–2007~~A201–2017 shall not exceed the amount the Construction Manager would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager under Section 14.1.3 of ~~A201–2007~~A201–2017 shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, utilizing as necessary a reasonable estimate of the Cost of the Work for Work not actually completed.

...

The Work may be suspended by the Owner as provided in Article 14 of AIA Document ~~A201–2007.~~A201–2017. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of AIA Document ~~A201–2007,~~A201–2017, except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1 and 5.3.5 of this Agreement.

...

§ 11.1 Terms in this Agreement shall have the same meaning as those in ~~A201–2007.~~A201–2017.
PAGE 20

Section 1.5 of ~~A201–2007~~A201–2017 shall apply to both the Preconstruction and Construction Phases.

...

Section 13.1 of ~~A201–2007~~A201–2017 shall apply to both the Preconstruction and Construction Phases.

...

The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement. Neither the Owner nor the Construction Manager shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement. Except as provided in Section 13.2.2 of ~~A201–2007,~~A201–2017, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

...

.2 AIA Document ~~A201–2007,~~ A201–2017, General Conditions of the Contract for Construction

...

Include Billing rates, Equipment Rate Schedules, Insurance Certifications, etc in this section.

...

Mark D'Arcy Vice President, Design & Construction

Bret Loughridge President

Certification of Document's Authenticity

AIA® Document D401™ – 2003

I, , hereby certify, to the best of my knowledge, information and belief, that I created the attached final document simultaneously with its associated Additions and Deletions Report and this certification at 16:51:21 ET on 07/20/2020 under Order No. 2681862530 from AIA Contract Documents software and that in preparing the attached final document I made no changes to the original text of AIA® Document A133™ – 2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, as published by the AIA in its software, other than those additions and deletions shown in the associated Additions and Deletions Report.

DocuSigned by:
Bret Lougbridge
F7E0B0440C5744A...
(Signed)

VP Operations
(Title)

7/20/2020
(Dated)

AIA® Document A201® – 2017

General Conditions of the Contract for Construction

for the following PROJECT:
(Name and location or address)

Northern Nevada Sierra Medical Center
625 Innovation Drive
Reno, Nevada 89511

THE OWNER:
(Name, legal status and address)

Sparks Family Medical Center, Inc. c/o
Universal Health Services of Delaware367 South Gulph Road
King of Prussia, PA 19406

THE ARCHITECT:
(Name, legal status and address)

ESa Architects.
1033 Demonbreun Street, Suite 800
Nashville, Tennessee 37203
615-329-9445

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

For guidance in modifying this document to include supplementary conditions, see AIA Document A503™, Guide for Supplementary Conditions.

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ARTICLE 1 GENERAL PROVISIONS

§ 1.1 Basic Definitions

§ 1.1.1 The Contract Documents

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement, and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal, or portions of Addenda relating to bidding or proposal requirements.

§ 1.1.2 The Contract

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect's consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect's consultants, or (4) between any persons or entities other than the Owner and the Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

§ 1.1.3 The Work

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

§ 1.1.4 The Project

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by Separate Contractors.

§ 1.1.5 The Drawings

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules, and diagrams.

§ 1.1.6 The Specifications

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

§ 1.1.7 Instruments of Service

Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect's consultants under their respective professional services agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

§ 1.1.8 Initial Decision Maker

The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2. The Initial Decision Maker shall not show partiality to the Owner or Contractor and shall not be liable for results of interpretations or decisions rendered in good faith.

§ 1.2 Correlation and Intent of the Contract Documents

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

In the event that Contractor is aware of inconsistencies within or between Contract Documents and applicable standards, codes and ordinances, provided the Contractor did not otherwise clarify or qualify such inconsistency or discrepancy in the GMP documents, the Contractor shall (i) provide the better quality or greater quantity of Work or (ii) comply with the more stringent requirement, either or both in accordance with the Architect's interpretation. The terms and conditions of this Subparagraph shall not relieve the Contractor of any other obligations set forth in the Contract Documents.

§ 1.2.1.1 The invalidity of any provision of the Contract Documents shall not invalidate the Contract or its remaining provisions. If it is determined that any provision of the Contract Documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Contract Documents shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Contract.

§ 1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

§ 1.2.3 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

§ 1.3 Capitalization

Terms capitalized in these General Conditions include those that are (1) specifically defined, (2) the titles of numbered articles, or (3) the titles of other documents published by the American Institute of Architects.

§ 1.4 Interpretation

In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

§ 1.5 Ownership and Use of Drawings, Specifications, and Other Instruments of Service

§ 1.5.1 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and retain all common law, statutory, and other reserved rights in their Instruments of Service, including copyrights. The Contractor, Subcontractors, Sub-subcontractors, and suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.

§ 1.5.2 The Contractor, Subcontractors, Sub-subcontractors, and suppliers are authorized to use and reproduce the Instruments of Service provided to them, subject to any protocols established pursuant to Sections 1.7 and 1.8, solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and suppliers may not use the Instruments of Service on other projects or for additions to the Project outside the scope of the Work without the specific written consent of the Owner, Architect, and the Architect's consultants.

§ 1.6 Notice

§ 1.6.1 Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement.

§ 1.6.2 Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.

§ 1.7 Digital Data Use and Transmission

The parties shall agree upon protocols governing the transmission and use of Instruments of Service or any other information or documentation in digital form. The parties may use AIA Document E203™–2013, Building

Information Modeling and Digital Data Exhibit, to establish the protocols for the development, use, transmission, and exchange of digital data.

§ 1.8 Building Information Models Use and Reliance
Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™–2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building information model, and each of their agents and employees. The Architect promptly deliver to the Contractor a full operable copy of the Architect's building and building system model(s) in order to facilitate the placement of the features, systems and components that will be supplied by the Contractor's personnel, suppliers and subcontractors. The Construction Manager's BIM shall be forwarded to Owner for Owner's exclusive use for operations and post construction.

§ 1.9 Contractor Knowledge
The terms "knowledge", "recognize", and "discover", their respective derivatives, and similar terms in the Contract Documents as used in reference to the Contractor, shall be interpreted to mean facts and information the Contractor knows or reasonably should know, recognizes or reasonably should recognize, and discovers or reasonably should discover in exercising the care, skill, and diligence required by the Contract Documents. The term "reasonably inferable" and similar terms in the Contract shall mean reasonably inferable by a contractor familiar with the Project and exercising the due care, skill, and diligence, required of a Contractor by the Contract Documents."

ARTICLE 2 OWNER

§ 2.1 General
§ 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 2.1.2 The Owner shall furnish to the Contractor, within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of, or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

§ 2.2 Evidence of the Owner's Financial Arrangements
§ 2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

§ 2.2.3 After the Owner furnishes evidence of financial arrangements under this Section 2.2, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.4 Where the Owner has designated information furnished under this Section 2.2 as "confidential," the Contractor shall keep the information confidential and shall not disclose it to any other person. However, the Contractor may disclose "confidential" information, after seven (7) days' notice to the Owner, where disclosure is required by law, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, or by court or arbitrator(s) order. The Contractor may also disclose "confidential" information to its employees, consultants, sureties, Subcontractors and their employees, Sub-subcontractors, and others who need to know the content of such information solely and exclusively for the Project and who agree to maintain the confidentiality of such information.

§ 2.3 Information and Services Required of the Owner

§ 2.3.1 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

§ 2.3.2 The Owner shall retain an architect lawfully licensed to practice architecture, or an entity lawfully practicing architecture, in the jurisdiction where the Project is located. That person or entity is identified as the Architect in the Agreement and is referred to throughout the Contract Documents as if singular in number.

§ 2.3.3 If the employment of the Architect terminates, the Owner shall employ a successor to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect.

§ 2.3.4 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 2.3.5 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness so as not to delay the progress of the Work. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Contractor's performance of the Work with reasonable promptness after receiving the Contractor's written request for such information or services.

§ 2.3.6 Unless otherwise provided in the Contract Documents, the Owner shall furnish to the Contractor one copy of the Contract Documents for purposes of making reproductions pursuant to Section 1.5.2.

§ 2.4 Owner's Right to Stop the Work

If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or repeatedly fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3.

§ 2.5 Owner's Right to Carry Out the Work

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. Additionally, if Contractor refuses, fails or is unable to supply enough properly skilled workmen, materials or equipment to perform the Work according to the schedule, Owner may, in its sole discretion, supplement the forces of Contractor to perform a portion of Contractor's work upon forty eight (48) hours' notice to Contractor, and charge Contractor the actual reasonable costs associated with the supplementation. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies and supplementing Contractors work, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure,. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to

the Owner.
If the Contractor disagrees with the actions of the Owner or the Architect, or the amounts claimed as costs to the Owner, the Contractor may file a Claim pursuant to Article 15.

ARTICLE 3 CONTRACTOR

§ 3.1 General

§ 3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Contractor or the Contractor's authorized representative.

The Contractor accepts the relationship of trust and confidence established between the Contractor and the Owner by the Agreement and the Conditions of the Contract. The Contractor covenants with the Owner to furnish its best skill and judgment and to cooperate in furthering the interests of the Owner, to furnish efficient business administration and superintendence, to use its best effort to furnish at all times an adequate supply of skilled workers and materials, and to perform the Work in the best way and in the most expeditious and economical manner consistent with the interests and expectations of the Owner. Contractor represents that it is financially solvent, able to pay its debts as they mature, and possesses sufficient working capital to complete the Work and perform its obligations hereunder.

§ 3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

§ 3.1.3 The Contractor shall not be relieved of its obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.

§ 3.2 Review of Contract Documents and Field Conditions by Contractor

§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed, and correlated personal observations with requirements of the Contract Documents.

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.3.4, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes as required by current law, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall submit Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner, subject to Section 15.1.7, as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes as required by current law, rules and regulations, and lawful orders of public authorities.

§ 3.3 Supervision and Construction Procedures

§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's reasonable skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and shall be solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely notice to the Owner and Architect, and shall propose alternative means, methods, techniques, sequences, or procedures. The Architect shall evaluate the proposed alternative solely for conformance with the design intent for the completed construction. Unless the Architect objects to the Contractor's proposed alternative, the Contractor shall perform the Work using its alternative means, methods, techniques, sequences, or procedures.

§ 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors.

§ 3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

§ 3.3.4 If the Work is being performed on a cost reimbursable basis, nothing in these General Conditions is intended to preclude or limit reimbursement where otherwise permitted in the Agreement. For example, if these General Conditions state to the effect that a cost shall be "at Contractor's expense", such a provision shall not preclude reimbursement where otherwise permitted by the Agreement.

§ 3.4 Labor and Materials

§ 3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

§ 3.4.2 Except in the case of minor changes in the Work approved by the Architect in accordance with Section 3.12.8 or ordered by the Architect in accordance with Section 7.4, the Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive.

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

§ 3.5 Warranty

§ 3.5.1 The Contractor warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.5.2 All material, equipment, or other special warranties required by the Contract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with Section 9.8.4.

§ 3.6 Taxes

The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

§ 3.7 Permits, Fees, Notices and Compliance with Laws

§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

§ 3.7.2 The Contractor shall comply with and give notices required by applicable current laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

§ 3.7.3 If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

§ 3.7.4 Concealed or Unknown Conditions

If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 14 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend that an equitable adjustment be made in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may submit a Claim as provided in Article 15.

§ 3.7.5 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

§ 3.8 Allowances

§ 3.8.1 The Contractor has included or shall include in the GMP all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents,

.1 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

.2 Contractor's cost for unloading and handling at the site, labor, installation costs, and other expenses shall also be covered by the Allowance. Provided the Allowance amount is included in the total of the GMP, Contractor's Fee shall be included in the GMP and not a part of the Allowance.

.3 whenever costs are more than or less than allowances, the Contract Sum 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 Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable promptness so as to not delay the Progress of the Work.

§ 3.9 Superintendent

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor.

§ 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the name and qualifications of a proposed superintendent. Within 14 days of receipt of the information, the Architect may notify the Contractor, stating whether the Owner or the Architect (1) has reasonable objection to the proposed superintendent or (2) requires additional time for review. Failure of the Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.

§ 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent, which shall not unreasonably be withheld or delayed.

§ 3.10 Contractor's Construction and Submittal Schedules

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall contain detail appropriate for the Project, including (1) the date of commencement of the Work, interim schedule milestone dates, and the date of Substantial Completion; (2) an apportionment of the Work by construction activity; and (3) the time required for completion of each portion of the Work. The schedule shall provide for the orderly progression of the Work to completion and shall not exceed time limits current under the Contract Documents. The schedule shall be revised at appropriate intervals as required by the conditions of the Work and Project.

§ 3.10.2 The Contractor, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, shall submit a submittal schedule for the Architect's approval. The Architect's approval shall not be unreasonably delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, or fails to provide submittals in accordance with the approved submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

§ 3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

3.10.4 From the Contractor's initial construction schedule and other information as developed, the Contractor, in cooperation with the Owner, the Architect, and major Subcontractors, will continuously monitor, and shall revise and update monthly, the Schedule. The construction schedule shall be further revised or expanded to provide a fully coordinated entire project schedule with more detailed information concerning the time requirements for all parts of the Work (Including but not limited to design milestones, FFE, DOH/AHJ inspections. Substantial completion, first patient-day, final completion, etc.) and other elements of the Project as such information is developed. The Contractor and each Subcontractor, materialman, and supplier shall provide revised data in order to assist the Contractor in determining the most appropriate and acceptable construction schedule and acceleration opportunities for the Work and to update the Schedule. Submission of an updated Schedule, acceptable to the Owner, which acceptance shall not unreasonably be withheld, shall be a condition precedent to receiving progress payments. The Contractor shall provide Schedule updates within ten (10) days following a request from the Owner. The Contractor shall give specific notice to the Owner and its consultants of any change in the logic of the schedule or any part thereof, or the removal of any restraints, or the deduction of any duration. The Construction Schedule shall cover all field tasks, significant material deliveries, other off-site restraints such as permits, inspections, approvals and milestones for start dates, completion dates and availability dates as required. Tasks shall be broken down into activities that allow monitoring monthly progress

§ 3.11 Documents and Samples at the Site

The Contractor shall make available, at the Project site, the Contract Documents, including Change Orders, Construction Change Directives, and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and the approved Shop Drawings, Product Data, Samples, and similar required submittals. These shall be in electronic form or paper copy, available to the Architect and Owner, and

delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed.

§ 3.12 Shop Drawings, Product Data and Samples

§ 3.12.1 Shop Drawings are drawings, diagrams, schedules, and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier, or distributor to illustrate some portion of the Work.

§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples that illustrate materials, equipment, or workmanship, and establish standards by which the Work will be judged.

§ 3.12.4 Shop Drawings, Product Data, Samples, and similar submittals are not Contract Documents. Their purpose is to demonstrate how the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

§ 3.12.5 The Contractor shall review for compliance with the Contract Documents, approve, and submit to the Architect, Shop Drawings, Product Data, Samples, and similar submittals required by the Contract Documents, in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of Separate Contractors.

§ 3.12.6 By submitting Shop Drawings, Product Data, Samples, and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

§ 3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples, or similar submittals, until the respective submittal has been approved by the Architect.

§ 3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from the requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples, or similar submittals, unless the Contractor has specifically notified the Architect of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar submittals, by the Architect's approval thereof.

§ 3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples, or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such notice, the Architect's approval of a resubmission shall not apply to such revisions.

§ 3.12.10 The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences, and procedures. The Contractor shall not be required to provide professional services in violation of applicable law.

§ 3.12.10.1 If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will

specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by an appropriately licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings, and other submittals related to the Work, designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy, accuracy or completeness of the services, certifications or approvals provided by such design professional or for any performance and design criteria provided by such design professionals or by Architect. The Construction Manager, or its subcontractors, shall comment or formally submit an RFI in regards to any potential performance or design criteria which by the contractors knowledge are not best practice or industry standards consistent with section "1.9.Contractors Knowledge".

§ 3.12.10.2 If the Contract Documents require the Contractor's design professional to certify that the Work has been performed in accordance with the design criteria, the Contractor shall furnish such certifications to the Architect at the time and in the form specified by the Architect.

§ 3.13 Use of Site

The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

§ 3.14 Cutting and Patching

§ 3.14.1 The Contractor shall be responsible for cutting, fitting, or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting, or patching shall be restored to the condition existing prior to the cutting, fitting, or patching, unless otherwise required by the Contract Documents.

§ 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or Separate Contractors by cutting, patching, or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter construction by the Owner or a Separate Contractor except with written consent of the Owner and of the Separate Contractor. Consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold, from the Owner or a Separate Contractor, its consent to cutting or otherwise altering the Work.

§ 3.15 Cleaning Up

§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials and rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery, and surplus materials from and about the Project.

§ 3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the Owner shall be entitled to reimbursement from the Contractor.

§ 3.16 Access to Work

The Contractor shall provide the Owner and Architect with access to the Work in preparation and progress wherever located.

§ 3.17 Royalties, Patents and Copyrights

The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for defense or loss when a particular design, process, or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright or patent violations are contained in

Drawings, Specifications, or other documents prepared by the Owner or Architect. However, if an infringement of a copyright or patent is discovered by, or made known to, the Contractor, the Contractor shall be responsible for the loss unless the information is promptly furnished to the Owner.

§ 3.18 Indemnification

§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

§ 3.18.2 In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

§ 3.18.3 To the fullest extent permitted by law, including without limitation California Civil Code, if applicable, Contractor's indemnity obligations under Section 3.18 will also include all fines, penalties, damages, liability, costs, expenses (including reasonable attorneys' fees) and any punitive damages arising out of or in connection with any violation of or failure to comply with any law, statute, ordinance, rule, regulation, code or requirement of a public authority that bears upon the performance of the Work by the Contractor, Subcontractor, or any person or entity for whom either is responsible, means, methods, procedures, techniques, or sequences of execution or performance of the Work, and failure to secure and pay for permits, fees, approvals, licenses, and inspections as required under the Contract Documents, or any violation of any permit or other approval of a public authority applicable to the Work, by the Contractor, a Subcontractor, or any person or entity for whom either is responsible. Notwithstanding the foregoing, nothing under Section 3.18, including this section 3.18.3, requires Contractor to indemnify an indemnitee for any loss, penalty, damage, liability, cost or expense of any kind resulting from Indemnitee's sole negligence or willful misconduct.

§ 3.18.4 Contractor shall indemnify and hold harmless all of the Indemnitees from and against any costs and expenses (including reasonable attorneys' fees) incurred by any of the Indemnitees in enforcing the Contractor's defense, indemnity, and hold harmless obligations.

§ 3.18.5 Neither final payment by Owner nor acceptance of the Project shall constitute a waiver of the foregoing indemnities and, notwithstanding any provision in the Contract Documents to the contrary, the foregoing indemnity obligations of Contractor shall survive termination, for any reason, of the Contract.

§ 3.18.6 Indemnification hereunder is in addition to and not in lieu of any common law indemnification to which Indemnitees are entitled.

ARTICLE 4 ARCHITECT

§ 4.1 General

§ 4.1.1 The Architect is the person or entity retained by the Owner pursuant to Section 2.3.2 and identified as such in the Agreement.

§ 4.1.2 Duties, responsibilities, and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified, or extended without written consent of the Owner, Contractor, and Architect. Consent shall not be unreasonably withheld.

§ 4.2 Administration of the Contract

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§ 4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents unless such failure results from a directive of the Architect or a failure of Architect to perform its responsibilities under the Contract Documents.. The Architect will not have control over or charge of,and will not be responsible for acts or omissions of, the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

§ 4.2.4 Communications

The Owner and Contractor shall include the Architect in all communications that relate to or affect the Architect's services or professional responsibilities. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and suppliers shall be through the Contractor. Communications by and with Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.

§ 4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.4.2 and 13.4.3, whether or not the Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 4.2.7 The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data, and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Sections 3.3, 3.5, and 3.12. The Architect's review shall not constitute approval of safety precautions or of any construction means, methods, techniques, sequences, or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 4.2.8 The Architect will prepare Construction Change Directives,and may order minor changes in the Work as provided in Section 7.4. The Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

§ 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion pursuant to Section 9.8; receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor pursuant to Section 9.10; and issue a final Certificate for Payment pursuant to Section 9.10.

§ 4.2.10 If the Owner and Architect agree, the Architect will provide one or more Project representatives to assist in carrying out the Architect's responsibilities at the site. The Owner shall notify the Contractor of any change in the duties, responsibilities and limitations of authority of the Project representatives.

§ 4.2.11 The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either, and will not be liable for results of interpretations or decisions rendered in good faith.
§ 4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

§ 4.2.14 The Architect will review and respond to requests for information about the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness so as to not delay the progress of the Work. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

ARTICLE 5 SUBCONTRACTORS

§ 5.1 Definitions

§ 5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a Separate Contractor or the subcontractors of a Separate Contractor.

§ 5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

§ 5.2 Award of Subcontracts and Other Contracts for Portions of the Work

§ 5.2.1 Unless otherwise stated in the Contract Documents, the Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the persons or entities proposed for each principal portion of the Work, including those who are to furnish materials or equipment fabricated to a special design. Within 14 days of receipt of the information, the Architect or Owner may notify the Contractor whether the Owner or the Architect (1) has reasonable objection to any such proposed person or entity or (2) requires additional time for review. Failure of the Owner or Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.

§ 5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

§ 5.2.4 The Contractor shall not substitute a Subcontractor, person, or entity for one previously selected if the Owner or Architect makes reasonable objection to such substitution.

§ 5.3 Subcontractual Relations

By appropriate written agreement, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work that the Contractor, by these Contract Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies, and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

§ 5.4 Contingent Assignment of Subcontracts

§ 5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner, provided that

.1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor; and

.2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract.

§ 5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

§ 5.4.3 Upon assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract.

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

§ 6.1 Owner's Right to Perform Construction and to Award Separate Contracts

§ 6.1.1 The term "Separate Contractor(s)" shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and with Separate Contractors retained under Conditions of the Contract substantially similar to those of this Contract, including those provisions of the Conditions of the Contract related to insurance and waiver of subrogation. Owner's Separate Contractor's shall be required to adhere to the safety requirements of the Contractor.

§ 6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

§ 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each Separate Contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with any Separate Contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to its construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, Separate Contractors, and the Owner until subsequently revised.

§ 6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces or with Separate Contractors, the Owner or its Separate Contractors shall have the same obligations and rights that the Contractor has under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6, and Articles 10, 11, and 12.

§ 6.2 Mutual Responsibility

§ 6.2.1 The Contractor shall afford the Owner and Separate Contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a Separate Contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly notify the Architect of apparent discrepancies or defects discovered in the construction or operations by the Owner or Separate Contractor that would render it unsuitable for proper execution and results of the Contractor's Work. Failure of the Contractor to notify the Architect of apparent discrepancies or defects prior to proceeding with the Work shall constitute an acknowledgment that the Owner's or Separate Contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work. The Contractor shall not be responsible for discrepancies or defects in the construction or operations by the Owner or Separate Contractor that are not discovered.

§ 6.2.3 The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a Separate Contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a Separate Contractor's delays, disruption of work, improperly timed activities, damage to the Work or defective construction.

§ 6.2.4 The Contractor shall promptly remedy damage that the Contractor wrongfully causes to completed or partially completed construction or to property of the Owner or Separate Contractor as provided in Section 10.2.5.

§ 6.2.5 The Owner and each Separate Contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

§ 6.3 Owner's Right to Clean Up

If a dispute arises among the Contractor, Separate Contractors, and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

ARTICLE 7 CHANGES IN THE WORK

§ 7.1 General

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor, and Architect. A Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor. An order for a minor change in the Work may be issued by the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Contractor shall proceed promptly with changes in the Work, unless otherwise provided in the Change Order, Construction Change Directive, or order for a minor change in the Work.

§ 7.2 Change Orders

§ 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor, and Architect stating their agreement upon all of the following:

.1 The change in the Work;

.2 The amount of the adjustment, if any, in the Contract Sum; GMP and any component of the GMP and

.3 The extent of the adjustment, if any, in the Contract Time.

§ 7.3 Construction Change Directives

§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum, GMP or Contract Time, or all of them. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, the Contract Sum, GMP and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

.1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

.2 Unit prices stated in the Contract Documents or subsequently agreed upon;

.3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or

.4 As provided in Section 7.3.4.

§ 7.3.4 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect or Owner shall determine the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.4 shall be limited to the following:

.1 Costs of labor, including applicable payroll taxes, fringe benefits required by agreement or custom, workers' compensation insurance, and other employee costs approved by the Owner and in line with approved business terms;

.2 Costs of materials, supplies, and equipment, including cost of transportation, whether incorporated or consumed;

.3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;

.4 Costs of premiums for all bonds and insurance, permit fees, and sales, use, or similar taxes, directly related to the change; and

.5 Costs of supervision and field office personnel directly attributable to the change.

§ 7.3.5 If the Contractor disagrees with the adjustment in the Contract Time, GMP and/or Contract Sum, the Contractor may make a Claim in accordance with applicable provisions of Article 15.

§ 7.3.6 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Owner of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum, GMP or Contract Time.

§ 7.3.7 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum, GMP and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum or GMP shall be actual net cost as confirmed by the Owner. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and

certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the parties will execute a Change Order. Change Orders may be issued for all or any part of a Construction Change Directive. All determinations by Architect may be disputed by Contractor and addressed in accordance with Article 15.

§ 7.4 Minor Changes in the Work

The Architect may order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. The Architect's order for minor changes shall be in writing. If the Contractor believes that the proposed minor change in the Work will affect the Contract Sum or Contract Time, the Contractor shall notify the Architect and shall not proceed to implement the change in the Work. If the Contractor performs the Work set forth in the Architect's order for a minor change without prior notice to the Architect that such change will affect the Contract Sum or Contract Time, the Contractor waives any adjustment to the Contract Sum or extension of the Contract Time.

ARTICLE 8 TIME

§ 8.1 Definitions

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work. Contractor acknowledges that completion of the Work in a timely manner is of critical importance to Owner and that Contractor's failure (except to the extent such delay is caused by Owner or otherwise excused as provided herein) to achieve Substantial Completion of the Work within the Contract Time may cause Owner to suffer damages. The Contractor acknowledges responsibility to maintain the schedule and use funds within the GMP Contract appropriately (and with Owner's approval) to maintain as well as correct any schedule deficiencies caused by Contractor or a Subcontractor.

§ 8.1.2 The date of commencement of the Work is the date established in the Agreement.

§ 8.1.3 The date of Substantial Completion shall be the date on which Contractor obtains the Certificate of Occupancy in accordance with Section 9.8.

§ 8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

§ 8.2 Progress and Completion

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, commence the Work prior to the effective date of insurance required to be furnished by the Contractor and Owner.

§ 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Owner determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Owner may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents or the under the law.

ARTICLE 9 PAYMENTS AND COMPLETION

§ 9.1 Contract Sum

§ 9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

§ 9.1.2 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 9.1.3 The Contractor shall provide monthly updates as to the Contract Sum and overall status of the Guaranteed Maximum Price. At a minimum, this report should include:

1. Executive Summary
2. Baseline budget along with current budget and projected final costs (including Change Orders)
3. CM Contingency Status and planned/projected use
4. CM Buyout summary noting budget, trade buyout amount, holds, savings/overrun, and status report.
5. Status of Allowances and holds
6. Summary of High-Risk Items, potential change orders, risk register status, and responsible party.
7. Milestones - Showing Original schedule, current and projected.

§ 9.2 Schedule of Values

Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit a schedule of values to the Owner and Architect before the first Application for Payment, allocating the entire Contract Sum to the various portions of the Work. The schedule of values shall be prepared in the form, and supported by the data to substantiate its accuracy, required by the Owner and Architect. This schedule, unless objected to by the Owner or Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment. Any changes to the schedule of values shall be submitted to the Owner or Architect and supported by such data to substantiate its accuracy as the Owner and Architect may require, and unless objected to by the Owner or Architect, shall be used as a basis for reviewing the Contractor's subsequent Applications for Payment.

§ 9.3 Applications for Payment

§ 9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 9.2, for completed portions of the Work. The application shall be notarized, if required, and supported by all data substantiating the Contractor's right to payment that the Owner or Architect require, such as copies of requisitions, and releases and waivers of liens from Subcontractors and suppliers, and shall reflect retainage if provided for in the Contract Documents.

§ 9.3.1.1 As provided in Section 7.3.9, such applications may include requests for payment on account of changes in the Work that have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.

§ 9.3.1.2 Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or supplier, unless such Work has been performed by others whom the Contractor intends to pay.

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location

agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage, and transportation to the site, for such materials and equipment stored off the site.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information, and belief, be free and clear of liens, claims, security interests, or encumbrances, in favor of the Contractor, Subcontractors, suppliers, or other persons or entities that provided labor, materials, and equipment relating to the Work, except for those claims or liens specifically noted in the Application for Payment. If the Contractor has knowledge of any claims or liens, the Contractor will certify as to what it knows of the claim or liens in the Application for Payment, and the Contractor will covenant to promptly bond or otherwise discharge or expunge such liens to the extent Owner has paid the Contractor for the Work in question. If any Subcontractor, Sub-Subcontractor or supplier records or files, or maintains any action on or respecting a claim of mechanics' lien, stop payment notice, or lis pendens relating to the Work, the Contractor will promptly procure appropriate release bonds that will extinguish or expunge the mechanics' lien, stop payment notice, or lis pendens, provided that the Owner has paid the Contractor for the Work in question.

§ 9.4 Certificates for Payment

§ 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either (1) issue to the Owner a Certificate for Payment in the full amount of the Application for Payment, with a copy to the Contractor; or (2) issue to the Owner a Certificate for Payment for such amount as the Architect determines is properly due, and notify the Contractor and Owner of the Architect's reasons for withholding certification in part as provided in Section 9.5.1; or (3) withhold certification of the entire Application for Payment, and notify the Contractor and Owner of the Architect's reason for withholding certification in whole as provided in Section 9.5.1. If Architect fails to respond within such seven-day period, the Contractor's Application for Payment will be deemed certified as if Architect had issued a Certificate for Payment in the full amount of the Application for Payment.

§ 9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data in the Application for Payment, that, to the best of the Architect's knowledge, information, and belief, the Work has progressed to the point indicated, the quality of the Work is in accordance with the Contract Documents, and that the Contractor is entitled to payment in the amount certified. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion, and to specific qualifications expressed by the Architect. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work; (2) reviewed construction means, methods, techniques, sequences, or procedures; (3) reviewed copies of requisitions received from Subcontractors and suppliers and other data requested by the Owner to substantiate the Contractor's right to payment; or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

§ 9.5 Decisions to Withhold Certification

§ 9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's reasonable opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

.1 defective Work not remedied; following written notice from the Owner or Architect and a reasonable period of time.

.2 third party claims filed or reasonable evidence indicating probable filing of such claims, unless security acceptable to the Owner is provided by the Contractor;

.3 failure of the Contractor to make payments properly due to Subcontractors or suppliers for labor, materials or equipment;
.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
.5 damage to the Owner or a Separate Contractor;
.6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover , Consequential damages for the anticipated delay, unless the anticipated delay is excusable under Section 8.3.; or
.7 repeated failure to carry out the Work in accordance with the Contract Documents.

§ 9.5.2 When either party disputes the Architect's decision regarding a Certificate for Payment under Section 9.5.1, in whole or in part, that party may submit a Claim in accordance with Article 15.

§ 9.5.3 When the reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§ 9.5.4 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or supplier to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Contractor shall reflect such payment on its next Application for Payment.

§ 9.6 Progress Payments

§ 9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

§ 9.6.2 The Contractor shall pay each Subcontractor, no later than seven days after receipt of payment from the Owner, the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

(Paragraph deleted)

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and suppliers' amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors and suppliers to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay, or to see to the payment of money to, a Subcontractor or supplier, except as may otherwise be required by law.

§ 9.6.5 The Contractor's payments to suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

§ 9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors or provided by suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, create any fiduciary liability or tort liability on the part of the Contractor for breach of trust, or entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

§ 9.6.8 Provided the Owner has fulfilled its payment obligations under the Contract Documents, the Contractor shall defend and indemnify the Owner from all loss, liability, damage or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any Subcontractor or supplier of any tier. Upon receipt of notice of a lien claim or other claim for payment, the Owner shall notify the Contractor. If approved by the applicable court, when required, the Contractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

§ 9.7 Failure of Payment

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents, the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum and GMP shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.7.1 If Owner is entitled to reimbursement or payment from Contractor under or pursuant to the Contract Documents, such payment will be made promptly upon demand by Owner. If Contractor fails to promptly make any payment owed to Owner, or if Owner incurs any costs and expenses to cure any default of Contractor or to correct defective Work, Owner has an absolute right to offset such amount against the Contract Sum. Owner may also, in its sole discretion, elect either to (1), deduct an amount equal to that which Owner is entitled from any payment then or thereafter due Contractor from Owner, or (2) issue a written notice to Contractor reducing Contract Sum by an amount equal to that which Owner is owed.

§ 9.8 Substantial Completion

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use, and shall be defined by issuance of the Certificate of Occupancy by the AHJ.. Owner expectations for Substantial Completion include full MEP system complete, operational, and balanced; all major work complete, and very limited punch list/minor cosmetic work remaining.

At the date when the Contract is executed or as a future Addendum included with the GMP, the Contractor and Owner shall establish and mutually agree to the Project Schedule, which shall be set forth in the Agreement as an Exhibit which shall establish the total Allowable Contract Time. The Allowable Contract Time may, from time to time, be adjusted by Change Order as allowed for within the Agreement and approved by owner. The Project Schedule should reflect a duration for construction activities that will allow essentially all construction activities to be 100% complete at the time of "Substantial Completion", and to allow all punch list to be complete by Owner first patient day.

Furthermore, for purposes of this Agreement, Contractor and Owner agree to meet and confer when the project is approximately 75% complete, as established by the total completed and stored to date on Contractor's pay application, to confirm final remaining duration (Time) allowed for Contractor to achieve Substantial Completion. This Contract time will serve as the date thereafter that Damages, as contemplated in15.1.7 shall begin to accrue unless adjusted by Change Order as allowed for within the Agreement and approved by Owner.

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended nse, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

§ 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion; establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance; and fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the

Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in the Certificate. In addition, the Contractor is required to obtain temporary or permanent certificate of occupancy permits from the proper authorities having jurisdiction to be deemed Substantially Complete. Upon such acceptance, and consent of surety if any, the Owner shall make payment of retainage applying to the Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents as shown on the lists to be provided pursuant to Section 9.8.4 by withholding no more than 150% of the reasonable cost of completing or correcting such Work.

§ 9.9 Partial Occupancy or Use

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect. For any partial occupancy or use, the Owner shall reduce retainage proportionately to the Contractor at the time of partial occupancy or use.

§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor, and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

§ 9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

§ 9.10 Final Completion and Final Payment

§ 9.10.1 Upon receipt of the Contractor's notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection. When the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect, (3) a written statement that the Contractor knows of no reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment, (5) documentation of any special warranties, such as manufacturers' warranties or specific Subcontractor warranties, and (6) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts and releases and waivers of liens, claims, security interests, or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien, claim, security interest, or encumbrance. If a lien, claim, security interest, or encumbrance remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging the lien, claim, security interest, or encumbrance, including all costs and reasonable attorneys' fees.

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed, corrected, and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of the surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of Claims.

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from

- .1 liens, Claims, security interests, or encumbrances arising out of the Contract and unsettled;
- .2 failure of the Work to comply with the requirements of the Contract Documents;
- .3 terms of special warranties required by the Contract Documents; or
- .4 audits performed by the Owner, if permitted by the Contract Documents, after final payment.

§ 9.10.5 Acceptance of final payment by the Contractor, a Subcontractor, or a supplier, shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.1 Safety Precautions and Programs

The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract.

§ 10.2 Safety of Persons and Property

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody, or control of the Contractor, a Subcontractor, or a Sub-subcontractor; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction.

§ 10.2.2 The Contractor shall comply with, and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, bearing on safety of persons or property or their protection from damage, injury, or loss.

§ 10.2.3 The Contractor shall implement, erect, and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards; promulgating safety regulations; and notifying the owners and users of adjacent sites and utilities of the safeguards.

§ 10.2.4 When use or storage of explosives or other hazardous materials or equipment, or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3. The Contractor may make a Claim for the cost to remedy the damage or loss to the extent such damage or loss is attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to

the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

§ 10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

§ 10.2.7 The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

§ 10.2.8 Injury or Damage to Person or Property
If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

§ 10.2.9 In the event the Contractor identifies activities or conditions during performance of the Work or at the Project, which, in the Contractor's good faith opinion, pose an unreasonable risk of bodily injury or property damage, whether immediate or in the future, the Contractor shall have the right to immediately take steps to protect its personnel and Subcontractors and stop Work and remove its personnel from the affected area.

§ 10.3 Hazardous Materials and Substances
§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials or substances. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and notify the Owner and Architect of the condition.

§ 10.3.2 Upon receipt of the Contractor's notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of the material or substance or who are to perform the task of removal or safe containment of the material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately, and the Contract Sum shall be increased by the amount of the Contractor's reasonable additional costs of shutdown, delay, and start-up.

§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss, or expense is due to the fault or negligence of the party seeking indemnity.

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for hazardous materials or substances the Contractor brings to the site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for hazardous materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

§ 10.3.5 The Contractor shall reimburse the Owner for the cost and expense the Owner incurs (1) for remediation of hazardous materials or substances the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.6 If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remedintion of a hazardous material or substnnce solely by reason of performing Work as required by the Contract Documents, the Owner shall reimburse the Contractor for all cost and expense thereby incurred.

§ 10.4 Emergencies

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

ARTICLE 11 INSURANCE AND BONDS

§ 11.1 Contractor's Insurance and Bonds

§ 11.1.1 The Contractor shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Contractor shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Owner, Architect, Architect's consultants, and Owner's Consultant's shall be named as additional insureds under the Contractor's commercial general liability policy or as otherwise described in the Contract Documents. Payment for general liability insurance shall be consistent with the agreed upon business terms and shall be billed according to work in place and not as an initial lump sum. For project specific policies (including builder's risk, Bonds, SDI, etc.), Contractor shall be entitled to bill at the time premium is paid.

§ 11.1.2 The Contractor shall provide surety bonds of the types, for such penal sums, and subject to such terms and conditions as required by the Contract Documents. The Contractor shall purchase and maintain the required bonds from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located.

§ 11.1.3 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

§ 11.1.4 Notice of Cancellation or Expiration of Contractor's Required Insurance. Within three (3) business days of the date the Contractor becomes aware of an impending or actual cancellation or expiration of any insurance required by the Contract Documents, the Contractor shall provide notice to the Owner of such impending or actual cancellation or expiration. Upon receipt of notice from the Contractor, the Owner shall, unless the lapse in coverage arises from an act or omission of the Owner, have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by the Contractor. The furnishing of notice by the Contractor shall not relieve the Contractor of any contractual obligation to provide any required coverage.

§ 11.2 Owner's Insurance

§ 11.2.1 The Owner shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Owner shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located.

§ 11.2.2 Failure to Purchase Required Property Insurance. If the Owner fails to purchase and maintain the required property insurance, with all of the coverages and in the amounts described in the Agreement or elsewhere in the Contract Documents, the Owner shall inform the Contractor in writing prior to commencement of the Work. Upon receipt of notice from the Owner, the Contractor may delay commencement of the Work and may obtain insurance that will protect the interests of the Contractor, Subcontractors, and Sub-Subcontractors in the Work. When the failure to provide coverage has been cured or resolved, the Contract Sum and Contract Time shall be equitably adjusted. In the event the Owner fails to procure coverage, the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent the loss to the Owner would have been covered by the insurance to have been

procured by the Owner. The cost of the insurance shall be charged to the Owner by a Change Order. If the Owner does not provide written notice, and the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain the required insurance, the Owner shall reimburse the Contractor for all reasonable costs and damages attributable thereto.

§ 11.2.3 Notice of Cancellation or Expiration of Owner's Required Property Insurance. Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any property insurance required by the Contract Documents, the Owner shall provide notice to the Contractor of such impending or actual cancellation or expiration. Unless the lapse in coverage arises from an act or omission of the Contractor: (1) the Contractor, upon receipt of notice from the Owner, shall have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by either the Owner or the Contractor; (2) the Contract Time and Contract Sum shall be equitably adjusted; and (3) the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent any loss to the Owner would have been covered by the insurance had it not expired or been cancelled. If the Contractor purchases replacement coverage, the cost of the insurance shall be charged to the Owner by an appropriate Change Order. The furnishing of notice by the Owner shall not relieve the Owner of any contractual obligation to provide required insurance.

§ 11.3 Waivers of Subrogation

§ 11.3.1 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, 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 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 sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 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.

§ 11.3.2 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 to be 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 the terms of Section 11.3.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

§ 11.4 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.

§11.5 Adjustment and Settlement of Insured Loss

§ 11.5.1 A loss insured under the property insurance required by the Agreement shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.5.2. The Owner shall pay the Architect and Contractor their just shares of insurance proceeds received by the Owner, and by appropriate agreements the Architect and Contractor shall make payments to their consultants and Subcontractors in similar manner.

§ 11.5.2 Prior to settlement of an insured loss, the Owner shall notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds. The Contractor shall have 14 days from receipt of notice to object to the proposed settlement or allocation of the proceeds. If the Contractor does not object, the Owner shall settle the loss and the Contractor shall be bound by the settlement and allocation. Upon receipt, the Owner shall deposit the insurance proceeds in a separate account and make the appropriate distributions. Thereafter, if no other agreement is made or the Owner does not terminate the Contract for convenience, the Owner and Contractor

shall execute a Change Order for reconstruction of the damaged or destroyed Work in the amount allocated for that purpose. If the Contractor timely objects to either the terms of the proposed settlement or the allocation of the proceeds, the Owner may proceed to settle the insured loss, and any dispute between the Owner and Contractor arising out of the settlement or allocation of the proceeds shall be resolved pursuant to Article 15. Pending resolution of any dispute, the Owner may issue a Construction Change Directive for the reconstruction of the damaged or destroyed Work.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

§ 12.1 Uncovering of Work

§ 12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Architect, be uncovered for the Architect's examination and be replaced aby Contractor without change in the Contract Time or GMP.

§ 12.1.2 If a portion of the Work has been covered that the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, the Contractor shall be entitled to an equitable adjustment to the Contract Sum and Contract Time as may be appropriate. If such Work is not in accordance with the Contract Documents, the costs of uncovering the Work, and the cost of correction, shall be at the Contractor's expense.

§ 12.2 Correction of Work

§ 12.2.1 Before Substantial Completion

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, discovered before Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

§ 12.2.2 After Substantial Completion

§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.5.

If prior to the date of Substantial Completion the Contractor, a Subcontractor, or anyone for whom either is responsible damages any portion of the Work, including, without limitation, mechanical, electrical, plumbing, and other building systems, machinery, equipment, or other mechanical device, the Contractor shall cause such item to be restored to "like new" condition at no expense to the Owner. In addition, the Contractor shall promptly remedy damage and loss arising in conjunction with the Project caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts they may be liable and for which the Contactor is responsible."

§ 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

§ 12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 12.2.

§ 12.2.3 The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

§ 12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction of the Owner or Separate Contractors, whether completed or partially completed, caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

§ 12.3 Acceptance of Nonconforming Work

If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be affected whether or not final payment has been made.

ARTICLE 13 MISCELLANEOUS PROVISIONS

§ 13.1 Governing Law

The Contract shall be governed by the law of the place where the Project is located, excluding that jurisdiction's choice of law rules. If the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4.

§ 13.2 Successors and Assigns

§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns, and legal representatives to covenants, agreements, and obligations contained in the Contract Documents. Except as provided in Section 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 13.2.2 The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate the assignment.

§ 13.3 Rights and Remedies

§ 13.3.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law.

§ 13.3.2 No action or failure to act by the Owner, Architect, or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed upon in writing.

§ 13.4 Tests and Inspections

§ 13.4.1 Tests, inspections, and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules, and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections, and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections, and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of tests, inspections, or approvals that do not become requirements until after bids are received or negotiations concluded. The Owner shall directly arrange and pay for tests, inspections, or approvals where building codes or applicable laws or regulations so require.

§ 13.4.2 If the Architect, Owner, or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Section 13.4.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection, or

approval, by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.4.3, shall be at the Owner's expense in addition to the GMP.

§ 13.4.3 If procedures for testing, inspection, or approval under Sections 13.4.1 and 13.4.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure, including those of repeated procedures and compensation for the Architect's services and expenses, shall be at the Contractor's expense in addition to the GMP.

§ 13.4.4 Required certificates of testing, inspection, or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

§ 13.4.5 If the Architect is to observe tests, inspections, or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

§ 13.4.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

§ 13.5 Interest

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate the parties agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

.1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;

.2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped;

.3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or

.4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, repeated suspensions, delays, or interruptions of the entire Work by the Owner as described in Section 14.3, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

§ 14.2 Termination by the Owner for Cause

§ 14.2.1 The Owner may terminate the Contract if the Contractor

.1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

.2 fails to make payment to Subcontractors or suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or suppliers;
.3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
.4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

§ 14.2.2 When any of the reasons described in Section 14.2.1 exist, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may, without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

.1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
.2 Accept assignment of subcontracts pursuant to Section 5.4; and
.3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. This obligation for payment shall survive termination of the Contract.

§ 14.3 Suspension by the Owner for Convenience

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

.1 that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or
.2 that an equitable adjustment is made or denied under another provision of the Contract.

§ 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner's convenience, the Contractor shall

.1 cease operations as directed by the Owner in the notice;
.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed including a pro-rata portion of profit and fee; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

ARTICLE 15 CLAIMS AND DISPUTES

§ 15.1 Claims

§ 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes

and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose damages in accordance with the Contract Documents.

§ 15.1.2 Time Limits on Claims
The Owner and Contractor shall commence all Claims and causes of action against the other and arising out of or related to the Contract, whether in contract, tort, breach of warranty or otherwise, in accordance with the requirements of the binding dispute resolution method selected in the Agreement and within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all Claims and causes of action not commenced in accordance with this Section 15.1.2.

§ 15.1.3 Notice of Claims
§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.1.3.2 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party. In such event, no decision by the Initial Decision Maker is required.

§ 15.1.4 Continuing Contract Performance
§ 15.1.4.1 Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

§ 15.1.4.2 The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker's decision, subject to the right of either party to proceed in accordance with this Article 15. The Architect will issue Certificates for Payment in accordance with the decision of the Initial Decision Maker.

§ 15.1.5 Claims for Additional Cost
If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 15.1.6 Claims for Additional Time
§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 15.1.6.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

(Paragraphs deleted)
§ 15.1.7 Waiver of Claims for Excess Consequential Damages

Contractor and Owner waive Claims against each other for Excess Consequential Damages arising out of or relating to this Contract. The above waiver does not apply to (i) to the extent such claims are covered and paid by general liability insurance required under this agreement or (ii) to any claims against a party that is in willful default of the Contract Documents. For purposes of this Agreement, (i) "Excess Consequential Damages" means damages incurred by a party for lost profits, lost business opportunity and other indirect damages. With respect to the Owner, "Consequential Damages" are defined as cost of onboarding staff, moving staff, patients, furniture and equipment (including storage of equipment and furniture) and renting of replacement facilities due to the inability to use all or a portion of the Project during the period in which the Project or portion of the Project is unsuitable for use due to a late Certificate of

Occupancy, late milestone for Owner furnished equipment delivery, or delay in First Patient Day resulting from the fault of the Contractor. For the avoidance of doubt, the Parties herewith agree that the maximum amount of Consequential Damages, of any type, to be paid by Contractor to Owner shall be capped at One Times (1X) of Contractor's Fee.

§ 15.2 Initial Decision

§ 15.2.1 Claims, excluding those where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2 or arising under Sections 10.3, 10.4, and 11.5, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim. If an initial decision has not been rendered within 30 days after the Claim has been referred to the Initial Decision Maker, the party asserting the Claim may demand mediation and binding dispute resolution without a decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

§ 15.2.3 In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.

§ 15.2.4 If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of the request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished, or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

§ 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.

§ 15.2.6.1 Either party may, within 30 days from the date of receipt of an initial decision, demand in writing that the other party file for mediation. If such a demand is made and the party receiving the demand fails to file for mediation within 30 days after receipt thereof, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

§ 15.2.7 In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 15.2.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

§ 15.3 Mediation

Section 15.3 shall be deleted in its entirety, as the Parties desire to move directly to Arbitration.

(Paragraphs deleted)

§ 15.4 Arbitration

§ 15.4.1 Arbitration shall be utilized as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. The Arbitration shall be conducted in the place where the Project is located, unless another location is mutually agreed upon. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 15.4.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

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

§ 15.4.3 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§ 15.4.4 Consolidation or Joinder

§ 15.4.4.1 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 15.4.4.2 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as those of the Owner and Contractor under this Agreement.

§ 15.4.4.4 Arbitration, at the Contractor's election, may include Subcontractors to Contractor that Contractor deems relevant to the matter in dispute and upon Contractor's request, the Arbitrator shall decide all or a particular portion of a dispute between the Contractor and a Subcontractor and, as Contractor may request, the Arbitrator shall speak to the extent to which the Arbitrator's decisions regarding a dispute between Contractor and Owner and the dispute between Contractor and Subcontractor are inter-related.

16 Potential Incentive Program - Incentive programs will be evaluated on a case by case basis with input from the Design and Construction teams and ultimately determined by the owner.

If Incentive Program is implemented, Owner and Contractor will mutually agree to incentives to stimulate increased value and benefit to the Project in terms of quality, patient safety, facility disruptions, schedule, budget, energy efficiencies, and other operational goals. Incentive program to be added as an Exhibit to the contract via an Amendment, Change Order at or before the GMP.

AIA® Document A201® – 2017

General Conditions of the Contract for Construction

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

For guidance in modifying this document to include supplementary conditions, see AIA Document A503™, Guide for Supplementary Conditions.

Additions and Deletions Report for
AIA® Document A201® – 2017

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Northern Nevada Sierra Medical Center
625 Innovation Drive
Reno, Nevada 89511

...

Sparks Family Medical Center, Inc. c/o
Universal Health Services of Delaware367 South Gulph Road
King of Prussia, PA 19406

...

ESa Architects
1033 Demonbreun Street, Suite 800
Nashville, Tennessee 37203
615-329-9445

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~~Certificate~~ Certificate of Substantial Completion

Commented [KT2]:

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In the event that Contractor is aware of inconsistencies within or between Contract Documents and applicable standards, codes and ordinances, provided the Contractor did not otherwise clarify or qualify such inconsistency or discrepancy in the GMP documents, the Contractor shall (i) provide the better quality or greater quantity of Work or (ii) comply with the more stringent requirement; either or both in accordance with the Architect's interpretation. The terms and conditions of this Subparagraph shall not relieve the Contractor of any other obligations set forth in the Contract Documents.

...

The parties shall agree upon protocols governing the transmission and use of Instruments of Service or any other information or documentation in digital form. The parties ~~will~~ may use AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, to establish the protocols for the development, use, transmission, and exchange of digital data.

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Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™–2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk

and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building information model, and each of their agents and employees. The Architect promptly deliver to the Contractor a full operable copy of the Architect's building and building system model(s) in order to facilitate the placement of the features, systems and components that will be supplied by the Contractor's personnel, suppliers and subcontractors. The Construction Manager's BIM shall be forwarded to Owner for Owner's exclusive use for operations and post construction.

§ 1.9 Contractor Knowledge

The terms "knowledge", "recognize", and "discover", their respective derivatives, and similar terms in the Contract Documents as used in reference to the Contractor, shall be interpreted to mean facts and information the Contractor knows or reasonably should know, recognizes or reasonably should recognize, and discovers or reasonably should discover in exercising the care, skill, and diligence required by the Contract Documents. The term "reasonably inferable" and similar terms in the Contract shall mean reasonably inferable by a contractor familiar with the Project and exercising the due care, skill, and diligence, required of a Contractor by the Contract Documents."

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§ 2.3.5 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable ~~promptness.~~ promptness so as not to delay the progress of the Work. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Contractor's performance of the Work with reasonable promptness after receiving the Contractor's written request for such information or services.

...

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ~~ten-day~~ seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such ~~default or neglect. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect and the Architect may, pursuant to Section 9.5.1, withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner for~~ deficiencies. Additionally, if Contractor refuses, fails or is unable to supply enough properly skilled workmen, materials or equipment to perform the Work according to the schedule, Owner may, in its sole discretion, supplement the forces of Contractor to perform a portion of Contractor's work upon forty eight (48) hours' notice to Contractor, and charge Contractor the actual reasonable costs associated with the supplementation. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such ~~deficiencies,~~ deficiencies and supplementing Contractors work, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, ~~neglect, or failure. If current and future payments~~ neglect or failure. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

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The Contractor accepts the relationship of trust and confidence established between the Contractor and the Owner by the Agreement and the Conditions of the Contract. The Contractor covenants with the Owner to furnish its best skill and judgment and to cooperate in furthering the interests of the Owner, to furnish efficient business administration and superintendence, to use its best effort to furnish at all times an adequate supply of skilled workers and materials, and to perform the Work in the best way and in the most expeditious and economical manner consistent with the interests and expectations of the Owner. Contractor represents that it is financially solvent, able to pay its debts as they mature, and possesses sufficient working capital to complete the Work and perform its obligations hereunder.

...

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, ~~codes,~~ codes as required by current law, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall submit Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner, subject to Section 15.1.7, as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, ~~codes,~~ codes as required by current law, rules and regulations, and lawful orders of public authorities.
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§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's ~~best~~ reasonable skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and shall be solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely notice to the Owner and Architect, and shall propose alternative means, methods, techniques, sequences, or procedures. The Architect shall evaluate the proposed alternative solely for conformance with the design intent for the completed construction. Unless the Architect objects to the Contractor's proposed alternative, the Contractor shall perform the Work nsing its alternative means, methods, techaiques, sequences, or procedures.

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§ 3.3.4 If the Work is being performed on a cost reimbursable basis, nothing in these General Conditions is intended to preclude or limit reimbursement where otherwise permitted in the Agreement. For example, if these General Conditions state to the effect that a cost shall be "at Contractor's expense", such a provision shall not preclude reimbursement where otherwise permitted by the Agreement.

...

§ 3.5.1 The Contractor warrants to the Owner ~~and Architect~~ that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.
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§ 3.7.2 The Contractor shall comply with and give notices required by applicable current laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

...

§ 3.8.1 The Contractor has included or shall include in the ~~Contract Sum~~ GMP all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

...

~~.2 Contractor's costs~~ .2Contractor'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 Sum but not in the allowances; and~~

~~.3~~ and other expenses shall also be covered by the Allowance. Provided the Allowance amount is included in the total of the GMP, Contractor's Fee shall be included in the GMP and not a part of the Allowance..3 whenever costs are more than or less than allowances, the Contract Sum 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 Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable ~~promptness~~promptness so as to not delay the Progress of the Work.

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3.10.4 From the Contractor's initial construction schedule and other information as developed, the Contractor, in cooperation with the Owner, the Architect, and major Subcontractors, will continuously monitor, and shall revise and update monthly, the Schedule. The construction schedule shall be further revised or expanded to provide a fully coordinated entire project schedule with more detailed information concerning the time requirements for all parts of the Work (Including but not limited to design milestones, FFE, DOH/AHJ inspections, Substantial completion, first patient-day, final completion, etc.) and other elements of the Project as such information is developed. The Contractor and each Subcontractor, materialman, and supplier shall provide revised data in order to assist the Contractor in determining the most appropriate and acceptable construction schedule and acceleration opportunities for the Work and to update the Schedule. Submission of an updated Schedule, acceptable to the Owner, which acceptance shall not unreasonably be withheld, shall be a condition precedent to receiving progress payments. The Contractor shall provide Schedule updates within ten (10) days following a request from the Owner. The Contractor shall give specific notice to the Owner and its consultants of any change in the logic of the schedule or any part thereof, or the removal of any restraints, or the deduction of any duration. The Construction Schedule shall cover all field tasks, significant material deliveries, other off-site restraints such as permits, inspections, approvals and milestones for start dates, completion dates and availability dates as required. Tasks shall be broken down into activities that allow monitoring monthly progress

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§ 3.12.10.1 If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by an appropriately licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings, and other submittals related to the Work, designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy, accuracy or completeness of the services, certifications or approvals provided by such design professional or for any performance and design criteria provided by such design professionals or by Architect. The Construction Manager, or its subcontractors, shall comment or formally submit an RFI in regards to any potential performance or design criteria which by the contractors knowledge are not best practice or industry standards consistent with section "1.9 Contractors Knowledge".

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The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for defense or loss when a particular design, process, or product of a particular manufacturer or

manufacturers is required by the Contract Documents, or where the copyright or patent violations are contained in Drawings, Specifications, or other documents prepared by the Owner or Architect. However, if an infringement of a copyright or patent is discovered by, or made known to, the Contractor, the Contractor shall be responsible for the loss unless the information is promptly furnished to the ~~Architect.~~Owner.

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§ 3.18.3 To the fullest extent permitted by law, including without limitation California Civil Code, if applicable, Contractor's indemnity obligations under Section 3.18 will also include all fines, penalties, damages, liability, costs, expenses (including reasonable attorneys' fees) and any punitive damages arising out of or in connection with any violation of or failure to comply with any law, statute, ordinance, rule, regulation, code or requirement of a public authority that bears upon the performance of the Work by the Contractor, Subcontractor, or any person or entity for whom either is responsible, means, methods, procedures, techniques, or sequences of execution or performance of the Work, and failure to secure and pay for permits, fees, approvals, licenses, and inspections as required under the Contract Documents, or any violation of any permit or other approval of a public authority applicable to the Work, by the Contractor, a Subcontractor, or any person or entity for whom either is responsible. Notwithstanding the foregoing, nothing under Section 3.18, including this section 3.18.3, requires Contractor to indemnify an indemnitee for any loss, penalty, damage, liability, cost or expense of any kind resulting from Indemnitee's sole negligence or willful misconduct.

§ 3.18.4 Contractor shall indemnify and hold harmless all of the Indemnitees from and against any costs and expenses (including reasonable attorneys' fees) incurred by any of the Indemnitees in enforcing the Contractor's defense, indemnity, and hold harmless obligations.

§ 3.18.5 Neither final payment by Owner nor acceptance of the Project shall constitute a waiver of the foregoing indemnities and, notwithstanding any provision in the Contract Documents to the contrary, the foregoing indemnity obligations of Contractor shall survive termination, for any reason, of the Contract.

§ 3.18.6 Indemnification hereunder is in addition to and not in lieu of any common law indemnification to which Indemnitees are entitled.

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§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract ~~Documents.~~ Documents unless such failure results from a directive of the Architect or a failure of Architect to perform its responsibilities under the Contract Documents.. The Architect will not have control over or charge ~~of, and~~ of and will not be responsible for acts or omissions of, the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

...

The Owner and Contractor shall include the Architect in all communications that relate to or affect the Architect's services or professional responsibilities. ~~The Owner shall promptly notify the Architect of the substance of any direct communications between the Owner and the Contractor otherwise relating to the Project. Communications~~ Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and suppliers shall be through the Contractor. Communications by and with Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.

...

§ 4.2.8 The Architect will prepare ~~Change Orders and Construction Change Directives, and~~ Construction Change Directives, and may order minor changes in the Work as provided in Section 7.4. The Architect will investigate and

make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.
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§ 4.2.14 The Architect will review and respond to requests for information about the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable ~~promptness.~~ promptness so as to not delay the progress of the Work. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

...

§ 5.2.1 Unless otherwise stated in the Contract Documents, the Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the persons or entities proposed for each principal portion of the Work, including those who are to furnish materials or equipment fabricated to a special design. Within 14 days of receipt of the information, the Architect or Owner may notify the Contractor whether the Owner or the Architect (1) has reasonable objection to any such proposed person or entity or (2) requires additional time for review. Failure of the Owner or Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.
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§ 6.1.1 The term "Separate Contractor(s)" shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and with Separate Contractors retained under Conditions of the Contract substantially similar to those of this Contract, including those provisions of the Conditions of the Contract related to insurance and waiver of subrogation. Owner's Separate Contractor's shall be required to adhere to the safety requirements of the Contractor.
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§ 6.2.1 The Contractor shall afford the Owner and Separate Contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their ~~activities,~~ activities and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a Separate Contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly notify the Architect of apparent discrepancies or defects discovered in the construction or operations by the Owner or Separate Contractor that would render it unsuitable for proper execution and results of the Contractor's Work. Failure of the Contractor to notify the Architect of apparent discrepancies or defects prior to proceeding with the Work shall constitute an acknowledgment that the Owner's or Separate Contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work. The Contractor shall not be responsible for discrepancies or defects in the construction or operations by the Owner or Separate Contractor that are not ~~apparent~~ discovered.

§ 6.2.3 The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a Separate Contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a Separate Contractor's delays, disruption of work, improperly timed activities, damage to the Work or defective construction.

...

.2 The amount of the adjustment, if any, in the Contract Sum; GMP and any component of the GMP and
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§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract ~~Sum~~ Sum, GMP or Contract Time, or ~~both.~~ all of them. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, the Contract ~~Sum~~ Sum, GMP and Contract Time being adjusted accordingly.

...

§ 7.3.4 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect or Owner shall determine the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.4 shall be limited to the following:

.1 Costs of labor, including applicable payroll taxes, fringe benefits required by agreement or custom, workers' compensation insurance, and other employee costs approved by the ~~Architect;~~Owner and in line with approved business terms;

...

§ 7.3.5 If the Contractor disagrees with the adjustment in the Contract Time, GMP and/or Contract Sum, the Contractor may make a Claim in accordance with applicable provisions of Article 15.

§ 7.3.6 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the ~~Architect~~ Owner of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract ~~Sum~~ Sum, GMP or Contract Time.

§ 7.3.7 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract ~~Sum~~ Sum, GMP and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum or GMP shall be actual net cost as confirmed by the ~~Architect.~~ Owner. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

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§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the ~~Architect will prepare~~ parties will execute a Change Order. Change Orders may be issued for all or any part of a Construction Change Directive. All determinations by Architect may be disputed by Contractor and addressed in accordance with Article 15.

...

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work. Contractor acknowledges that completion of the Work in a timely manner is of critical importance to Owner and that Contractor's failure (except to the extent such delay is caused by Owner or otherwise excused as provided herein) to achieve Substantial Completion of the Work within the Contract Time may cause Owner to suffer damages. The Contractor acknowledges responsibility to maintain the schedule and use funds within the GMP Contract appropriately (and with Owner's approval) to maintain as well as correct any schedule deficiencies caused by Contractor or a Subcontractor.

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§ 8.1.3 The date of Substantial Completion ~~is the date certified by the Architect~~ shall be the date on which Contractor obtains the Certificate of Occupancy in accordance with Section 9.8.

...

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work;

(3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the ~~Architect~~ Owner determines, justify delay, then the Contract Time shall be extended for such reasonable time as the ~~Architect~~ Owner may determine.
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§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract ~~Documents.~~Documents or the under the law.

...

§ 9.1.3 The Contractor shall provide monthly updates as to the Contract Sum and overall status of the Guaranteed Maximum Price. At a minimum, this report should include:

1. Executive Summary
2. Baseline budget along with current budget and projected final costs (including Change Orders)
3. CM Contingency Status and planned/projected use
4. CM Buyout summary noting budget, trade buyout amount, holds, savings/overrun, and status report.
5. Status of Allowances and holds
6. Summary of High-Risk Items, potential change orders, risk register status, and responsible party.
7. Milestones - Showing Original schedule, current and projected.

Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit a schedule of values to the Owner and Architect before the first Application for Payment, allocating the entire Contract Sum to the various portions of the Work. The schedule of values shall be prepared in the form, and supported by the data to substantiate its accuracy, required by the Owner and Architect. This schedule, unless objected to by the Owner or Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment. Any changes to the schedule of values shall be submitted to the Owner or Architect and supported by such data to substantiate its accuracy as the Owner and Architect may require, and unless objected to by the Owner or Architect, shall be used as a basis for reviewing the Contractor's subsequent Applications for Payment.
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§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information, and belief, be free and clear of liens, claims, security interests, or encumbrances, in favor of the Contractor, Subcontractors, suppliers, or other persons or entities that provided labor, materials, and equipment relating to the ~~Work.~~Work, except for those claims or liens specifically noted in the Application for Payment. If the Contractor has knowledge of any claims or liens, the Contractor will certify as to what it knows of the claim or liens in the Application for Payment, and the Contractor will covenant to promptly bond or otherwise discharge or expunge such liens to the extent Owner has paid the Contractor for the Work in question. If any Subcontractor, Sub-Subcontractor or supplier records or files, or maintains any action on or respecting a claim of mechanics' lien, stop payment notice, or lis pendens relating to the Work, the Contractor will promptly procure appropriate release bonds that will extinguish or expunge the mechanics' lien, stop payment notice, or lis pendens, provided that the Owner has paid the Contractor for the Work in question.

...

§ 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either (1) issue to the Owner a Certificate for Payment in the full amount of the Application for Payment, with a copy to the Contractor; or (2) issue to the Owner a Certificate for Payment for such amount as the Architect determines is properly due, and notify the Contractor and Owner of the Architect's reasons for withholding certification in part as provided in Section 9.5.1; or (3) withhold certification of the entire Application for Payment, and notify the Contractor and Owner of the Architect's reason for withholding certification in whole as provided in Section 9.5.1. If Architect fails to

respond within such seven-day period, the Contractor's Application for Payment will be deemed certified as if Architect had issued a Certificate for Payment in the full amount of the Application for Payment.

...

§ 9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's reasonable opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

.1 defective Work not remedied; following written notice from the Owner or Architect and a reasonable period of time.

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.3 failure of the Contractor to make payments properly due to Subcontractors or suppliers for labor, materials or equipment;

...

.6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover ~~actual or liquidated damages for the anticipated delay;~~ Consequential damages for the anticipated delay, unless the anticipated delay is excusable under Section 8.3.; or

...

~~**§ 9.6.3** The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.~~

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and ~~suppliers~~ suppliers' amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors and suppliers to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay, or to see to the payment of money to, a Subcontractor or supplier, except as may otherwise be required by law.

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If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents, the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum and GMP shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.7.1 If Owner is entitled to reimbursement or payment from Contractor under or pursuant to the Contract Documents, such payment will be made promptly upon demand by Owner. If Contractor fails to promptly make any payment owed to Owner, or if Owner incurs any costs and expenses to cure any default of Contractor or to correct defective Work, Owner has an absolute right to offset such amount against the Contract Sum. Owner may also, in its sole discretion, elect either to (1), deduct an amount equal to that which Owner is entitled from any payment then or thereafter due Contractor from Owner, or (2) issue a written notice to Contractor reducing Contract Sum by an amount equal to that which Owner is owed.

...

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended ~~use~~use, and shall be defined by issuance of the Certificate of Occupancy by the AHJ.. Owner expectations for Substantial Completion include full MEP system complete, operational, and balanced; all major work complete, and very limited punch list/minor cosmetic work remaining.

At the date when the Contract is executed or as a future Addendum included with the GMP, the Contractor and Owner shall establish and mutually agree to the Project Schedule, which shall be set forth in the Agreement as an Exhibit which shall establish the total Allowable Contract Time. The Allowable Contract Time may, from time to time, be adjusted by Change Order as allowed for within the Agreement and approved by owner. The Project Schedule should reflect a duration for construction activities that will allow essentially all construction activities to be 100% complete at the time of "Substantial Completion", and to allow all punch list to be complete by Owner first patient day.

Furthermore, for purposes of this Agreement, Contractor and Owner agree to meet and confer when the project is approximately 75% complete, as established by the total completed and stored to date on Contractor's pay application, to confirm final remaining duration (Time) allowed for Contractor to achieve Substantial Completion. This Contract time will serve as the date thereafter that Damages, as contemplated in15.1.7 shall begin to accrue unless adjusted by Change Order as allowed for within the Agreement and approved by Owner.

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§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in the Certificate. In addition, the Contractor is required to obtain temporary or permanent certificate of occupancy permits from the proper authorities having jurisdiction to be deemed Substantially Complete. Upon such acceptance, and consent of surety if any, the Owner shall make payment of retainage applying to the Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract ~~Documents.~~Documents as shown on the lists to be provided pursuant to Section 9.8.4 by withholding no more than 150% of the reasonable cost of completing or correcting such Work.

...

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect. For any partial occupancy or use, the Owner shall reduce retainage proportionately to the Contractor at the time of partial occupancy or use.

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§ 10.2.9 In the event the Contractor identifies activities or conditions during performance of the Work or at the Project, which, in the Contractor's good faith opinion, pose an unreasonable risk of bodily injury or property damage, whether immediate or in the future, the Contractor shall have the right to immediately take steps to protect its personnel and Subcontractors and stop Work and remove its personnel from the affected area.

...

§ 10.3.2 Upon receipt of the Contractor's notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of the material or substance or who are to perform the task of removal or safe containment of the material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended ~~appropriately~~ appropriately, and the Contract Sum shall be increased by the amount of the Contractor's reasonable additional costs of shutdown, delay, and start-up.
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§ 11.1.1 The Contractor shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Contractor shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Owner, Architect, ~~and Architect's consultants~~ Architect's consultants, and Owner's Consultant's shall be named as additional insureds under the Contractor's commercial general liability policy or as otherwise described in the Contract Documents. Payment for general liability insurance shall be consistent with the agreed upon business terms and shall be billed according to work in place and not as an initial lump sum. For project specific policies (including builder's risk, Bonds, SDI, etc.), Contractor shall be entitled to bill at the time premium is paid.
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§ 12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Architect, be uncovered for the Architect's examination and be replaced ~~at the Contractor's expense~~ aby Contractor without change in the Contract ~~Time.~~Time or GMP.

...

If prior to the date of Substantial Completion the Contractor, a Subcontractor, or anyone for whom either is responsible damages any portion of the Work, including, without limitation, mechanical, electrical, plumbing, and other building systems, machinery, equipment, or other mechanical device, the Contractor shall cause such item to be restored to "like new" condition at no expense to the Owner. In addition, the Contractor shall promptly remedy damage and loss arising in conjunction with the Project caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts they may be liable and for which the Contactor is responsible."

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If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be ~~effected~~ affected whether or not final payment has been made.

...

§ 13.4.2 If the Architect, Owner, or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Section 13.4.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection, or approval, by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.4.3, shall be at the Owner's ~~expense~~ expense in addition to the GMP.

§ 13.4.3 If procedures for testing, inspection, or approval under Sections 13.4.1 and 13.4.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure, including those of repeated procedures and compensation for the Architect's services and expenses, shall be at the Contractor's ~~expense~~ expense in addition to the GMP.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. ~~The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this~~ This obligation for payment shall survive termination of the Contract.

...

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly ~~executed,~~ executed including a pro-rata portion of profit and fee; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

...

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose ~~liquidated~~ damages in accordance with the Contract Documents.

~~§ 15.1.7 Waiver of Claims for Consequential Damages~~

~~The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes~~

~~.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 office 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 the Work.~~

~~This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.7 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.~~

§ 15.1.7 Waiver of Claims for Excess Consequential Damages

Contractor and Owner waive Claims against each other for Excess Consequential Damages arising out of or relating to this Contract. The above waiver does not apply to (i) to the extent such claims are covered and paid by general liability insurance required under this agreement or (ii) to any claims against a party that is in willful default of the Contract Documents. For purposes of this Agreement, (i) "Excess Consequential Damages" means damages incurred by a party for lost profits, lost business opportunity and other indirect damages. With respect to the Owner, "Consequential Damages" are defined as cost of onboarding staff, moving staff, patients, furniture and equipment (including storage of equipment and furniture) and renting of replacement facilities due to the inability to use all or a portion of the Project during the period in which the Project or portion of the Project is unsuitable for use due to a late Certificate of Occupancy, late milestone for Owner furnished equipment delivery, or delay in First Patient Day resulting from the fault of the Contractor. For the avoidance of doubt, the Parties herewith agree that the maximum amount of Consequential Damages, of any type, to be paid by Contractor to Owner shall be capped at One Times (1X) of Contractor's Fee.

Section 15.3 shall be deleted in its entirety, as the Parties desire to move directly to Arbitration.

~~§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.7, shall be subject to mediation as a condition precedent to binding dispute resolution.~~

~~§ 15.3.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.~~

~~§ 15.3.3 Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file for binding dispute resolution. If such a demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.~~

~~§ 15.3.4 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.~~

§ 15.4.1 ~~If the parties have selected arbitration~~ Arbitration shall be utilized as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. The Arbitration shall be conducted in the place where the Project is located, unless another location is mutually agreed upon. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

...

§ 15.4.4.4 Arbitration, at the Contractor's election, may include Subcontractors to Contractor that Contractor deems relevant to the matter in dispute and upon Contractor's request, the Arbitrator shall decide all or a particular portion of a dispute between the Contractor and a Subcontractor and, as Contractor may request, the Arbitrator shall speak to the extent to which the Arbitrator's decisions regarding a dispute between Contractor and Owner and the dispute between Contractor and Subcontractor are inter-related.

16 Potential Incentive Program - Incentive programs will be evaluated on a case by case basis with input from the Design and Construction teams and ultimately determined by the owner.

If Incentive Program is implemented, Owner and Contractor will mutually agree to incentives to stimulate increased value and benefit to the Project in terms of quality, patient safety, facility disruptions, schedule, budget, energy efficiencies, and other operational goals. Incentive program to be added as an Exhibit to the contract via an Amendment, Change Order at or before the GMP.

Certification of Document's Authenticity

AIA® Document D401™ – 2003

I, , hereby certify, to the best of my knowledge, information and belief, that I created the attached final document simultaneously with its associated Additions and Deletions Report and this certification at 16:51:42 ET on 07/20/2020 under Order No. 2681862530 from AIA Contract Documents software and that in preparing the attached final document I made no changes to the original text of AIA® Document A201™ – 2017, General Conditions of the Contract for Construction, as published by the AIA in its software, other than those additions and deletions shown in the associated Additions and Deletions Report.

DocuSigned by:
Bret Loughridge
F7E0B6440C6744A...
(Signed)

VP Operations
(Title)

7/20/2020
(Dated)

EXHIBIT “4”

Universal Health Services, Inc.
UHS of Delaware, Inc.

Memo
Date: July 23, 2020
To: Travis Burton, Senior Operations Manager, SR Construction
From: Sean Applegate, Senior Regional Project Manager, UHS
Re: Peek Brothers Dispute

Travis,

I am following up in writing to summarize our discussion and position on the dispute with Peek Brothers. It is my understanding that they are asserting that they are owed payment for bringing additional import material (6,000 CY) to the site. Their assertion is that they were directed by SR Construction to bring this additional material to the site to establish a building pad at elevation 43, which, as I understand it, represents a change to their understood work plan of bringing the building pad to an elevation of 42 and then using soils from the footing/grade-beam and utility trenches to eventually reach subgrade.

Also, as I understand it, there was no real necessary change in their work plan as the construction documents and subcontract agreement call for Peek Brothers to deliver a certified building pad at elevation 43 and complete a rough graded site at the proper subgrade elevation as indicated on the grading/site improvement drawings. Additionally, I understand that we now have additional fill that will now need to be hauled away from the site (6,000 CY) as it was not truly necessary in the current scope of work that is subsumed under their subcontract, and Peek Brothers are requesting a change order for this extra work.

UHS is rejecting this change order, and we are directing SR Construction to initiate dispute resolution on the matter. SR Construction shall not settle or otherwise authorize payment of all or any portion of the disputed change request under the terms of the Prime Contract without written authorization from UHS. It is our expectation that SR Construction will keep UHS fully apprised of any further settlement discussions and/or dispute resolution proceedings until such time that a resolution has been reached. UHS reserves all rights on this matter.

Thank you, and please let me know if you have any questions or comments regarding our stance on this issue.

EXHIBIT "5"

4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE BARRY L. BRESLOW

PEEK BROTHERS CONSTRUCTION,

Plaintiff,

vs. Case No. CV20-01375

SR CONSTRUCTION, Department No. 8

Defendant.

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TRANSCRIPT OF PROCEEDINGS
Hearing on motion to compel arbitration and stay litigation
January 14, 2021

APPEARANCES:

For the Plaintiff: Nathan Aman
Emilee Hammond
Attorneys at law
Reno, Nevada

For the Defendant: Noah Allison
Attorney at law
Las Vegas, Nevada

Reported by: Isolde Zihn, CCR #87

RENO, NEVADA, THURSDAY, JANUARY 14, 2021, 11:05 A.M.

THE COURT: Good morning, counsel.

If everybody could turn on their video and audio.

Okay. Good morning.

I'm Judge Breslow, presiding judge in Department 8.

This is the time and place set for a hearing on defendant's motion to compel arbitration and stay the litigation in case number civil 20-1375, Peek Brothers Construction versus SR Construction.

We are proceeding this morning virtually, as we have for several months, on account of the global COVID-19 pandemic. We are allowed to have court hearings this way, that is, pursuant to simultaneous audiovisual means as allowed by Nevada's Supreme Court Rule Subpart 9 and various administrative orders of Nevada's Second Judicial District Court.

The hearing this morning is open to the public via a link on the court's website.

The Court recognizes its court clerk, Ms. DeGayner, and its certified shorthand reporter, Ms. Zihn, who, like the Court itself, are joining from Washoe County, Nevada.

Starting with counsel for plaintiff, Peek Brothers. And ladies first. Will you please identify yourself for the record; also what county and state you're joining us from.

Ms. Hammond.

MS. HAMMOND: Good afternoon, Your Honor.

Emilee Hammond, on behalf of Peek Brothers Construction.

And I am joining you from Washoe County.

THE COURT: Excellent. Thank you. Nice to see you.

Mr. Aman.

MR. AMAN: Nathan Aman, also joining from Washoe County, on behalf of Peek Brothers.

THE COURT: Thank you very much.

Mr. Allison, on behalf of the defendant.

MR. ALLISON: Good morning, Your Honor.

Noah Allison, appearing on behalf of SR Construction; joining from Clark County, Nevada.

THE COURT: Excellent. Thank you.

Well, it's defendant's motion to compel arbitration and stay, so let me hear, of course, first from the defense, then plaintiff, and then we'll close up with defense.

I, of course, reserve my right to interrupt freely and often to question, debate, challenge and better understand your positions.

And let me say as a preface to all sides that, first of all, I apologize if this matter has been submitted for over 60 days. I know you're waiting for an answer from this

Court so that you can either move forward, based on the Court's decision, or if a party is sufficiently aggrieved, take it to a different court for immediate appellate review. But it's a product of, we had the holidays, and we've had what's going on outside on many different levels.

So I apologize to all counsel and your respective parties for the delay associated with the Court deciding that a hearing would be beneficial, and then finding a date that worked.

I also apologize that we started a few minutes late because I accidentally knocked my camera off my laptop onto the ground and had to put it back together quickly before the hearing. But levity aside, I know this is an important issue.

But, you know, unless I'm wrong, it really boils down to the Court's view of the question of whether the dispute between your clients involves an issue of fact or law which the contractor is required to arbitrate with the owner under the prime contract. Because it seems like the language of the subcontract indicates that the contractor and the sub are not obligated to arbitrate, unless both A and B or 1 and 2 apply; one being that the prime contract has an arbitration requirement. It does. So we're really left with part two: that the particular dispute between the contractor and

the sub involves issues of fact or law which the contractor is required to arbitrate under the terms of the prime contract.

So, I guess, by a show of hands, does anyone disagree that's really what we're here to discuss? I mean, is it more than that, less than that, or other than that? If you disagree, please raise your hand.

All right. So we're on the same page on what we're here to do. All right.

So the movant should please go forward, make argument as to that point and anything else you believe would inform the Court as to their view.

Please proceed.

MR. ALLISON: All right. Thank you, Your Honor.

I appreciate your remarks. And I'm going to try to just cut to the issue that Your Honor referenced.

I know Your Honor understands very well the standards and preferences for arbitration with respect to the case law and NRS Chapter 38, so I'm not going to belabor that, but that is important, I think, for the way you need to approach your decision.

THE COURT: There's a general -- I wouldn't use the word "bias," but incentive, a general acceptance of the idea that the parties have decided to agree to resolve their

differences other than with access directly to the Court. That's to be enforced and generally encouraged.

Now, there's a whole body of law -- not law -- there's a whole bunch of legal notes, law school notes, papers by neutrals, litigants' counsel, who have said that that's a noble idea gone astray over the last 25 years because of the time and expense, savings that hasn't really borne out particularly these very complex, heavy-lift, three-arbitrator, JAMS arbitrations in San Francisco with people from around the country and the world. It costs just as much, takes just as long. But it's a noble idea, and the judiciary, by and large, seems to review these in a way to encourage this.

So that's the law, and I generally accept that as guiding this Court's principle, if it's a close call.

MR. ALLISON: Understood. Thank you.

I'll set the table a little bit with just describing the delivery method of the project. It's in my brief, but I think it's important. I think it goes to the heart of why this is required of the arbitrator under the prime contract.

This is for the construction of the hospital that's a Sparks medical facility.

THE COURT: I've driven by it many times on my way to the eye doctor, who offices 100 or 200 yards away from there.

Big, giant project. It's going to serve this community, hopefully, well for many years. And the people that live here should be thrilled that people are investing this in this community.

MR. ALLISON: Yes. And thank you.

And as is typical for very large projects like this, the delivery method is a cost-plus-GMP method.

And, Your Honor, I don't want to insult -- if you're familiar with how a cost-plus-GMP contract differs from a lump sum contract, I won't get into it too much, but that's the key.

And that's why, when Peek Brothers makes the argument that -- the way we're arguing is, that every time there's a dispute between a sub and a general, it must be arbitrated, that's not the case. But it is the case quite often when it's a lump-sum -- when it's a cost-plus-GMP contract. And I'll explain why.

In a cost-plus-GMP contract, the owner is obligated to pay for the costs of construction, plus a fee to the general contractor. It's limited to the guaranteed maximum price. But the goal and the hope and prayer of the owner is that, whatever the project costs, and the fee of the general contractor, is going to come in below the guaranteed maximum price; meaning, you know, the project could be -- the

guaranteed maximum price could be a million dollars, and if the cost of the project comes in at $800,000, it's great for the owner. He only has ended up paying for the cost of the project, plus the guaranteed maximum price.

The cost of the work includes everything that the general contractor pays to the subcontractor. That includes change orders, typically.

When there's a -- so let's take, for example, an earthwork subcontractor like you would have for Peek Brothers, and let's assume that it's -- I am going to use round numbers -- there's a hundred-thousand-dollar contract with them. And that's the line item for earthwork in the million-dollar-guaranteed-maximum-price contract.

If there's change orders to the earthwork contractor, that line item goes up by whatever the change order is. So let's say there's a $50,000 change order. So it's $150,000. Well, where does that come from?

That comes from a contingency line item that's in the contract. So 50,000 in contingency comes out and goes in the line item for the earthwork contractor, which the owner has to pay for.

Then, at the end of the project, you add up all the costs, and if it's below the guaranteed maximum price, the contingency item, what's left of it, is crossed out, and the

owner doesn't have to pay that.

So my point is, and why this is so important to this matter, is that when a subcontractor makes a change order request on a guaranteed-maximum-price-lump-sum -- or cost-plus project, the -- lost my thought. The -- hang on a second. I've got to get my --

THE COURT: That's okay. I can have the court reporter read back the beginning of the sentence, if you'd like.

MR. ALLISON: No, thank you. That's not necessary.

So when there's -- when the subcontractor has a change order on a guaranteed-maximum-price contract, and it increases the line item for that work, that's extra money out of the owner's pocket, no matter what. He's got to pay for that.

So when a subcontractor's change order has merit, obviously the owner is going to be happy to pay for that because it's part of the cost of the work, and it should be increased.

When the subcontractor's change order lacks merit, meaning it's not based on -- it shouldn't be included as a cost of the work because it was due to an error or a problem caused by the subcontractor itself -- which is the allegation -- our allegation in this case -- the owner should

not have to pay for that. And that's exactly what has happened in this case.

Peek Brothers has made a change order demand in this matter. SR Construction is a general contractor, which kind of is in the middle, and it kind of acts as an advocate for both the sub, when necessary. The owner is an advocate for the owner and the sub. That's what a good general contractor does.

SR looked at the change order and said, "This really doesn't have any merit," and it advised the owner as such that: We're being asked to give a change order to the subcontractor. It's going to cost you, Mr. Owner, an extra, whatever, hundred thousand dollars. What do you think? We don't think it has merit.

Well, the owner -- and you saw the exhibit -- wrote a memo and said: Absolutely not. We refuse to pay this change order. SR, if you try to bring it to us, we are going to tell you: Absolutely not.

So that now puts SR in the middle of this thing, so what do we do? Peek Brothers moves forward and files -- proceeds to demand its change orders. And now we have to either agree to proceed with litigation in this forum, or we go ahead and we -- recognizing that we have exposure to the owner for exactly what we have exposure to -- the owner might

not -- doesn't agree with it, we now have the need to bring it into arbitration. So that's what we did: We demanded arbitration.

We named the owner in the arbitration. And the reason why you name the owner in the arbitration is because, while we agree the owner and SR are completely on the same page that it lacks merit, at the end of the day, the arbitrator in this case is going to have to say, if things go -- if things were to go, for example, Peek's way --

THE COURT: They would award against the owner, and the owner would back-charge the general.

MR. ALLISON: Right. So we would be stuck. And if this thing goes into two different forums, if we have to go through this forum with Peek Brothers, the arbitrator has no obligation to do what you say. If this goes through arbitration with the owner, which is where we would have to go on that issue, identical issue, you don't have to do what the arbitrator says. So we have this complete disjunction that is cured by the contract documents themselves, which is why we get to the heart of the issue, why this involves issues that must be arbitrated under the prime contract.

And then I'd refer you -- because I think there was another argument made by Peek Brothers that the prime contract doesn't really speak to involving the subcontractor

on claims.

Well, I'm going to point to the section in the -- in a201 -- which I'll give you the exhibit number in a moment -- Section 15.4.4.4 says, "Arbitration at the contractor's election may include subcontractors to the contractor that the contractor deems relevant to the matter in dispute, and upon subcontractor's request, the arbitrator shall decide all or a particular portion of a dispute between the contractor and a subcontractor. And as the contractor may request, the arbitrator shall speak to the extent that the arbitrator's decision regarding a dispute between the contractor and owner and the dispute between contractor and subcontractor are interrelated."

That is the arbitrator's obligation. That is also standard AIA language. That's the standard AIA a201 language.

So it's not anything funky here, Judge. This is what's normal and typical in a general condition to a contract. And that is exactly what we want -- where we go. If we get into arbitration, and Peek Brothers wants to go to the arbitrator and say, "I want you to speak as to how these are interrelated," the contract documents allow that -- allow Peek Brothers' owner, SR, to ask the arbitrator to do that. But that's something that everybody contracted to do.

THE COURT: Well, let me ask you this, though. Not to interrupt. Let's look at it for a minute from Peek Brothers. They say, "Okay. First of all, our contract doesn't have an arbitration agreement." And, I mean -- no. Let's back up.

The agreement that you have with the owner is between you two. Now, I realize the jurisprudence suggests that a third-party sub like this can be brought in, and that's one of the bases that your client is suggesting the Court should look at this under.

But they say: The exception here -- it's rendered meaningless; right? This is Peek Brothers: This doesn't mean anything -- I'm pointing to my other screen here, where I have a copy of Exhibit D, Section W, the subcontract number, the dispute resolution -- right? -- that I went over. It says you have to satisfy A and B or 1 and 2. "The particular dispute between a contractor and sub involves issues of fact or law which the contractor is required to arbitrate under the terms of the prime contract."

Now, Peek Brothers says, if this Court views it the way you're suggesting it should, then that's pretty much everything; that the exception subsumes the rule. This should be: We don't have to arbitrate, you know, unless. But if you're saying that just because the general is in the

middle of it, they're always going to be in the middle of it, or they're often going to be in the middle of it. And so if you want us to agree to arbitrate all disputes, you should say so. This just gobbles up almost everything in its sight. So the Court is struggling with that a little bit.

How do you, Mr. Allison, respond to that?

MR. ALLISON: I have a great response, Judge, and that is: The illustration I gave you was for a cost-plus-GMP delivery system.

THE COURT: Right.

MR. ALLISON: There's other kinds. In fact, remember, this master subcontract agreement that you're referring to is intended to govern all contract relationships between SR and Peek Brothers. The idea is that they enter into this master agreement, and as projects come along, a work order is issued, which incorporates the terms and conditions of the master contract.

So had this marriage not been dissolved five months into it, and we were -- had been doing this for years and years and years, we would have lots of successful projects under our belts. And some of those, many of those, would involve lump-sum contract arrangements with the owner.

Now, a lump-sum is completely different than a cost-plus contract. The owner pays -- promises to pay an

amount of money irregardless of whether it's -- it has no bearing or relation to what it actually costs. The owner is just willing to pay a sum amount of money to get his construction project delivered.

If that's the case, and there's a dispute between. SR and the subcontractor over that, over a change order, and there's no -- we're not seeking -- there's no change between the owner and the GC, the change order means nothing anymore. It's meaningless, because the owner doesn't -- he's always going to pay the lump-sum amount. So it doesn't mean anything.

In that situation, which would be pretty common, Peek Brothers would be absolutely correct to say that that would be something that doesn't involve --

THE COURT: That's not in play here, because we have a cost-plus contract.

MR. ALLISON: Yes, this is a cost-plus contract.

THE COURT: I understand. But, so, I mean -- okay. But the sub -- well, I'm just trying to think out loud here. The sub is then, I guess, wedded to or stuck with the fact that the general contractor had a cost-plus contract with the owner as opposed to a lump-sum. And if it was a lump-sum contract, then the arbitration and dispute resolution analysis might be different.

All right. Let's do this, Mr. Allison. I'm going to get back to you. I'm going to make sure everyone has their full opportunity to explain to the Court their view, and why the Court should see it that way. But let me talk to those opposing the motion.

Who would like to address it first?

MR. AMAN: Nathan Aman, on behalf of Peek Brothers.

THE COURT: Thank you.

MR. AMAN: I guess it's still morning, Your Honor. Good morning.

First of all, I want to talk about the very issue that you started with: Why not arbitration? And in our experience, just as Your Honor discussed, the triple A arbitration for construction cases is cumbersome. The discovery rules are vague, hard to enforce. There's issues throughout it. We've gone through this with my office on multiple occasions, and you end up paying three different arbitrators from all over the country that don't necessarily understand the manner and practices of this particular locale, so it gets into all sorts of issues. We do not want to be involved there.

In many cases, arbitration is preferable, especially in the Court's Arbitration Program. We like utilizing the Arbitration Program because it does work out to be cheaper

and more effective.

But in our experience going through triple A, that's not the case. It was born with good intentions, but it has morphed into an animal unto itself that becomes expensive, cumbersome, time-consuming. And this case isn't necessary for it.

Maybe if we had a delay damages case where it was very important to discuss the construction schedule and everything that went wrong with the construction schedule cases we've had before, then it might be important to have the experienced panel to really understand that process. That's not what this case is about.

The question then becomes: Why does SR want it?

It has this, I want to say, improper idea that the owner is going to be required to pay for this. And as I'll explain, that's not the case.

And as Your Honor also pointed out, one of the most important issues here is the arbitration provision itself. The arbitration provision here is the exception; not what is mandated, but the exception. And once we discuss this a little bit further, we'll talk about the language. But the facts are important.

And in S. R.'s pleading they essentially ignore the facts and focus on the contractual relationship between the

prime contractor, the owner, and it truly has no relevance to this issue before us today.

THE COURT: Well, why not? Because you just heard Mr. Allison say, "Judge, if you do not order arbitration here, we're going to be dual-tracking this."

Maybe my response to Mr. Allison, then, along the lines of, "Well, maybe, then hit the pause button on the arbitration, if this case goes to litigation, and see what happens here before you have to go to arbitration."

Because if Mr. Allison's client prevails, if this matter goes to litigation, there's nothing to arbitrate with the owner. On the other hand, if they don't prevail, well, then that's a horse of a different color. So what do you think of his dual-tracking argument: "Judge, let's try to avoid that, if we can"?

MR. AMAN: Well, Your Honor, I don't think there's going to be a dual-tracking issue. I want to go into the facts of this case because that's important, because that's the entire arbitration provision right there. It's talking about the facts that give rise to the arbitration provision or the law. And at this point, there is no law, there's no NRS 624 provision that's mandating arbitration, so it's all about the facts. And then you get into the very confusing language that goes into the AIA 133 and the AIA 201.

Let's talk about the facts here. We have a contractual relationship between the owner, which is UHS, and SR Construction to build a project. Whatever their contract is, it is.

Then you have Peek Brothers' Construction contract with SR Construction, which the final contract was approximately three million dollars.

So under that contract, our client, Peek Brothers, is mass grading. So the mass grading involves essentially getting all of the soils prepared, dealing with preparing the building pad, dealing with preparing roadways, things along those lines.

This issue is focused on the building pad. So when Peek Brothers bids a project like this, they implied -- utilize their own means and methods to come to the end result: It's going to cost this much because we are utilizing this process to move the dirt, place the dirt, haul the dirt, to store the dirt, and to do all of this work.

So in doing that, Peek Brothers, in relation to the building pad, bid this project in this way: Per the building pad, you have the mass grading. And then, before the foundation, the concrete goes in, you have what's called subbase roof. So Peek Brothers' plan, the way they bid this is, you do the mass grading. And now you're a couple feet

below the subgrade elevation, below where the concrete pad is going to go.

What Peek Brothers did is, once they trenched the footings, the concrete footings, the building pad, the plumbing, the electrical, they pull out those spoils, set them there. The plumber comes in, electrician, concrete foundation person come in, they do all of their work, and then some of the spoils go back into those trenches. But then you have an extra amount of stockpile, spoils.

Peek Brothers' means and methods of bidding this in doing projects like this is to use those spoils to bring the pad up to subgrade. That's where the bid came from, and that's the process by which Peek Brothers bid the project.

Now you get into April, 2020. And these facts are laid out in the Complaint, and those are to be accepted as true as part of this process.

April, 2020, you have a meeting at the project involving various subcontractors, so there's various witnesses that would be able to testify to these issues.

You have an individual named Fred Kravetz, who is a -- I believe his title was a general superintendent at the time, for SR Construction.

Mr. Kravetz at the meeting directs and requires Peek Brothers to immediately bring the pad to subgrade levels.

However, at that point in time, the trenching had not been done, so there are no spoils.

THE COURT: Any of it?

MR. AMAN: No. At that point in time, just mass graded, and they were going to go in next, do the trenching, and then utilize that to bring it up to subgrade.

THE COURT: Well, I'm assuming you're suggesting that what the evidence suggests he did, because he was in a bit of hurry or wanted to move things along, he didn't want to wait; right?

MR. AMAN: Correct, Your Honor.

THE COURT: Again, Mr. Allison, the fact that I'm allowing this level of -- this has to do with the issue of whether the issues of fact, you know, or law, are such that the contractor is required to arbitrate them under the terms of the prime contract. So I'm allowing this level of detail, and I'm not -- you know, it's not a bench trial. I'm not going to make any findings that somebody did what they shouldn't have, or breached or -- I'm just -- I want to hear the background point of view of those opposing the motion. I'm sure you will educate the Court as to points you think are important. But please continue.

MR. AMAN: Yes, Your Honor.

And these are key issues in terms -- they're also

pled in our Complaint, so --

THE COURT: Right to the point. Go ahead.

MR. AMAN: So we have this meeting in April, 2020 with Mr. Kravetz. He directs Peek Brothers. Peek Brothers at that meeting says, "This is going to cost you. It's going to be more expensive. We have to truck in these materials that we would have used."

He says, "No. I need to move on this timeline. I need to get this done," and orders Peek Brothers to bring in 150,000 square feet of material, bring the pad up to subgrade. Peek Brothers has to go back and trench. So now we have extra stockpiles, extra spoils, that have to either be trucked off the project or utilized somewhere else on the project.

So this is going to be a big fact-intensive case involving Mr. Kravitz's misguided decision to tell them what to do.

The background is going to show that Mr. Kravetz had various issues with Peek Brothers. He didn't understand the process. He was reprimanded by superiors. There are various issues that are going to come forth to the extent that he was reprimanded for cussing at Peek Brothers' employees. There's a lot of issues; so much so that he was, my understanding, completely divested of communicating with Peek Brothers, at

all, after these transactions because of how sideways it got.

It appears that this was a demand by Mr. Kravetz not understanding the process, demanding to keep some sort of timeline, and that is the totality of the issue. It is a misguided decision by Mr. Kravetz to order Peek Brothers to do work that was unnecessary.

And this gets into the issue of change orders. This is not your typical change order process, because your typical change order process is done by the sub presenting a change order. So it's something they ran into the field, and saying, "This needs to be done. Can you get it approved?" And then it goes to the owner.

This was a situation where SR Construction, through Mr. Kravetz, was demanding Peek Brothers do this work. Peek Brothers says, "It's going to cost you." My understanding, he said he didn't care. They go forward and do the work. So the change orders in this situation are a little disingenuous. They're really invoices to SR Construction.

This gets into the issue of: Does the owner have any responsibility? Under those facts, absolutely not. So the owner's response is absolutely proper that this is an SR Construction/Peek Brothers' issue, and has nothing to do with facts or issues related to the prime contract because it was a mistake, a misguided direction by SR Construction. That's

the totality of the issues here.

So then we have to move over and get into the arbitration provision. Let's go back and go through exactly what that says.

The arbitration provision out of the master subcontract agreement, Exhibit D, paragraph W, states, "The contractor and subcontractor shall not be obligated to resolve disputes arising under this subcontract by arbitration, unless" -- the Court pointed out -- "the prime contract has an arbitration requirement, and a particular dispute between the contractor and subcontractor involves issues of facts or law which the contractor is required to arbitrate under the terms of the prime contract."

THE COURT: Well, Mr. Allison says it does. He says, this is exactly the type of dispute that his client is required to arbitrate with the owner, with the hospital.

And you heard me say, "Well, this is supposed to be an exception. And it seems like, if I view it the way you, Mr. Allison, are suggesting it should, the exception is sort of swallowed up by almost everything, you know, where the general gets in the middle of it. Then it seems a little broad."

On the other hand, he said, "Yeah, but, Judge, that's" -- my understanding, my takeaway from the comments --

"Judge, this is sort of the world we're in with the cost-plus contract here, as opposed to a fixed-price contract, and so it is what it is. This is sort of a standard form, experienced parties. This is just, unfortunately, the agreement that they signed."

How do you respond to that?

MR. AMAN: Your Honor, I would say this is not a standard agreement, by any means. AIA contracts aren't standard by any means. This contract is not standard.

As we're going into dissecting this language, you get to the heart of it. It's ambiguous; it's confusing; it doesn't make sense. And under our rules, that is construed against the drafter, and that's SR Construction. If SR Construction wanted everything arbitrated, it would say so. If SR Construction wanted it arbitrated if it was a cost-plus or GMP or some other type of contract, the arbitration provision would say so. It does not say that.

THE COURT: Well, again, I don't want to misstate Mr. Allison's arguments. He didn't say, "Judge, everything."

I was just observing that it seems to me where we're getting close to that, because a good-faith argument could be made in the different scenarios the Court is envisioning, that it would be a dispute, factual dispute, with the owner, and if the sub is involved, well, we're arbitrating.

So, you know, that's just my interpretation. I don't think Mr. Allison conceded that. But he recognized the Court's concern, is the way I put it.

MR. AMAN: Your Honor, it is a provision. This provision is confusing. It's stating that arbitration is the exception, not the rule. And then it gives this vague discussion about what the rules are. And then it cites to the prime contract.

Well, the prime contract does not require, is not obligating Peek Brothers to arbitrate under it. Mr. Allison's very section that he cited from the AIA 201, which is Exhibit 3 to our opposition to the motion to compel, Section 15.4.4.4, that is all about the contractor's election; he may request the subcontractor be involved. That is nothing to mandate the subcontractor to be involved. That is the general contractor asking the subcontractor to be involved in the arbitration between the owner and the prime contractor. There is nothing in AIA 133 or the AIA 201 that mandates or even sheds any light on the provision that we discussed on the master service agreement.

They don't link up; they don't make sense together, at all. So we have to look at the master subcontract agreement as itself to try to evaluate what the facts are.

And whether SR Construction wants to try to take its

mistake and go against the owner, that's its right. But the continued representation by SR Construction throughout its pleadings that the owner is absolutely going to be liable for this and the owner is liable for this is false.

The owner is never going to be liable for this because this is all stemming from an SR Construction mistake. This isn't a change order type of issue in the normal sense. This is a mistake by SR Construction, a misguided direction by one of its employees to have Peek Brothers do approximately $140,000 worth of work that was not required.

THE COURT: Well, let me -- before I move on, what is the amount in dispute here? I'm just talking in this case, not any other issues that may exist between the general and the owner, between anybody else. How much is Peek Brothers seeking by way of its lawsuit here?

MR. AMAN: Your Honor, it was -- I'm going to call it invoiced in two different change orders. One was approximately 13 -- one was approximately $4,000. That's change order 13. And then you have change order 17, which was the cost of the import, the cost of the trucking. That's approximately $137,000. So we're talking a little over $140,000 in this dispute.

So when we look at this arbitration provision, we have to again focus on, it's the exception, not the rule, and

we have to focus on the facts. This is nothing to do about the contract.

To me, it's telling that in none of the pleadings so far about this issue, despite the fact that SR continue -- or Peek Brothers continually points out the crux of this case, the only facts that matter are the decision by Mr. Kravetz. Nowhere in SR's pleadings do they once even discuss Mr. Kravetz, at all, bring up his name; bring up a meeting; bring up a discussion; bring up these allegations that we are making in the Complaint that are going to be supported throughout the case. That is very telling.

I don't know why we're going down this road of GMPs. That's not addressed in the master subcontract or agreement. We have the language that we have, to the extent it's ambiguous and should be construed against the drafter, which is SR Construction.

And in light of that conclusion, this notion that the owner is going to be responsible for paying for these invoices, that's never going to happen. Whether SR wants to go through the arbitration process and its prime contractor try to prove that, it's not going to go anywhere.

This is a separate matter that should not be subsumed into the monster that is the triple A construction arbitration. If SR Construction wants to get the $140,000

from anybody to pay Peek Brothers, they should look to Mr. Kravetz.

THE COURT: Okay.

MR. AMAN: Thank you, Your Honor.

THE COURT: You're welcome. I understand your position.

Mr. Allison, there's a lot to unpack there. I'm sure every time you heard a statement that you didn't agree with you made a mental note: When it's my turn, I'm going to jump on that. So now is your turn.

Tell me anything you'd like in response to what you've just heard, and then we'll button up why, despite what we've just heard in argument, it is the type of dispute that otherwise would be required, due to the fact that the law ought to be arbitrated between the general and the sub.

Mr. Allison.

MR. ALLISON: Thank you.

So, Your Honor, are you ready to rule on the merits of the case --

THE COURT: You heard what I said. I mean, I'm not -- this is not a bench trial. I'm not going to decide whether who wins and how much. I am just trying to stay in my lane here, which is to determine if this is the type of dispute which the general and the sub would be required to

arbitrate under its contract.

You've heard passionately from those opposing that, "It's not. It's not. It's a -- this rogue guy, this rogue manager instructed something. And it's really not that type of thing."

And I assume that you're going to say, "But it is. Any way you cut it, it ends up being the same way."

But go ahead, Mr. Allison.

MR. ALLISON: Okay. Thank you.

Well, you know, I also want to just -- thank you, Your Honor. Peek Brothers filed a Complaint, and we filed a motion to compel arbitration. We haven't had a chance to file an Answer or anything like that.

THE COURT: Right.

MR. ALLISON: So those facts, again, are to be decided at arbitration.

But let me just quickly give you SR's view of the world on this thing.

THE COURT: Sure. Because a good lawyer never wastes an opportunity to begin the art of persuasion.

MR. ALLISON: Sure.

THE COURT: So go ahead.

MR. ALLISON: Earthwork is like working in a giant sandbox. You have your site, it's like a sandbox. You have

to achieve elevations throughout the project, including the building pad, including everything else around it, including the parking lots, roads, everything that goes through there.

And you're given a survey at the beginning of that, tells you what the existing elevations are. And a good earthwork subcontractor will look at that survey and say -- and where it needs to go; he'll also know where they need to get it to -- and he'll say to himself: I either need to bring in material or I'll need to export material to achieve the ultimate elevations on this project. And then, based on that, a good earthwork subcontractor will get their bid.

Because on this project, unlike some earthwork subcontracts, it was just, "I'm going to deliver you these elevations for this lump-sum price. It wasn't based on quantities, like if I have to bring in so much dirt, it's X dollars a cubic yard. If I export this amount, it's this much.

Well, the earthwork -- there's been disputes, and there's also a dispute that is related to this, between SR and Peek Brothers related to the overall elevations and excavations on this project.

At the current time, now that Peek Brothers is off the project, there are areas of this project that are three feet too high, up to three feet too high. Not three inches

too high; three feet too high. There's an enormous amount of material that SR now has to hire another earthwork subcontractor to export from the project to achieve the elevations that Peek was supposed to achieve.

Why is that important? Because if I'm building a building pad, and I have a superintendent tell me to build the pad to elevation first, and do the -- entrench it after you've gotten it to elevation -- which is what is normal and typical. We'll have experts that will say that's what you do on most projects. You build a pad to elevation, then excavate the trenches there.

If they needed to build that to elevation, why on earth did they import material to get that pad elevation? They could have gone somewhere else out on the site and scraped up some dirt and moved it over. They imported more.

We're going to be able to demonstrate with arbitration that Peek Brothers had absolutely no comprehension of what the elevations were on this project when they did the work. So that's going to be our position, and that's what we're going to argue about in front of an arbitrator.

And I want to talk about triple A for a quick moment, too. We're not asking for the legendary triple A construction panel to decide this, that's imported from the

most expensive areas of San Francisco and Los Angeles to come to Reno. This is going to be a local, somebody from either Reno or Nevada that's going to be a construction lawyer that knows this stuff, that knows how to read surveys, that knows how the earthwork business works, and they're going to be the ones -- it's going to be a single arbitrator, and they're going to decide this thing in a day or two.

If we go your route, Your Honor, the first thing I'd do, if I'm Mr. Aman, is I would demand a jury trial because I know I'm going to lose if I have it in front of a triple A --

THE COURT: You know, it's funny you mention that. I'll just hit the pause for a moment.

An Administrative Order just went out either late yesterday afternoon or this morning, you know, another Administrative Order from the Second Judicial District, and it just pushed everything back. Courthouse remains closed till March 14th, I think, or March 4th. Every trial that was set to go in February is now in March. I mean, in the pecking order, criminal justice trials where somebody is in custody that has invoked their right to a speedy trial, they go first; after that, and way down below, unfortunately, are civil jury trials.

I'm not in any way, shape or form trying to, you know, give the impression that these -- that businesses and

people and entities that have bona fide disputes don't deserve their day in court as promptly and safely as we possibly can. But the reality is, if somebody demands a jury now in a civil case, you're looking at 2023. It's just hard to envision a scenario where it's other than that, even though it's just January of 2021.

So usually what I'm seeing is, defendants in civil litigation are the ones demanding the juries, not the plaintiffs. Anyway, there you go.

Continue.

MR. ALLISON: Yeah. Well, in this case, I mean, I've done enough trials to know, and so has everybody on this screen, to know that, if I have a weak -- a case that's weak on the facts, and I'm representing a local subcontractor, I'm going to want to bring in a jury to have that decided against a Las Vegas general contractor, not --

THE COURT: Well, no comment there. I'll concede we have experienced, professional and reputable counsel all involved. In fact, it's a pleasure to have counsel at this level.

MR. ALLISON: Thank you.

So that's all I'll say about triple A.

And back to the idea that I think Your Honor was struggling with me, that it seems like this contractual

arrangement between SR and Peek is going to result in arbitration every time, I'm going to -- I sat down, and I kind of did a diagram of that, you know, the four quadrants. So you need to look at that provision, Exhibit W -- or paragraph W.

And first off, if there's no arbitration provision in the prime contract, there's no arbitration between the sub and -- so there's half the contracts right there. So we can't make Peek Brothers arbitrate with us if there's no arbitration clause in the prime contract.

THE COURT: Good point.

MR. ALLISON: We can't make Peek Brothers arbitrate with us on the lump-sum for the reason I explained on those issues.

Now, there are issues on the lump-sum where I think we could. And I did give two examples in my brief where on a lump -- on a cost-plus, we would probably fail in a motion to compel arbitration with a sub. And that would be if there's a trade damage dispute between two subcontractors, where Peek Brothers runs over the scaffolding, and we had to back-charge Peek and give the scaffold guy a change order. That's a back-charge, and that's not going to touch the owner. So that's -- that wouldn't be decided.

And also, if SR is five miles into the -- over the

GMP, meaning we are now paying for the project, and I have now a change order with a sub, that's not going to affect the owner. The owner is not going to pay for that. So that would be another example where we wouldn't -- I would fail in a motion to compel arbitration.

This is the sweet spot we are talking about. This is not all the time. This is kind of one of those moments when it is required. And that's because, as I explained our position, where all Peek Brothers had to do is go scrape up some dirt somewhere else on the project instead of importing a ton of it and trying to make us pay for it.

You know, the owner is telling us, "I'm not paying for that. Why didn't they go over there and scrape up the material? Now I've got to pay to take off all this additional material, too."

So that is why it involves issues of fact and law related to the prime contract.

THE COURT: There's no counterclaim yet. It's because we're not at that point in this case. You're still determining --

MR. ALLISON: Right.

THE COURT: -- the scope of the fight, but not yet the merits of the case.

MR. ALLISON: I would characterize it -- a

counterclaim, I would call it as a setoff. It's a setoff against their change order. It would be, you know, "We had to do all these other things, so it's a setoff" argument. And I think that's an appropriate thing to do anytime on a project is, if you have setoffs, you claim them when there's a claim.

So that's going to happen no matter what, and that's something that we think needs to occur in arbitration, which will be decided in a day or two by somebody who really knows this stuff.

I think I don't have anything else to say, unless Your Honor has any additional questions.

THE COURT: Well, here's what I'm going to do. I'm going to give Mr. Aman two minutes to do a sur-opposition, and then, since it's your motion, Mr. Allison, another minute after that to respond to anything new he says.

Go ahead, Mr. Aman.

MR. AMAN: Your Honor, I'm going to take this opportunity to simply say we're going to rest on where we're at.

I think we've made it very clear that this is a limited dispute involving a decision by one of SR Construction's employees.

It's almost like the scenario counsel for SR

Construction said: Backing over, it was a mistake, it was a misguided direction. This is the means and methods that Peek Brothers chose, and thereby this dispute has nothing to do with the owner. And the master subcontract agreement, I believe, supports our position.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Allison, anything final final?

MR. ALLISON: No. I'm good.

THE COURT: Okay. Give me just a moment here to gather my thoughts. I'm going to just put you on mute, but I'll still be here. It will be just about a minute and a half.

(Off the record.)

THE COURT: All right. We're back on the record.

Two things. First thing: Motion to compel arbitration is denied.

The Court specifically finds that the dispute which underlies the Complaint here does not involve an issue of fact or law which the contractor is required to arbitrate under the terms of the prime contract.

The Court adopts the analysis of the opposition, and plaintiff shall prepare a short order, three pages or less, consistent with its argument today, the Court's observations

and questions, and its briefing, run it by defense counsel as to form only, consistent with our local rules on how much time they get, and then submit an order hopefully that defendant agrees as to form -- certainly not as to substance; they've been arguing passionately against it -- and submit it to the Court for review and entry. Submit it by e-mail to my judicial assistant, both in Word form and PDF.

In the event parties cannot agree that the form proposed by plaintiff accurately reflects what the Court has just said, defendant shall contemporaneously, with plaintiffs submitting the proposed order in Word and PDF, submit its proposed order in PDF and Word as well, and then the Court will merge or sign one or the other. That's number one.

Number two, as important as number one. The Court exercises its discretion under Nevada Supreme Court Rule 252 and Second Judicial District Court Rule 6, I'm staying this case, this litigation, other than the entry of this order, for 90 days. No Answer is required; no dispositive motion is required; no discovery; no nothing.

On or before April 30, parties are ordered to a settlement conference with a neutral of their choosing; presumably somebody with construction background, but doesn't have to be.

If counsel cannot agree on a neutral after good-faith

efforts, let the Court know by e-mail that you're at an impasse even at that level, and I'll appoint someone from my large Rolodex of qualified neutrals, the cost of the event to be shared equally, unless you're able to convince one of my colleagues or a colleague in another judicial branch to preside over your settlement conference, and move forward with a settlement conference.

I'm going to set now a status hearing for 90 days or so from now and see where everything stands. If you're unable to resolve it after a settlement conference, I don't need to know why, I don't need to know who was the stick in the mud, or which side or who -- "They offered nothing." I don't care. We're just going to go from that point forward rules of engagement; how much time do you need for discovery? We'll do it -- we'll have a concierge judge for purposes of streamlining the proceedings here; understanding that each side has a different view factually of what happened and legally of what the facts that can be proven as applied to the law, what kind of result. I get that.

I want to have everyone bear in mind -- and I'm sure they do -- that this Court's experience is, our system works really well for $50,000-or-below claims because of the mandatory Supreme Court Arbitration Program. And our system works reasonably well for claims, you know, if you add

another zero and above.

But the middle, the 50 to 250, sometimes the cost of the process can eat up the amount that's being argued, even if there's a fee-shifting provision to the prevailer. But, you know, I'm not trying to condescend here. Everyone knows that.

So I don't need to know if you're unsuccessful. I just need to know you tried in good faith, and you couldn't do it. Then we will talk about what happens next the next time I see you.

So, you know, 90 days, even in the pandemic world, should be enough time to get this settlement done, settlement conference done, like I said, by April 30.

The case is stayed for 90 days. I'll set a status hearing for, I guess, early May. And then game on.

MR. ALLISON: Your Honor --

THE COURT: So let's start with if either side has any questions.

Let me start with counsel for plaintiffs. Any questions about what I'm asking you to do with respect to this order and what I'm asking you -- directing you to do with respect to going through a settlement conference to try really hard to work this matter out?

MR. AMAN: No, Your Honor. Perfectly understood.

THE COURT: All right. Thank you.

Mr. Allison, any questions from the defense?

MR. ALLISON: Just a timing issue, Your Honor.

I appreciate your order. However, it's my understanding of the law that, on a motion to deny a motion to compel arbitration, that is immediately appealable to the appellate level.

THE COURT: Well, the stay doesn't apply to that.

MR. ALLISON: I want to make sure my 30 days isn't threatened. I need -- if I need to do that, I just need to know -- we could stay the entry of the order, which would prevent me from having to worry about my appeal rights.

THE COURT: Okay. I like that option. I think that's a splendid option as opposed to others.

We can stay entry of the order. Yeah. Since it's fresh in everyone's minds, I would like the drafts on my desk, you know, within a week or two.

And I'm not trying to have people work unnecessarily, particularly when you're directed to a resolution event. On the other hand, I don't want this to be something that has to be dusted off and re-learned again 90 days from now if the resolution is unsuccessful.

But, yes, for purposes of challenging for appellate review this Court's decision to deny the request to order

arbitration, I don't want this order to affect the rights of the aggrieved.

So, Mr. Aman, any objection if we -- the Court doesn't enter this order; it's just deemed held in abeyance pending the settlement conference?

MR. AMAN: No objection, Your Honor.

THE COURT: Mr. Allison, does that address your concerns?

MR. ALLISON: Yes.

THE COURT: All right. So let me -- let's get some dates then.

Settlement conference, let's say by April 15th. That's 90 days from today, roughly. Tax day; right? An easy day to remember.

And then, a week or two after that I'm going to give you some proposed dates. If you can quickly at least preliminarily check your calendars and see if you're available; and, if not, we'll give you a new date. If you say yes now, and it turns out there's a conflict you were not aware of, we can pick a new date. But let me throw some proposed dates out there the last two weeks of April, see if that works.

Ms. DeGayner.

THE CLERK: Wednesday, April 21st, at 2:00 o'clock.

THE COURT: Okay. Let me start with plaintiff's counsel.

MR. AMAN: That works for us, Your Honor.

THE COURT: Thank you.

And defense counsel.

MR. ALLISON: I'm open that day, yes.

THE COURT: Okay. That will be the order of the Court. Status hearing at that time.

Go ahead, Mr. Allison.

MR. ALLISON: One more question.

THE COURT: Go ahead.

MR. ALLISON: I'm processing your -- you know, remember I have an owner UHS that I have to deal with, as well.

THE COURT: Well, they're not before me.

MR. ALLISON: May I involve them in the settlement conference?

THE COURT: Sure. At their discretion. I would certainly encourage it, but they're not under the Court's authority. They're not parties here, so I can't order them to be here.

Now, if you want to truthfully tell them that "Judge Breslow thinks it's a very good idea if they are available and could participate because there might be issues that

transcend this case," sure. I would think that would be a very good idea. And I will not preclude them. But I'm not ordering them because I don't have jurisdiction over them at this time.

MR. ALLISON: Okay. Thank you.

THE COURT: You're welcome.

All right. Show of hands. Anybody else with a question or comment that they'd like to put on the record?

All right. Well, thank you very much, counsel. That will conclude this hearing.

I wish everybody a pleasant rest of the afternoon. To you, your families, your staff, I hope you have a safe and healthy rest of the winter.

The Court will be in recess.

Have a nice afternoon.

MR. ALLISON: Thank you, Your Honor.

MS. HAMMOND: Thank you, Your Honor.

THE COURT: Thank you.

(Recess.)

STATE OF NEVADA)

COUNTY OF WASHOE)

I, ISOLDE ZIHN, a Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department 8 of the above-entitled court on Thursday, January 14, 2021, at the hour of 11:05 a.m. of said day, and took verbatim stenotype notes of the proceedings had upon the matter of PEEK BROTHERS CONSTRUCTION, Plaintiff, versus SR CONSTRUCTION, Defendant, Case No. CV20-01375, and thereafter reduced to writing by means of computer-assisted transcription as herein appears;

That the foregoing transcript, consisting of pages 1 through 46, all inclusive, contains a full, true and complete transcript of my said stenotype notes, and is a full, true and correct record of the proceedings had at said time and place.

Dated at Reno, Nevada, this 19th day of January, 2021.

/s/ Isolde Zihn
Isolde Zihn, CCR #87

EXHIBIT “6”

2840
Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509
VILORIA, OLIPHANT, OSTER & AMAN L.L.P.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PEEK BROTHERS CONSTRUCTION, INC., a Nevada Domestic Corporation.

Plaintiff,

vs.

SR CONSTRUCTION, INC., a Nevada Domestic Corporation; DOE Defendants 1 - 10.

Defendants.

Case No.: CV20-01375

Dept. No.: 8

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Before the Court is a fully-briefed and submitted *Motion to Compel Arbitration and Stay Litigation* ("*Motion*") filed on October 7, 2020 by Defendant SR CONSTRUCTION, INC. ("SR Construction") by and through its counsel of record, The Allison Law Firm Chtd. The Court issued an *Order Setting Hearing* on December 17, 2020 requesting oral argument on the *Motion*. The Court heard oral arguments from the parties on January 14, 2021.

Accordingly, after consideration of the papers and pleadings on file in this case, the oral argument presented by the parties, and the applicable law, the Court sets forth its written Order as follows.

VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

I. FACTUAL BACKGROUND

This litigation arises out of a Master Subcontract Agreement ("Subcontract") entered into between SR Construction and PEEK BROTHERS CONSTRUCTION, INC. ("Peek Brothers") in which Peek Brothers agreed to perform earthwork related to the construction of the Northern Nevada Medical Center ("Project"). SR Construction is the prime contractor ("Contractor") on the Project, and Sparks Family Medical Center, Inc. c/o Universal Health Services of Delaware ("UHS") is the owner of the Project.

During construction of the Project, a dispute arose between Peek Brothers and SR Construction, which is the subject of the underlying Complaint. In the Complaint, Peek Brothers alleges SR Construction directed Peek Brothers to import approximately 150,000 square feet of material ("material" or "structural fill") to bring the building pad to subgrade elevation prior to Peek Brothers digging up the trenches and footings on the Project site. When bidding the Project, Peek Brothers assumed it would use the material dug up from the trenches and footings to bring said building pad to subgrade elevation. Peek Brothers maintains that, despite importing the material and performing the work as directed by SR Construction, SR Construction now refuses to pay the excess cost related to said work.

Accordingly, Peek Brothers filed a Complaint against SR Construction on September 2, 2020 for Breach of Contract, Attorneys' Fees, Unjust Enrichment, and Violation of NRS Chapter 624. SR Construction now seeks an order of this Court compelling Peek Brothers to arbitrate its claims pursuant to an arbitration provision contained under Exhibit D, § W of the Subcontract.

II. STANDARD OF REVIEW AND APPLICABLE LAW

In Nevada, the district court has the authority to determine whether an agreement to arbitrate exists or a controversy is subject to an arbitration agreement. See NRS 38.221; NRS 38.219(2); Philips v. Parker, 106 Nev. 415, 417, 794 P.2d 716 (1990). There must be an agreement to arbitrate for there to be a presumption of arbitrability. Philips, 106 Nev. at 417, 794 P.2d at 716. Moreover, "arbitrability is usually a question of contractual construction,"

which is, in turn, a question of law for the court's determination. State ex rel. Masto v. Second Judicial Dist. Court ex rel. County of Washoe, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) (citing Kennedy & Mitchell, Inc. v. Anadarko Prod. Co., 243 Kan. 130, 754 P.2d 803, 805-06 (1988)).

Exhibit D, § W of the Subcontract contains a "Dispute Resolution" provision, which provides as follows:

> Contractor and Subcontractor shall **not** be obligated to resolve disputes arising under this Subcontract by arbitration, unless: (i) the prime contract has an arbitration requirement; **and** (ii) a particular dispute between Contractor and Subcontractor **involves issues of fact or law which the Contractor is required to arbitrate under the terms of the prime contract.**

Subcontract, Exhibit D, § W (emphasis added). Further, the prime contract only provides that claims between the owner and the prime contractor shall be subject to binding arbitration. See AIA Document A133 – 2009, § 9.2 and AIA Document A201 – 2017, § 15.4.1.

Based on the foregoing, the Court finds that the dispute between Peek Brothers and SR Construction does not involve issues of fact or law that must be arbitrated pursuant to the prime contract because the dispute does *not* involve UHS. Therefore, the arbitration provision contained in Exhibit D, § W of the Subcontract does not apply, and Peek Brothers is not obligated to resolve the instant dispute by way of arbitration. As such, SR Construction's request to compel Peek Brothers to submit its claims to the American Arbitration Association ("AAA") should be denied.

Accordingly, and good cause appearing,

IT IS HEREBY ORDERED the *Motion to Compel Arbitration and Stay Litigation* is DENIED.

DATED this 13 day of ~~January~~ April, 2021.

BARRY L. BRESLOW
District Judge

ATTORNEYS AND COUNSELORS AT LAW
VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. Box 62 ~ Reno, Nevada 89504
327 California Avenue ~ Reno, Nevada 89509

EXHIBIT "7"

AMERICAN ARBITRATION ASSOCIATION®

CONSTRUCTION ARBITRATION RULES
DEMAND FOR ARBITRATION

Mediation: If you would like the AAA to contact the other parties and attempt to arrange a mediation, please check this box ☐. There is no additional administrative fee for this service.		
Name of Respondent: Peek Brothers Construction		
Address: 2082 Resource Drive		
City: Fernley	State: Nevada	Zip Code: 89408
Phone No.: 775-835-6472	Fax No.:	
Email Address: travis@peekbrothers.net		
Name of Representative (if known): Nathan Aman, Esq.		
Name of Firm (if applicable): Viloria, Oliphant, Oster & Aman L.L.P.		
Representative's Address: 327 California Ave.		
City: Reno	State: Nevada	Zip Code: 89509
Phone No.: 775-284-8888	Fax No.: 775-284-3838	
Email Address: naman@renonvlaw.com		

The named claimant, a party to an arbitration agreement dated 10/4/2019 (SR-Peek) + 5/6/20 (SR-UHS) , which provides for arbitration under the Construction Industry Rules of the American Arbitration Association, hereby demands arbitration.

Arbitration Clause: Please indicate whether the contract containing the dispute resolution clause governing this dispute is a standard industry form contract (such as AIA, ConsensusDOCS or AGC) or a customized contract for the specific project.

Contract Form: SR-Peek MSA, Exh D ¶ W; SR-UHS AIA A133-2009, ¶ 9.2 and AIA A201-2017 ¶ 15.4.

The Nature of the Dispute:

This involves the construction of the Northern Nevada Sierra Medical Center. There are three parties to this dispute: UHS is the owner, SR is the general contractor, Peek Bros. is the excavation and grading subcontractor. Peek Bros. seeks payment for alleged changes to its scope of work. SR disputes the change orders sought by Peek Bros. UHS has advised SR it also rejects Peek's change orders and advised it will not pay SR for the

Dollar Amount of Claim: $ 250,000.00

Other Relief Sought: ☑ Attorneys Fees ☑ Interest ☑ Arbitration Costs ☐ Punitive/Exemplary
☐ Other:

Amount Enclosed: $ 2,650.00
In accordance with Fee Schedule: ☐ Flexible Fee Schedule ☑ Standard Fee Schedule

Please describe appropriate qualifications for arbitrator(s) to be appointed to hear this dispute:

An attorney or construction industry professional with knowledgeable and experience in the presentation and defense of claims on a large commercial construction project. Ideally, the arbitrator should have experience in handling disputes involving the performance of site work.

Hearing Locale Requested: Reno, Nevada

Project Site: 625 Innovation Drive, Reno, Nevada 89511

Please visit our website at www.adr.org/support to file this case online.
AAA Customer Service can be reached at 800-778-7879.

AMERICAN ARBITRATION ASSOCIATION®

CONSTRUCTION ARBITRATION RULES
DEMAND FOR ARBITRATION

Estimated Time Needed for Hearings Overall:	hours or 5	days
Specify Type of Business: Claimant: General Contractor	Respondent: Sitework Contractor	
You are hereby notified that a copy of our arbitration agreement and this demand are being filed with the American Arbitration Association with a request that it commence administration of the arbitration. The AAA will provide notice of your opportunity to file an answering statement.		
Signature (may be signed by a representative): Noah G. Allison	Date:	
Name of Claimant: SR Construction, Inc.		
Address (to be used in connection with this case): 3579 Red Rock Street		
City: Las Vegas	State: Nevada	Zip Code: 89103
Phone No.: 702-877-6111	Fax No.:	
Email Address: tburton@srbuilt-usa.com		
Name of Representative: Noah G. Allison, Esq.		
Name of Firm (if applicable): The Allison Law Firm Chtd.		
Representative's Address: 3191 East Warm Springs Road		
City: Las Vegas	State: Nevada	Zip Code: 89120
Phone No.: 702-933-4444	Fax No.: 702-933-4445	
Email Address: noah@allisonnevada.com		
Notice: To begin proceedings, **please file online at www.adr.org/fileonline.** You will need to upload a copy of this Demand and the Arbitration Agreement, and pay the appropriate fee.		

* Please see attached sheet for information on additional Respondent.

Please visit our website at www.adr.org/support to file this case online.
AAA Customer Service can be reached at 800-778-7879.

Name of Respondent: Sparks Family Medical Center, Inc. c/o Universal Health Services of Delaware

Address: 367 South Gulph Road

City: King of Prussia

State: PA

Zip Code: 19406

Email Address: sean.applegate@uhsinc.com

Name of Representative (if known): Sean Applegate, Sr. Regional Project Manager

Name of Firm (if appliable): N/A

Representative's Address: Same

City: Same

State: Same

Zip Code: Same

Phone No.: 267-496-2790

Fax No.:

Email Address: Same

Universal Health Services, Inc.
UHS of Delaware, Inc.

Memo
Date: July 23, 2020
To: Travis Burton, Senior Operations Manager, SR Construction
From: Sean Applegate, Senior Regional Project Manager, UHS
Re: Peek Brothers Dispute

Travis,

I am following up in writing to summarize our discussion and position on the dispute with Peek Brothers. It is my understanding that they are asserting that they are owed payment for bringing additional import material (6,000 CY) to the site. Their assertion is that they were directed by SR Construction to bring this additional material to the site to establish a building pad at elevation 43, which, as I understand it, represents a change to their understood work plan of bringing the building pad to an elevation of 42 and then using soils from the footing/grade-beam and utility trenches to eventually reach subgrade.

Also, as I understand it, there was no real necessary change in their work plan as the construction documents and subcontract agreement call for Peek Brothers to deliver a certified building pad at elevation 43 and complete a rough graded site at the proper subgrade elevation as indicated on the grading/site improvement drawings. Additionally, I understand that we now have additional fill that will now need to be hauled away from the site (6,000 CY) as it was not truly necessary in the current scope of work that is subsumed under their subcontract, and Peek Brothers are requesting a change order for this extra work.

UHS is rejecting this change order, and we are directing SR Construction to initiate dispute resolution on the matter. SR Construction shall not settle or otherwise authorize payment of all or any portion of the disputed change request under the terms of the Prime Contract without written authorization from UHS. It is our expectation that SR Construction will keep UHS fully apprised of any further settlement discussions and/or dispute resolution proceedings until such time that a resolution has been reached. UHS reserves all rights on this matter.

Thank you, and please let me know if you have any questions or comments regarding our stance on this issue.

Noah Allison

From: Auto-Receipt <noreply@mail.authorize.net>
Sent: Friday, September 11, 2020 10:52 AM
To: Noah Allison
Subject: Transaction Receipt from American Arbitration Association for $2650.00 (USD)

Order Information

Description: WebFile; Case 012000148368

Billing Information
Noah Allison
The Allison Law Firm Chtd
3191 E Warm Springs Rd
Las Vegas, Nevada 89120
US
noah@allisonnevada.com
7029334444

Shipping Information

Total: $2650.00 (USD)

Payment Information

Date/Time:	11-Sep-2020 13:52:26 EDT
Transaction ID:	62554758325
Payment Method:	Visa xxxx3528
Transaction Type:	Purchase
Auth Code:	622713

Merchant Contact Information

American Arbitration Association
New York, NY 10271
US
corpfinance@adr.org

EXHIBIT "8"

THE ALLISON LAW FIRM CHTD.
Noah G. Allison (Bar #6202)
Heather Caliguire Fleming (Bar #14492)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Tel (702) 933-4444
Fax (702) 933-4445
noah@allisonnevada.com
Attorneys for SR Construction, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

PEEK BROTHERS CONSTRUCTION, INC., a Nevada Domestic corporation, Plaintiff, vs. SR CONSTRUCTION, INC., a Nevada Domestic Corporation; DOE Defendants 1 - 10. Defendants.	Case No.: CV20-01375 Dept. No.: 8 **[PROPOSED] ORDER SHORTENING TIME**

ORDER SHORTENING TIME

Upon good cause shown, and pursuant to the Court's order on April 13, 2021, the Motion to Stay Proceedings Pending Appeal shall be heard on a shortened time in the above-entitled Court on the ____ day of _____, 2021, at the hour of _____, in Department 8. Plaintiff's Opposition is due seven (7) days after the filing of the Motion. SR's Reply is due seven (7) days after the filing of Plaintiff's Opposition.

Dated this ____ day of _____, 2021.

_____
DISTRICT COURT JUDGE

THE ALLISON LAW FIRM CHTD.
Noah G. Allison (Bar #6202)
Heather Caliguire Fleming (Bar #14492)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Tel (702) 933-4444
Fax (702) 933-4445
noah@allisonnevada.com
Attorneys for SR Construction, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

PEEK BROTHERS CONSTRUCTION, INC., a Nevada Domestic corporation, Plaintiff, vs. SR CONSTRUCTION, INC., a Nevada Domestic Corporation; DOE Defendants 1 - 10. Defendants.	Case No.: CV20-01375 Dept. No.: 8 **SUPPLEMENT TO MOTION TO STAY PROCEEDINGS PENDING APPEAL ON ORDER SHORTENING TIME**

COMES NOW Defendant SR Construction, Inc. ("SR") by and through its counsel of record, Noah G. Allison of the Allison Law Firm Chtd., and herein submits its Supplement to its Motion to Stay Proceedings Pending Appeal on Order Shortening Time.

On April 28, 2021, the parties appeared before a settlement judge on the order of the Nevada Supreme Court. Based on that appearance, the settlement judge recommended removal from the settlement program. On April 29, 2021, the Nevada Supreme Court issued an order removing the case from the settlement program and reinstating briefing. *See* Order Removing from Settlement Program and Reinstating Briefing, attached hereto as Exhibit 1. The appeal is moving forward with all possible speed. These events are further evidence that the appeal was not brought for improper purposes, such as to delay the proceedings. Based on this, a stay is necessary so that the status quo is preserved until the Nevada Supreme Court issues a decision on SR's appeal.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 29th day of April, 2021.

THE ALLISON LAW FIRM CHTD.

By: */s/ Heather Caliguire Fleming*
Noah G. Allison (Bar #6202)
Heather Caliguire Fleming (Bar #14492)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Attorneys for SR Construction, Inc.

THE ALLISON LAW FIRM CHTD.
3191 E. Warm Springs Road
Las Vegas, Nevada 89120-3147

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE ALLISON LAW FIRM CHTD., and that on April 29th, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which served the following parties electronically:

Nathan J. Aman, Esq.
Emilee N. Hammond, Esq.
VILORIA, OLIPHANT, OSTER & AMAN, LLP
327 California Ave.
Reno, Nevada 89509
Attorneys for Peek Brothers Construction, Inc.

/s/ Nita MacFawn
Employee of The Allison Law Firm Chtd.

THE ALLISON LAW FIRM CHTD.
3191 E. Warm Springs Road
Las Vegas, Nevada 89120-3147

INDEX OF EXHIBITS

Exhibit #	Description	# of Pages
Exhibit 1	Nevada Supreme Court Order Removing from Settlement Program and Reinstating Briefing	2

THE ALLISON LAW FIRM CHTD.
3191 E. Warm Springs Road
Las Vegas, Nevada 89120-3147

EXHIBIT “1”

IN THE SUPREME COURT OF THE STATE OF NEVADA

SR CONSTRUCTION, INC., A NEVADA DOMESTIC CORPORATION,
Appellant,
vs.
PEEK BROTHERS CONSTRUCTION, INC., A NEVADA DOMESTIC CORPORATION,
Respondent.

No. 82786

FILED

APR 29 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER REMOVING FROM SETTLEMENT PROGRAM AND REINSTATING BRIEFING

Pursuant to the recommendation of the settlement judge, this appeal is removed from the settlement program. *See* NRAP 16. Accordingly, we reinstate the deadlines for requesting transcripts and filing briefs.

Appellant shall have 14 days from the date of this order to file and serve a transcript request form. If no transcript is to be requested, appellant shall file and serve a certificate to that effect within the same time period. *See* NRAP 9(a). Further, appellant shall have 90 days from the date of this order to file and serve the opening brief and appendix. In preparing and assembling the appendix, counsel shall strictly comply with the provisions of NRAP 30. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1).

It is so ORDERED.

_____, C.J.

cc: Debbie Leonard, Settlement Judge
Allison Law Firm, Chtd.
Viloria, Oliphant, Oster & Aman L.L.P.

2645
Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PEEK BROTHERS CONSTRUCTION, INC., a Nevada Domestic Corporation. Plaintiff, vs. SR CONSTRUCTION, INC., a Nevada Domestic Corporation; DOE Defendants 1 - 10. Defendants.	Case No.: CV20-01375 Dept. No.: 8

PLAINTIFF'S OPPOSITION TO DEFENDANT SR CONSTRUCTION, INC.'S MOTION TO STAY PROCEEDINGS PENDING APPEAL ON ORDER SHORTENING TIME

COMES NOW, Plaintiff PEEK BROTHERS CONSTRUCTION, INC. ("Peek Brothers"), by and through its counsel of record, the law firm of Viloria, Oliphant, Oster & Aman L.L.P, and hereby opposes Defendant's Motion to Stay Proceedings Pending Appeal on Order Shortening Time ("Motion to Stay").

This Opposition is based on the following memorandum of points and authorities, any exhibits attached thereto, any oral argument this Court wishes to entertain, and all other papers and pleadings on file before this Court of utility in rendering a just decision.

VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

SR Construction seeks a stay from this Court pending the outcome of its appeal to the Nevada Supreme Court of the Court's Order Denying Motion to Compel Arbitration and Stay Litigation ("Order"). Despite thorough questioning and discussion of the parties' respective positions during oral argument and a written order clearly delineating the basis for denial of SR Construction's Motion to Compel Arbitration and Stay Litigation ("Motion to Compel"), SR Construction now claims that this Court denied its Motion to Compel for "non-specified reasons." However, the Court was exceedingly clear that, because this dispute does not involve issues of fact or law that require arbitration pursuant to the prime contract and does not involve the owner of the Project, UHS, the arbitration provision *does not apply*. Once again, arbitration under the Subcontract is the exception, not the rule, and the Court's decision to deny SR Construction's Motion to Compel is supported by both Nevada law and the express language of the agreements in this case.

Peek Brothers absolutely did not agree—in the Subcontract or otherwise—to arbitrate a dispute that does not involve UHS with the American Arbitration Association ("AAA"). Because it is extremely unlikely that SR Construction will prevail in its appeal, Peek Brothers should not continue to be deprived of its right to properly prosecute its legitimate claims before this Court. Additionally, the initial discovery process is generally the same in arbitration and litigation – the same basic information will be exchanged. Consequently, any stay is merely a delay tactic to prevent this matter from moving forward.

As such, Peek Brothers respectfully requests the Court deny SR Construction's Motion to Stay and allow this case to proceed during the pendency of the appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

Because Peek Brothers extensively laid out the facts of this case in its Opposition to Motion to Stay, Peek Brothers incorporates those facts by reference herein and merely summarizes those facts for the sake of judicial economy. The crux of this case is SR

VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

Construction's express directive to Peek Brothers to import structural fill to the Project site rather than utilize the material excavated from the building footings and plumbing trenches ("spoils") to backfill those footings and build up the building pad. Despite performance and substantial costs incurred by Peek Brothers, SR Construction refused to accept two Change Orders for the additional material and labor that Peek Brothers expended in order to comply with SR Construction's demands. Accordingly, Peek Brothers filed a Complaint against SR Construction for Breach of Contract, Attorneys' Fees, Unjust Enrichment, and a Violation of NRS Chapter 624.

After counsel for SR Construction accepted service of the summons and Complaint, SR Construction filed a Demand for Arbitration with the American Arbitration Association ("AAA") on September 11, 2020. SR Construction then filed a Motion to Compel Arbitration and Stay Litigation ("Motion to Compel") on October 7, 2020, requesting this Court compel Peek Brothers to arbitrate its dispute based upon the fact that the owner of the Project, Sparks Family Medical Center, Inc. c/o Universal Health Services of Delaware ("UHS" or "Owner"), refuses to pay for SR Construction's mistake. Peek Brothers vehemently opposed the Motion to Compel, and maintained that the instant dispute does not involves issues of fact or law that SR Construction is required to arbitrate pursuant to its Prime Contract with UHS. See Plaintiff's Opposition to Defendant SR Construction, Inc.'s Motion to Compel Arbitration and Stay Litigation ("Opposition to Motion to Compel"), generally.

The Court entered an Order Setting Hearing on December 17, 2020, and the parties appeared before this Court on January 14, 2020 to argue the merits of the Motion to Compel. Throughout the hearing, the Court engaged in thorough and substantial questioning of counsel during the parties' respective arguments and entered an oral ruling denying the Motion to Compel. See January 14, 2021 Transcript of Proceedings of Hearing on Motion to Compel Arbitration and Stay Litigation, attached hereto as **Exhibit 1**. The Court "specifically [found] that the dispute which underlies the Complaint here does not involve an issue of fact or law which the contractor is required to arbitrate under the terms of the prime contract." **Exhibit 1**,

p. 38, lns. 18-22. In addition, the Court expressly adopted the analysis outlined in Peek Brothers' Opposition to Motion to Compel and directed Peek Brothers to prepare an order "consistent with its argument today, the Court's observations and questions, and its briefing." Id. at lns. 22-24; p. 39, ln. 1. The Court entered said Order Denying Defendant's Motion to Compel Arbitration and Stay Litigation ("Order") on April 13, 2021.[1]

That same day, prior to entry of the Order, the Court held a status hearing in which the Court discussed the outcome of the settlement conference and lifted its temporary stay of this case. Immediately thereafter, SR Construction filed its Notice of Appeal with the Nevada Supreme Court, seeking review of this Court's denial of its Motion to Compel. SR Construction now seeks a stay with this Court pending the outcome of its appeal.

III. LEGAL ARGUMENT

Section 38.247 of the Nevada Rules of Civil Procedure ("NRCP") permits a party to appeal a district court's order denying a motion to compel arbitration. NRCP 38.247(1)(a). Should a party appeal such an order, that party may request that all proceedings be stayed pending appeal. Pursuant to Rule 8 of the Nevada Rules of Appellate Procedure ("NRAP"), that party must generally move for a stay in the District Court before seeking relief in the Supreme Court or the Court of Appeals. Should a party seek relief in the Supreme Court or the Court of Appeals, Rule 8(c) enumerates four factors that the court will consider in deciding whether to issue a stay:

> (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits of the appeal or writ petition.

NRAP 8(c).

[1] At the January 14, 2021 hearing, the Court exercised its discretion to stay the litigation for ninety days, including entry of the Order, pending the outcome of a settlement conference between the parties. See **Exhibit 1**, pp. 39-42. That settlement conference was held on March 31, 2021. The settlement conference was ultimately unsuccessful and the Court entered the Order thereafter. Consequently, there has already been a stay issued in this case, and an additional stay would further delay Peek Brothers' ability to effectively and expediently prosecute its claims.

VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509
VILORIA, OLIPHANT, OSTER & AMAN L.L.P.

In Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 250, 89 P.3d 36, 37 (2004), the Nevada Supreme Court addressed a petitioner's motion for a stay pursuant to NRAP 8(a)(2) after the petitioner appealed a district court order denying a motion to compel arbitration. The court analyzed the factors outlined under NRAP 8(c), noting that the "the first stay factor—whether the object of the appeal will be defeated if the stay is denied—takes on added significance and generally warrants a stay of lower court proceedings" when the order appealed from is an order refusing to compel arbitration. Id. Thus, "absent a strong showing that the appeal lacks merit or that irreparable harm will result if a stay is granted," the Nevada Supreme Court opined that "a stay should issue to avoid defeating the object of the appeal." Id., 120 Nev. at 251-52, 89 P.3d at 38. However, the Nevada Supreme Court also made clear that a stay is not automatic, and that the other factors must also be considered. Id., 120 Nev. at 253, 89 P.3d at 39.

A. NRAP 8(c) Enumerates Factors the Supreme Court—Not the District Court—Must Consider

SR Construction relies entirely upon the Nevada Supreme Court's decision in Mikohn in arguing that a stay is warranted in this case. SR Construction's reliance, however, is misguided, as both the express language of NRAP 8(c) and the Supreme Court's opinion in Mikohn make clear that the factors outlined therein are factors the Supreme Court—not the District Court—must consider. See NRAP 8(c) ("In deciding whether to issue a stay or injunction, the **Supreme Court** or **Court of Appeals** will generally consider the following factors…") (Emphasis added); see also Mikohn, 120 Nev. at 251, 89 P.3d at 38 ("[I]n determining whether to issue a stay pending disposition of an appeal, **this** court considers the following factors…") (Emphasis added). Thus, this Court is not bound by the decision in Mikohn is determining whether a stay is warranted and may consider *any* factors that it deems appropriate to its analysis. However, to the extent this Court finds the Mikohn factors persuasive, Peek Brothers addresses the Mikohn decision as it relates to the facts of this case below.

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B. Mikohn *Does Not* Mandate a Stay Where the Appeal is Not Frivolous or Brought for Dilatory Purposes

SR Construction maintains, without actually applying the Mikohn factors to the facts of this case, that because its Motion to Compel is not frivolous or brought for dilatory purposes, this Court *must* grant the instant Motion to Stay. See Motion to Stay, p. 7 ("Unless the appeal is frivolous or the stay motion is brought purely for dilatory purposes, the *Mikohn* case ***mandates*** a stay pending the outcome of the appeal"). Once again, this is an erroneous interpretation of the Supreme Court's decision. The Mikohn decision explicitly states that, in light of the significance of the first stay factor, a stay should be granted "absent a strong showing that the appeal *lacks merit* or that *irreparable harm will result*." Id., 120 Nev. at 251-52, 89 P.3d at 38 (emphasis added).

In analyzing the fourth NRAP factor—likelihood of success on the merits—the Supreme Court recognized that "the party opposing the stay motion can defeat the motion by making a strong showing that appellate relief is unattainable." Id., 120 Nev. at 253, 89 P.3d at 40. The Supreme Court goes on to state that, "in particular, if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes, the court should deny the stay." Id. Quite contrary to SR Construction's representations, Supreme Court absolutely did not state that unless an appeal is frivolous or the stay is brought for dilatory purposes, a stay is *mandated*. The existence of those conditions merely weighs heavily in favor of a finding that the appeal lacks merit.

Accordingly, the Nevada Supreme Court—or this Court—need not find that SR Construction's appeal is "frivolous" or "brought for dilatory purposes" in order to deny SR Construction's Motion to Stay. Rather, this Court should deny the Motion to Stay because its denial of the Motion to Compel is *not* clearly erroneous, was based on substantial evidence, and SR Construction is unlikely to prevail on the merits of its appeal.

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VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

C. SR Construction is Not Likely to Prevail on the Merits of Its Appeal.

Under Section 38.219 of the Nevada Revised Statutes, "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except as otherwise provided in NRS 597.995 or upon a ground that exists at law or in equity for the revision of a contract." NRS 38.219. In Nevada, the district court has the authority to determine whether an agreement to arbitrate exists or a controversy is subject to an arbitration agreement. See NRS 38.221; NRS 38.219(2); Philips v. Parker, 106 Nev. 415, 417, 794 P.2d 716 (1990). There must be an agreement to arbitrate for there to be a presumption of arbitrability. Philips, 106 Nev. at 417, 794 P.2d at 716. "Nevada courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration." Int'l Assoc. Firefighters v. City of Las Vegas, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988). However, "[i]f the court finds that there is no enforceable agreement, it may not...order the parties to arbitrate." NRS 38.221(3); see also AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 648 (1986) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (internal citations and quotations omitted). "This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." AT&T Technologies, 457 U.S. at 648-49.

"The question of whether an agreement to arbitrate 'exists is one of fact, requiring [the Supreme Court] to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.'" Truck Ins. Exchange v. Palmer J. Swanson, Inc., 124 Nev. 629, 633, 189 P.3d 656, 659 (2008) (quoting May v. Anderson, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005)). Substantial evidence is "'that which a reasonable mind might accept as adequate to support a conclusion.'" McClanahan v. Raley's Inc., 117 Nev. 921, 924, 34 P.3d 573, 576 (2001) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (internal quotations omitted)).

i. The Dispute Between Peek Brothers and SR Construction Does Not Involve UHS and Does Not Require Arbitration Pursuant to the Prime Contract.

This Court is well aware of the arguments raised by Peek Brothers in its Opposition to Motion to Compel and presented during oral argument. Thus, Peek Brothers incorporates those arguments herein and reiterates such arguments only as relevant to the instant Motion to Stay.

Exhibit D, § W of the Master Subcontract Agreement ("Subcontract"), attached hereto as **Exhibit 2**, contains a "Dispute Resolution" provision, which provides as follows:

> Contractor and Subcontractor shall **not** be obligated to resolve disputes arising under this Subcontract by arbitration, unless: (i) the prime contract has an arbitration requirement; **and** (ii) a particular dispute between Contractor and Subcontractor **involves issues of fact or law which the Contractor is required to arbitrate under the terms of the prime contract**.

Exhibit 2, Exhibit D, § W (emphasis added). This provision makes exceedingly clear that SR Construction and Peek Brothers are *not* required to arbitrate unless certain conditions are met. Arbitration is the exception, not the rule. Consequently, based on the express terms of the Subcontract, Peek Brothers and SR Construction are not obligated to resolve disputes under the Subcontract *unless* the prime contract both includes an arbitration requirement *and* the dispute between Peek Brothers and SR Construction involves issues of fact or law that the prime contract requires SR Construction to arbitrate.

In this case, the Prime Contract, which is comprised of AIA Document A133 – 2009, attached hereto as **Exhibit 3**, and AIA Document A201 – 2017, attached hereto as **Exhibit 4**, does provide for arbitration of disputes but only between UHS and SR Construction. It does not include any language whatsoever regarding "issues of fact or law" which require SR Construction to arbitrate disputes with its *subcontractors*. Therefore, the dispute between Peek Brothers and SR Construction is not subject to arbitration.

As noted both in Peek Brothers' Opposition to Motion to Compel and by this Court during oral argument, SR Construction's argument—that disputes involving payment for work performed by subcontractors must be arbitrated because UHS is responsible for payment to SR Construction—leads to the absurd and contrary conclusion that *all* disputes between SR

VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

Construction and its subcontractors be arbitrated. Had this truly been the result intended, SR Construction could have and should have included an arbitration provision in the Subcontract that required arbitration of *all* disputes.

In addition, while the Prime Contract allows a contractor to include as parties to an arbitration "Subcontractors to Contractor that Contractor deems relevant to the matter in dispute," this assumes that there actually is a dispute between SR Construction and UHS—the only parties to the Prime Contract. Despite including UHS as a "respondent" on an attached page to its Demand for Arbitration, SR Construction has absolutely and unequivocally failed to bring a claim against or allege a dispute with UHS. See Demand for Arbitration, attached hereto as **Exhibit 5**. Rather, UHS was apparently included as a "respondent" solely as a misguided attempt to force Peek Brothers into arbitrating a dispute that is not subject to the arbitration provision.

Accordingly, the instant dispute does not involve UHS, is not required to be arbitrated pursuant to the terms of the Subcontract *or* the Prime Contract, and may be properly litigated in district court.

ii. This Court's Decision was Not Clearly Erroneous and Was Based on Substantial Evidence.

Based on the foregoing substantial evidence, the Court adopted the arguments raised in Peek Brothers' Opposition to Motion to Compel and explicitly found as follows:

> [T]he Court finds that the dispute between Peek Brothers and SR Construction does not involve issues of fact or law that must be arbitrated pursuant to the prime contract because the dispute does *not* involve UHS. Therefore, the arbitration provision contained in Exhibit D, § W of the Subcontract does not apply, and Peek Brothers is not obligated to resolve the instant dispute by way of arbitration. As such, SR Construction's request to compel Peek Brothers to submit its claims to the American Arbitration Association ("AAA") should be denied.

Order, p. 3.

Because "the question of whether an agreement to arbitrate 'exists is one of fact," the Nevada Supreme Court will "defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.'" Truck Ins. Exchange v. Palmer J. Swanson,

ATTORNEYS AND COUNSELORS AT LAW
VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. Box 62 ~ Reno, Nevada 89504
327 California Avenue ~ Reno, Nevada 89509

Inc., 124 Nev. 629, 633, 189 P.3d 656, 659 (2008) (quoting May v. Anderson, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005)). Here, the Court's decision was *not* clearly erroneous, is supported by the express terms of the agreements at issue and Nevada law, and was made after thorough briefing of the issues and questioning of counsel for the parties during oral argument.

As such, it is extremely unlikely that SR Construction will succeed on the merits of its appeal, and this Court should deny SR Construction's Motion to Stay. See Mikohn, 120 Nev. at 253, 89 P.3d at 40 ("[T]he party opposing the stay motion can defeat the motion by making a strong showing that appellate relief is unattainable").

D. Contrary to the Rationale Outlined in Mikohn, the Object of the Appeal will Not be Defeated if this Court Declines to Stay the Litigation Pending Appeal.

Not only is SR Construction unlikely to prevail in its appeal, Peek Brothers submits that the first NRAP 8 factor actually weighs in favor of denying SR Construction's Motion to Stay. The Supreme Court decided Mikohn almost exactly seventeen years ago in 2004. While the undersigned counsel is unaware of how the AAA functioned at that time and whether it truly was a less costly, more efficient alternative to litigation, the same certainly cannot be said today. Arbitration with the AAA is currently cumbersome, devoid of rules, and is often more expensive than litigation. Thus, the rationale espoused in Mikohn – namely that "[a]rbitration, as an alternative dispute resolution mechanism, is generally designed to avoid the higher costs and longer time periods associated with traditional litigation" – no longer holds water. Mikohn, 120 Nev. at 252, 89 P.3d at 39. Based on the undersigned's experience, there are no longer "monetary and timesaving benefits" to proceeding with AAA rather than the courts.[2]

With that being said, the AAA rules – just like the Nevada Rules of Civil Procedure – provide for the amendment of claims and counterclaims, the early exchange of documents in

[2] The foregoing position must be evaluated based on experience, as every case is different and there is no case law to support either position. However, there are numerous articles that discuss the increased cost of Arbitration versus litigation. For example this Washington Post news item cites to a study by the nonprofit advocacy organization Public Citizen, entitled Second Thoughts About Arbitration: It Can Be More Expensive Than Litigation in Contract Disputes. https://www.washingtonpost.com/archive/realestate/2002/05/18/second-thoughts-about-arbitration-it-can-be-more-expensive-than-litigation-in-contract-disputes/2fbdf4df-a90a-484a-8ffe-c5bfcd255838/

ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509
VILORIA, OLIPHANT, OSTER & AMAN L.L.P.

discovery, participation at hearings, and the submission of dispositive motions to the arbitrator. Given that this case is at its inception, the object of SR Construction's appeal would not be defeated because the parties will simply proceed along the same procedural path as they would if they were proceeding under the AAA arbitration without the expense of a AAA arbitrator who bills at an hourly rate. In the event this litigation continues and SR Construction prevails on appeal, the parties can simply utilize the documents and evidence they obtained in discovery in the arbitration proceedings and will not be required to duplicate their efforts. If anything, the parties will realize a cost savings by not having to pay an arbitrator for any hearings related to the discovery in this case.

IV. CONCLUSION

Based on the foregoing, Peek Brothers respectfully requests this Court deny SR Construction's Motion to Stay Proceedings Pending Appeal on Shortened Time and allow this litigation to proceed during the pendency of SR Construction's appeal.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this _____ day of April, 2021.

VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.

By:_____
Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509
VILORIA, OLIPHANT, OSTER & AMAN L.L.P.

VILORIA, OLIPHANT, OSTER & AMAN L.L.P.
ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of VILORIA, OLIPHANT, OSTER & AMAN L.L.P., and that on the date shown below, I caused service of a true and correct copy of the attached:

PLAINTIFF'S OPPOSITION TO DEFENDANT SR CONSTRUCTION, INC.'S MOTION TO STAY PROCEEDINGS PENDING APPEAL ON ORDER SHORTENING TIME

to be completed by:

__X__ electronic service upon electronically filing the within document with the Second Judicial District Court addressed to:

The Allison Law Firm Chtd.
Noah G. Allison
3191 East Warm Springs Road
Las Vegas, Nevada 89120
Attorneys for Defendants

DATED this _____ day of April, 2021

By: _____

INDEX OF EXHIBITS

Exhibit	Description	Number of pages (exclusive of tabs)
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ATTORNEYS AND COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509
VILORIA, OLIPHANT, OSTER & AMAN L.L.P.

EXHIBIT “1”

EXHIBIT “1”

4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE BARRY L. BRESLOW

PEEK BROTHERS CONSTRUCTION,

Plaintiff,

vs. Case No. CV20-01375

SR CONSTRUCTION, Department No. 8

Defendant.

----------/

TRANSCRIPT OF PROCEEDINGS
Hearing on motion to compel arbitration and stay litigation
January 14, 2021

APPEARANCES:

For the Plaintiff: Nathan Aman
Emilee Hammond
Attorneys at law
Reno, Nevada

For the Defendant: Noah Allison
Attorney at law
Las Vegas, Nevada

Reported by: Isolde Zihn, CCR #87

RENO, NEVADA, THURSDAY, JANUARY 14, 2021, 11:05 A.M.

THE COURT: Good morning, counsel.

If everybody could turn on their video and audio.

Okay. Good morning.

I'm Judge Breslow, presiding judge in Department 8.

This is the time and place set for a hearing on defendant's motion to compel arbitration and stay the litigation in case number civil 20-1375, Peek Brothers Construction versus SR Construction.

We are proceeding this morning virtually, as we have for several months, on account of the global COVID-19 pandemic. We are allowed to have court hearings this way, that is, pursuant to simultaneous audiovisual means as allowed by Nevada's Supreme Court Rule Subpart 9 and various administrative orders of Nevada's Second Judicial District Court.

The hearing this morning is open to the public via a link on the court's website.

The Court recognizes its court clerk, Ms. DeGayner, and its certified shorthand reporter, Ms. Zihn, who, like the Court itself, are joining from Washoe County, Nevada.

Starting with counsel for plaintiff, Peek Brothers. And ladies first. Will you please identify yourself for the record; also what county and state you're joining us from.

Ms. Hammond.

MS. HAMMOND: Good afternoon, Your Honor.

Emilee Hammond, on behalf of Peek Brothers Construction.

And I am joining you from Washoe County.

THE COURT: Excellent. Thank you. Nice to see you.

Mr. Aman.

MR. AMAN: Nathan Aman, also joining from Washoe County, on behalf of Peek Brothers.

THE COURT: Thank you very much.

Mr. Allison, on behalf of the defendant.

MR. ALLISON: Good morning, Your Honor.

Noah Allison, appearing on behalf of SR Construction; joining from Clark County, Nevada.

THE COURT: Excellent. Thank you.

Well, it's defendant's motion to compel arbitration and stay, so let me hear, of course, first from the defense, then plaintiff, and then we'll close up with defense.

I, of course, reserve my right to interrupt freely and often to question, debate, challenge and better understand your positions.

And let me say as a preface to all sides that, first of all, I apologize if this matter has been submitted for over 60 days. I know you're waiting for an answer from this

Court so that you can either move forward, based on the Court's decision, or if a party is sufficiently aggrieved, take it to a different court for immediate appellate review. But it's a product of, we had the holidays, and we've had what's going on outside on many different levels.

So I apologize to all counsel and your respective parties for the delay associated with the Court deciding that a hearing would be beneficial, and then finding a date that worked.

I also apologize that we started a few minutes late because I accidentally knocked my camera off my laptop onto the ground and had to put it back together quickly before the hearing. But levity aside, I know this is an important issue.

But, you know, unless I'm wrong, it really boils down to the Court's view of the question of whether the dispute between your clients involves an issue of fact or law which the contractor is required to arbitrate with the owner under the prime contract. Because it seems like the language of the subcontract indicates that the contractor and the sub are not obligated to arbitrate, unless both A and B or 1 and 2 apply; one being that the prime contract has an arbitration requirement. It does. So we're really left with part two: that the particular dispute between the contractor and

the sub involves issues of fact or law which the contractor is required to arbitrate under the terms of the prime contract.

So, I guess, by a show of hands, does anyone disagree that's really what we're here to discuss? I mean, is it more than that, less than that, or other than that? If you disagree, please raise your hand.

All right. So we're on the same page on what we're here to do. All right.

So the movant should please go forward, make argument as to that point and anything else you believe would inform the Court as to their view.

Please proceed.

MR. ALLISON: All right. Thank you, Your Honor.

I appreciate your remarks. And I'm going to try to just cut to the issue that Your Honor referenced.

I know Your Honor understands very well the standards and preferences for arbitration with respect to the case law and NRS Chapter 38, so I'm not going to belabor that, but that is important, I think, for the way you need to approach your decision.

THE COURT: There's a general -- I wouldn't use the word "bias," but incentive, a general acceptance of the idea that the parties have decided to agree to resolve their

differences other than with access directly to the Court. That's to be enforced and generally encouraged.

Now, there's a whole body of law -- not law -- there's a whole bunch of legal notes, law school notes, papers by neutrals, litigants' counsel, who have said that that's a noble idea gone astray over the last 25 years because of the time and expense, savings that hasn't really borne out particularly these very complex, heavy-lift, three-arbitrator, JAMS arbitrations in San Francisco with people from around the country and the world. It costs just as much, takes just as long. But it's a noble idea, and the judiciary, by and large, seems to review these in a way to encourage this.

So that's the law, and I generally accept that as guiding this Court's principle, if it's a close call.

MR. ALLISON: Understood. Thank you.

I'll set the table a little bit with just describing the delivery method of the project. It's in my brief, but I think it's important. I think it goes to the heart of why this is required of the arbitrator under the prime contract.

This is for the construction of the hospital that's a Sparks medical facility.

THE COURT: I've driven by it many times on my way to the eye doctor, who offices 100 or 200 yards away from there.

Big, giant project. It's going to serve this community, hopefully, well for many years. And the people that live here should be thrilled that people are investing this in this community.

MR. ALLISON: Yes. And thank you.

And as is typical for very large projects like this, the delivery method is a cost-plus-GMP method.

And, Your Honor, I don't want to insult -- if you're familiar with how a cost-plus-GMP contract differs from a lump sum contract, I won't get into it too much, but that's the key.

And that's why, when Peek Brothers makes the argument that -- the way we're arguing is, that every time there's a dispute between a sub and a general, it must be arbitrated, that's not the case. But it is the case quite often when it's a lump-sum -- when it's a cost-plus-GMP contract. And I'll explain why.

In a cost-plus-GMP contract, the owner is obligated to pay for the costs of construction, plus a fee to the general contractor. It's limited to the guaranteed maximum price. But the goal and the hope and prayer of the owner is that, whatever the project costs, and the fee of the general contractor, is going to come in below the guaranteed maximum price; meaning, you know, the project could be -- the

guaranteed maximum price could be a million dollars, and if the cost of the project comes in at $800,000, it's great for the owner. He only has ended up paying for the cost of the project, plus the guaranteed maximum price.

The cost of the work includes everything that the general contractor pays to the subcontractor. That includes change orders, typically.

When there's a -- so let's take, for example, an earthwork subcontractor like you would have for Peek Brothers, and let's assume that it's -- I am going to use round numbers -- there's a hundred-thousand-dollar contract with them. And that's the line item for earthwork in the million-dollar-guaranteed-maximum-price contract.

If there's change orders to the earthwork contractor, that line item goes up by whatever the change order is. So let's say there's a $50,000 change order. So it's $150,000. Well, where does that come from?

That comes from a contingency line item that's in the contract. So 50,000 in contingency comes out and goes in the line item for the earthwork contractor, which the owner has to pay for.

Then, at the end of the project, you add up all the costs, and if it's below the guaranteed maximum price, the contingency item, what's left of it, is crossed out, and the

owner doesn't have to pay that.

So my point is, and why this is so important to this matter, is that when a subcontractor makes a change order request on a guaranteed-maximum-price-lump-sum -- or cost-plus project, the -- lost my thought. The -- hang on a second. I've got to get my --

THE COURT: That's okay. I can have the court reporter read back the beginning of the sentence, if you'd like.

MR. ALLISON: No, thank you. That's not necessary.

So when there's -- when the subcontractor has a change order on a guaranteed-maximum-price contract, and it increases the line item for that work, that's extra money out of the owner's pocket, no matter what. He's got to pay for that.

So when a subcontractor's change order has merit, obviously the owner is going to be happy to pay for that because it's part of the cost of the work, and it should be increased.

When the subcontractor's change order lacks merit, meaning it's not based on -- it shouldn't be included as a cost of the work because it was due to an error or a problem caused by the subcontractor itself -- which is the allegation -- our allegation in this case -- the owner should

not have to pay for that. And that's exactly what has happened in this case.

Peek Brothers has made a change order demand in this matter. SR Construction is a general contractor, which kind of is in the middle, and it kind of acts as an advocate for both the sub, when necessary. The owner is an advocate for the owner and the sub. That's what a good general contractor does.

SR looked at the change order and said, "This really doesn't have any merit," and it advised the owner as such that: We're being asked to give a change order to the subcontractor. It's going to cost you, Mr. Owner, an extra, whatever, hundred thousand dollars. What do you think? We don't think it has merit.

Well, the owner -- and you saw the exhibit -- wrote a memo and said: Absolutely not. We refuse to pay this change order. SR, if you try to bring it to us, we are going to tell you: Absolutely not.

So that now puts SR in the middle of this thing, so what do we do? Peek Brothers moves forward and files -- proceeds to demand its change orders. And now we have to either agree to proceed with litigation in this forum, or we go ahead and we -- recognizing that we have exposure to the owner for exactly what we have exposure to -- the owner might

not -- doesn't agree with it, we now have the need to bring it into arbitration. So that's what we did: We demanded arbitration.

We named the owner in the arbitration. And the reason why you name the owner in the arbitration is because, while we agree the owner and SR are completely on the same page that it lacks merit, at the end of the day, the arbitrator in this case is going to have to say, if things go -- if things were to go, for example, Peek's way --

THE COURT: They would award against the owner, and the owner would back-charge the general.

MR. ALLISON: Right. So we would be stuck. And if this thing goes into two different forums, if we have to go through this forum with Peek Brothers, the arbitrator has no obligation to do what you say. If this goes through arbitration with the owner, which is where we would have to go on that issue, identical issue, you don't have to do what the arbitrator says. So we have this complete disjunction that is cured by the contract documents themselves, which is why we get to the heart of the issue, why this involves issues that must be arbitrated under the prime contract.

And then I'd refer you -- because I think there was another argument made by Peek Brothers that the prime contract doesn't really speak to involving the subcontractor

on claims.

Well, I'm going to point to the section in the -- in a201 -- which I'll give you the exhibit number in a moment -- Section 15.4.4.4 says, "Arbitration at the contractor's election may include subcontractors to the contractor that the contractor deems relevant to the matter in dispute, and upon subcontractor's request, the arbitrator shall decide all or a particular portion of a dispute between the contractor and a subcontractor. And as the contractor may request, the arbitrator shall speak to the extent that the arbitrator's decision regarding a dispute between the contractor and owner and the dispute between contractor and subcontractor are interrelated."

That is the arbitrator's obligation. That is also standard AIA language. That's the standard AIA a201 language.

So it's not anything funky here, Judge. This is what's normal and typical in a general condition to a contract. And that is exactly what we want -- where we go. If we get into arbitration, and Peek Brothers wants to go to the arbitrator and say, "I want you to speak as to how these are interrelated," the contract documents allow that -- allow Peek Brothers' owner, SR, to ask the arbitrator to do that. But that's something that everybody contracted to do.

THE COURT: Well, let me ask you this, though. Not to interrupt. Let's look at it for a minute from Peek Brothers. They say, "Okay. First of all, our contract doesn't have an arbitration agreement." And, I mean -- no. Let's back up.

The agreement that you have with the owner is between you two. Now, I realize the jurisprudence suggests that a third-party sub like this can be brought in, and that's one of the bases that your client is suggesting the Court should look at this under.

But they say: The exception here -- it's rendered meaningless; right? This is Peek Brothers: This doesn't mean anything -- I'm pointing to my other screen here, where I have a copy of Exhibit D, Section W, the subcontract number, the dispute resolution -- right? -- that I went over. It says you have to satisfy A and B or 1 and 2. "The particular dispute between a contractor and sub involves issues of fact or law which the contractor is required to arbitrate under the terms of the prime contract."

Now, Peek Brothers says, if this Court views it the way you're suggesting it should, then that's pretty much everything; that the exception subsumes the rule. This should be: We don't have to arbitrate, you know, unless. But if you're saying that just because the general is in the

middle of it, they're always going to be in the middle of it, or they're often going to be in the middle of it. And so if you want us to agree to arbitrate all disputes, you should say so. This just gobbles up almost everything in its sight. So the Court is struggling with that a little bit.

How do you, Mr. Allison, respond to that?

MR. ALLISON: I have a great response, Judge, and that is: The illustration I gave you was for a cost-plus-GMP delivery system.

THE COURT: Right.

MR. ALLISON: There's other kinds. In fact, remember, this master subcontract agreement that you're referring to is intended to govern all contract relationships between SR and Peek Brothers. The idea is that they enter into this master agreement, and as projects come along, a work order is issued, which incorporates the terms and conditions of the master contract.

So had this marriage not been dissolved five months into it, and we were -- had been doing this for years and years and years, we would have lots of successful projects under our belts. And some of those, many of those, would involve lump-sum contract arrangements with the owner.

Now, a lump-sum is completely different than a cost-plus contract. The owner pays -- promises to pay an

amount of money irregardless of whether it's -- it has no bearing or relation to what it actually costs. The owner is just willing to pay a sum amount of money to get his construction project delivered.

If that's the case, and there's a dispute between. SR and the subcontractor over that, over a change order, and there's no -- we're not seeking -- there's no change between the owner and the GC, the change order means nothing anymore. It's meaningless, because the owner doesn't -- he's always going to pay the lump-sum amount. So it doesn't mean anything.

In that situation, which would be pretty common, Peek Brothers would be absolutely correct to say that that would be something that doesn't involve --

THE COURT: That's not in play here, because we have a cost-plus contract.

MR. ALLISON: Yes, this is a cost-plus contract.

THE COURT: I understand. But, so, I mean -- okay. But the sub -- well, I'm just trying to think out loud here. The sub is then, I guess, wedded to or stuck with the fact that the general contractor had a cost-plus contract with the owner as opposed to a lump-sum. And if it was a lump-sum contract, then the arbitration and dispute resolution analysis might be different.

All right. Let's do this, Mr. Allison. I'm going to get back to you. I'm going to make sure everyone has their full opportunity to explain to the Court their view, and why the Court should see it that way. But let me talk to those opposing the motion.

Who would like to address it first?

MR. AMAN: Nathan Aman, on behalf of Peek Brothers.

THE COURT: Thank you.

MR. AMAN: I guess it's still morning, Your Honor. Good morning.

First of all, I want to talk about the very issue that you started with: Why not arbitration? And in our experience, just as Your Honor discussed, the triple A arbitration for construction cases is cumbersome. The discovery rules are vague, hard to enforce. There's issues throughout it. We've gone through this with my office on multiple occasions, and you end up paying three different arbitrators from all over the country that don't necessarily understand the manner and practices of this particular locale, so it gets into all sorts of issues. We do not want to be involved there.

In many cases, arbitration is preferable, especially in the Court's Arbitration Program. We like utilizing the Arbitration Program because it does work out to be cheaper

and more effective.

But in our experience going through triple A, that's not the case. It was born with good intentions, but it has morphed into an animal unto itself that becomes expensive, cumbersome, time-consuming. And this case isn't necessary for it.

Maybe if we had a delay damages case where it was very important to discuss the construction schedule and everything that went wrong with the construction schedule cases we've had before, then it might be important to have the experienced panel to really understand that process. That's not what this case is about.

The question then becomes: Why does SR want it?

It has this, I want to say, improper idea that the owner is going to be required to pay for this. And as I'll explain, that's not the case.

And as Your Honor also pointed out, one of the most important issues here is the arbitration provision itself. The arbitration provision here is the exception; not what is mandated, but the exception. And once we discuss this a little bit further, we'll talk about the language. But the facts are important.

And in S. R.'s pleading they essentially ignore the facts and focus on the contractual relationship between the

prime contractor, the owner, and it truly has no relevance to this issue before us today.

THE COURT: Well, why not? Because you just heard Mr. Allison say, "Judge, if you do not order arbitration here, we're going to be dual-tracking this."

Maybe my response to Mr. Allison, then, along the lines of, "Well, maybe, then hit the pause button on the arbitration, if this case goes to litigation, and see what happens here before you have to go to arbitration."

Because if Mr. Allison's client prevails, if this matter goes to litigation, there's nothing to arbitrate with the owner. On the other hand, if they don't prevail, well, then that's a horse of a different color. So what do you think of his dual-tracking argument: "Judge, let's try to avoid that, if we can"?

MR. AMAN: Well, Your Honor, I don't think there's going to be a dual-tracking issue. I want to go into the facts of this case because that's important, because that's the entire arbitration provision right there. It's talking about the facts that give rise to the arbitration provision or the law. And at this point, there is no law, there's no NRS 624 provision that's mandating arbitration, so it's all about the facts. And then you get into the very confusing language that goes into the AIA 133 and the AIA 201.

Let's talk about the facts here. We have a contractual relationship between the owner, which is UHS, and SR Construction to build a project. Whatever their contract is, it is.

Then you have Peek Brothers' Construction contract with SR Construction, which the final contract was approximately three million dollars.

So under that contract, our client, Peek Brothers, is mass grading. So the mass grading involves essentially getting all of the soils prepared, dealing with preparing the building pad, dealing with preparing roadways, things along those lines.

This issue is focused on the building pad. So when Peek Brothers bids a project like this, they implied -- utilize their own means and methods to come to the end result: It's going to cost this much because we are utilizing this process to move the dirt, place the dirt, haul the dirt, to store the dirt, and to do all of this work.

So in doing that, Peek Brothers, in relation to the building pad, bid this project in this way: Per the building pad, you have the mass grading. And then, before the foundation, the concrete goes in, you have what's called subbase roof. So Peek Brothers' plan, the way they bid this is, you do the mass grading. And now you're a couple feet

below the subgrade elevation, below where the concrete pad is going to go.

What Peek Brothers did is, once they trenched the footings, the concrete footings, the building pad, the plumbing, the electrical, they pull out those spoils, set them there. The plumber comes in, electrician, concrete foundation person come in, they do all of their work, and then some of the spoils go back into those trenches. But then you have an extra amount of stockpile, spoils.

Peek Brothers' means and methods of bidding this in doing projects like this is to use those spoils to bring the pad up to subgrade. That's where the bid came from, and that's the process by which Peek Brothers bid the project.

Now you get into April, 2020. And these facts are laid out in the Complaint, and those are to be accepted as true as part of this process.

April, 2020, you have a meeting at the project involving various subcontractors, so there's various witnesses that would be able to testify to these issues.

You have an individual named Fred Kravetz, who is a -- I believe his title was a general superintendent at the time, for SR Construction.

Mr. Kravetz at the meeting directs and requires Peek Brothers to immediately bring the pad to subgrade levels.

However, at that point in time, the trenching had not been done, so there are no spoils.

THE COURT: Any of it?

MR. AMAN: No. At that point in time, just mass graded, and they were going to go in next, do the trenching, and then utilize that to bring it up to subgrade.

THE COURT: Well, I'm assuming you're suggesting that what the evidence suggests he did, because he was in a bit of hurry or wanted to move things along, he didn't want to wait; right?

MR. AMAN: Correct, Your Honor.

THE COURT: Again, Mr. Allison, the fact that I'm allowing this level of -- this has to do with the issue of whether the issues of fact, you know, or law, are such that the contractor is required to arbitrate them under the terms of the prime contract. So I'm allowing this level of detail, and I'm not -- you know, it's not a bench trial. I'm not going to make any findings that somebody did what they shouldn't have, or breached or -- I'm just -- I want to hear the background point of view of those opposing the motion. I'm sure you will educate the Court as to points you think are important. But please continue.

MR. AMAN: Yes, Your Honor.

And these are key issues in terms -- they're also

pled in our Complaint, so --

THE COURT: Right to the point. Go ahead.

MR. AMAN: So we have this meeting in April, 2020 with Mr. Kravetz. He directs Peek Brothers. Peek Brothers at that meeting says, "This is going to cost you. It's going to be more expensive. We have to truck in these materials that we would have used."

He says, "No. I need to move on this timeline. I need to get this done," and orders Peek Brothers to bring in 150,000 square feet of material, bring the pad up to subgrade. Peek Brothers has to go back and trench. So now we have extra stockpiles, extra spoils, that have to either be trucked off the project or utilized somewhere else on the project.

So this is going to be a big fact-intensive case involving Mr. Kravitz's misguided decision to tell them what to do.

The background is going to show that Mr. Kravetz had various issues with Peek Brothers. He didn't understand the process. He was reprimanded by superiors. There are various issues that are going to come forth to the extent that he was reprimanded for cussing at Peek Brothers' employees. There's a lot of issues; so much so that he was, my understanding, completely divested of communicating with Peek Brothers, at

all, after these transactions because of how sideways it got.

It appears that this was a demand by Mr. Kravetz not understanding the process, demanding to keep some sort of timeline, and that is the totality of the issue. It is a misguided decision by Mr. Kravetz to order Peek Brothers to do work that was unnecessary.

And this gets into the issue of change orders. This is not your typical change order process, because your typical change order process is done by the sub presenting a change order. So it's something they ran into the field, and saying, "This needs to be done. Can you get it approved?" And then it goes to the owner.

This was a situation where SR Construction, through Mr. Kravetz, was demanding Peek Brothers do this work. Peek Brothers says, "It's going to cost you." My understanding, he said he didn't care. They go forward and do the work. So the change orders in this situation are a little disingenuous. They're really invoices to SR Construction.

This gets into the issue of: Does the owner have any responsibility? Under those facts, absolutely not. So the owner's response is absolutely proper that this is an SR Construction/Peek Brothers' issue, and has nothing to do with facts or issues related to the prime contract because it was a mistake, a misguided direction by SR Construction. That's

the totality of the issues here.

So then we have to move over and get into the arbitration provision. Let's go back and go through exactly what that says.

The arbitration provision out of the master subcontract agreement, Exhibit D, paragraph W, states, "The contractor and subcontractor shall not be obligated to resolve disputes arising under this subcontract by arbitration, unless" -- the Court pointed out -- "the prime contract has an arbitration requirement, and a particular dispute between the contractor and subcontractor involves issues of facts or law which the contractor is required to arbitrate under the terms of the prime contract."

THE COURT: Well, Mr. Allison says it does. He says, this is exactly the type of dispute that his client is required to arbitrate with the owner, with the hospital.

And you heard me say, "Well, this is supposed to be an exception. And it seems like, if I view it the way you, Mr. Allison, are suggesting it should, the exception is sort of swallowed up by almost everything, you know, where the general gets in the middle of it. Then it seems a little broad."

On the other hand, he said, "Yeah, but, Judge, that's" -- my understanding, my takeaway from the comments --

"Judge, this is sort of the world we're in with the cost-plus contract here, as opposed to a fixed-price contract, and so it is what it is. This is sort of a standard form, experienced parties. This is just, unfortunately, the agreement that they signed."

How do you respond to that?

MR. AMAN: Your Honor, I would say this is not a standard agreement, by any means. AIA contracts aren't standard by any means. This contract is not standard.

As we're going into dissecting this language, you get to the heart of it. It's ambiguous; it's confusing; it doesn't make sense. And under our rules, that is construed against the drafter, and that's SR Construction. If SR Construction wanted everything arbitrated, it would say so. If SR Construction wanted it arbitrated if it was a cost-plus or GMP or some other type of contract, the arbitration provision would say so. It does not say that.

THE COURT: Well, again, I don't want to misstate Mr. Allison's arguments. He didn't say, "Judge, everything."

I was just observing that it seems to me where we're getting close to that, because a good-faith argument could be made in the different scenarios the Court is envisioning, that it would be a dispute, factual dispute, with the owner, and if the sub is involved, well, we're arbitrating.

So, you know, that's just my interpretation. I don't think Mr. Allison conceded that. But he recognized the Court's concern, is the way I put it.

MR. AMAN: Your Honor, it is a provision. This provision is confusing. It's stating that arbitration is the exception, not the rule. And then it gives this vague discussion about what the rules are. And then it cites to the prime contract.

Well, the prime contract does not require, is not obligating Peek Brothers to arbitrate under it. Mr. Allison's very section that he cited from the AIA 201, which is Exhibit 3 to our opposition to the motion to compel, Section 15.4.4.4, that is all about the contractor's election; he may request the subcontractor be involved. That is nothing to mandate the subcontractor to be involved. That is the general contractor asking the subcontractor to be involved in the arbitration between the owner and the prime contractor. There is nothing in AIA 133 or the AIA 201 that mandates or even sheds any light on the provision that we discussed on the master service agreement.

They don't link up; they don't make sense together, at all. So we have to look at the master subcontract agreement as itself to try to evaluate what the facts are.

And whether SR Construction wants to try to take its

mistake and go against the owner, that's its right. But the continued representation by SR Construction throughout its pleadings that the owner is absolutely going to be liable for this and the owner is liable for this is false.

The owner is never going to be liable for this because this is all stemming from an SR Construction mistake. This isn't a change order type of issue in the normal sense. This is a mistake by SR Construction, a misguided direction by one of its employees to have Peek Brothers do approximately $140,000 worth of work that was not required.

THE COURT: Well, let me -- before I move on, what is the amount in dispute here? I'm just talking in this case, not any other issues that may exist between the general and the owner, between anybody else. How much is Peek Brothers seeking by way of its lawsuit here?

MR. AMAN: Your Honor, it was -- I'm going to call it invoiced in two different change orders. One was approximately 13 -- one was approximately $4,000. That's change order 13. And then you have change order 17, which was the cost of the import, the cost of the trucking. That's approximately $137,000. So we're talking a little over $140,000 in this dispute.

So when we look at this arbitration provision, we have to again focus on, it's the exception, not the rule, and

we have to focus on the facts. This is nothing to do about the contract.

To me, it's telling that in none of the pleadings so far about this issue, despite the fact that SR continue -- or Peek Brothers continually points out the crux of this case, the only facts that matter are the decision by Mr. Kravetz. Nowhere in SR's pleadings do they once even discuss Mr. Kravetz, at all, bring up his name; bring up a meeting; bring up a discussion; bring up these allegations that we are making in the Complaint that are going to be supported throughout the case. That is very telling.

I don't know why we're going down this road of GMPs. That's not addressed in the master subcontract or agreement. We have the language that we have, to the extent it's ambiguous and should be construed against the drafter, which is SR Construction.

And in light of that conclusion, this notion that the owner is going to be responsible for paying for these invoices, that's never going to happen. Whether SR wants to go through the arbitration process and its prime contractor try to prove that, it's not going to go anywhere.

This is a separate matter that should not be subsumed into the monster that is the triple A construction arbitration. If SR Construction wants to get the $140,000

from anybody to pay Peek Brothers, they should look to Mr. Kravetz.

THE COURT: Okay.

MR. AMAN: Thank you, Your Honor.

THE COURT: You're welcome. I understand your position.

Mr. Allison, there's a lot to unpack there. I'm sure every time you heard a statement that you didn't agree with you made a mental note: When it's my turn, I'm going to jump on that. So now is your turn.

Tell me anything you'd like in response to what you've just heard, and then we'll button up why, despite what we've just heard in argument, it is the type of dispute that otherwise would be required, due to the fact that the law ought to be arbitrated between the general and the sub.

Mr. Allison.

MR. ALLISON: Thank you.

So, Your Honor, are you ready to rule on the merits of the case --

THE COURT: You heard what I said. I mean, I'm not -- this is not a bench trial. I'm not going to decide whether who wins and how much. I am just trying to stay in my lane here, which is to determine if this is the type of dispute which the general and the sub would be required to

arbitrate under its contract.

You've heard passionately from those opposing that, "It's not. It's not. It's a -- this rogue guy, this rogue manager instructed something. And it's really not that type of thing."

And I assume that you're going to say, "But it is. Any way you cut it, it ends up being the same way."

But go ahead, Mr. Allison.

MR. ALLISON: Okay. Thank you.

Well, you know, I also want to just -- thank you, Your Honor. Peek Brothers filed a Complaint, and we filed a motion to compel arbitration. We haven't had a chance to file an Answer or anything like that.

THE COURT: Right.

MR. ALLISON: So those facts, again, are to be decided at arbitration.

But let me just quickly give you SR's view of the world on this thing.

THE COURT: Sure. Because a good lawyer never wastes an opportunity to begin the art of persuasion.

MR. ALLISON: Sure.

THE COURT: So go ahead.

MR. ALLISON: Earthwork is like working in a giant sandbox. You have your site, it's like a sandbox. You have

to achieve elevations throughout the project, including the building pad, including everything else around it, including the parking lots, roads, everything that goes through there.

And you're given a survey at the beginning of that, tells you what the existing elevations are. And a good earthwork subcontractor will look at that survey and say -- and where it needs to go; he'll also know where they need to get it to -- and he'll say to himself: I either need to bring in material or I'll need to export material to achieve the ultimate elevations on this project. And then, based on that, a good earthwork subcontractor will get their bid.

Because on this project, unlike some earthwork subcontracts, it was just, "I'm going to deliver you these elevations for this lump-sum price. It wasn't based on quantities, like if I have to bring in so much dirt, it's X dollars a cubic yard. If I export this amount, it's this much.

Well, the earthwork -- there's been disputes, and there's also a dispute that is related to this, between SR and Peek Brothers related to the overall elevations and excavations on this project.

At the current time, now that Peek Brothers is off the project, there are areas of this project that are three feet too high, up to three feet too high. Not three inches

too high; three feet too high. There's an enormous amount of material that SR now has to hire another earthwork subcontractor to export from the project to achieve the elevations that Peek was supposed to achieve.

Why is that important? Because if I'm building a building pad, and I have a superintendent tell me to build the pad to elevation first, and do the -- entrench it after you've gotten it to elevation -- which is what is normal and typical. We'll have experts that will say that's what you do on most projects. You build a pad to elevation, then excavate the trenches there.

If they needed to build that to elevation, why on earth did they import material to get that pad elevation? They could have gone somewhere else out on the site and scraped up some dirt and moved it over. They imported more.

We're going to be able to demonstrate with arbitration that Peek Brothers had absolutely no comprehension of what the elevations were on this project when they did the work. So that's going to be our position, and that's what we're going to argue about in front of an arbitrator.

And I want to talk about triple A for a quick moment, too. We're not asking for the legendary triple A construction panel to decide this, that's imported from the

most expensive areas of San Francisco and Los Angeles to come to Reno. This is going to be a local, somebody from either Reno or Nevada that's going to be a construction lawyer that knows this stuff, that knows how to read surveys, that knows how the earthwork business works, and they're going to be the ones -- it's going to be a single arbitrator, and they're going to decide this thing in a day or two.

If we go your route, Your Honor, the first thing I'd do, if I'm Mr. Aman, is I would demand a jury trial because I know I'm going to lose if I have it in front of a triple A --

THE COURT: You know, it's funny you mention that. I'll just hit the pause for a moment.

An Administrative Order just went out either late yesterday afternoon or this morning, you know, another Administrative Order from the Second Judicial District, and it just pushed everything back. Courthouse remains closed till March 14th, I think, or March 4th. Every trial that was set to go in February is now in March. I mean, in the pecking order, criminal justice trials where somebody is in custody that has invoked their right to a speedy trial, they go first; after that, and way down below, unfortunately, are civil jury trials.

I'm not in any way, shape or form trying to, you know, give the impression that these -- that businesses and

people and entities that have bona fide disputes don't deserve their day in court as promptly and safely as we possibly can. But the reality is, if somebody demands a jury now in a civil case, you're looking at 2023. It's just hard to envision a scenario where it's other than that, even though it's just January of 2021.

So usually what I'm seeing is, defendants in civil litigation are the ones demanding the juries, not the plaintiffs. Anyway, there you go.

Continue.

MR. ALLISON: Yeah. Well, in this case, I mean, I've done enough trials to know, and so has everybody on this screen, to know that, if I have a weak -- a case that's weak on the facts, and I'm representing a local subcontractor, I'm going to want to bring in a jury to have that decided against a Las Vegas general contractor, not --

THE COURT: Well, no comment there. I'll concede we have experienced, professional and reputable counsel all involved. In fact, it's a pleasure to have counsel at this level.

MR. ALLISON: Thank you.

So that's all I'll say about triple A.

And back to the idea that I think Your Honor was struggling with me, that it seems like this contractual

arrangement between SR and Peek is going to result in arbitration every time, I'm going to -- I sat down, and I kind of did a diagram of that, you know, the four quadrants. So you need to look at that provision, Exhibit W -- or paragraph W.

And first off, if there's no arbitration provision in the prime contract, there's no arbitration between the sub and -- so there's half the contracts right there. So we can't make Peek Brothers arbitrate with us if there's no arbitration clause in the prime contract.

THE COURT: Good point.

MR. ALLISON: We can't make Peek Brothers arbitrate with us on the lump-sum for the reason I explained on those issues.

Now, there are issues on the lump-sum where I think we could. And I did give two examples in my brief where on a lump -- on a cost-plus, we would probably fail in a motion to compel arbitration with a sub. And that would be if there's a trade damage dispute between two subcontractors, where Peek Brothers runs over the scaffolding, and we had to back-charge Peek and give the scaffold guy a change order. That's a back-charge, and that's not going to touch the owner. So that's -- that wouldn't be decided.

And also, if SR is five miles into the -- over the

GMP, meaning we are now paying for the project, and I have now a change order with a sub, that's not going to affect the owner. The owner is not going to pay for that. So that would be another example where we wouldn't -- I would fail in a motion to compel arbitration.

This is the sweet spot we are talking about. This is not all the time. This is kind of one of those moments when it is required. And that's because, as I explained our position, where all Peek Brothers had to do is go scrape up some dirt somewhere else on the project instead of importing a ton of it and trying to make us pay for it.

You know, the owner is telling us, "I'm not paying for that. Why didn't they go over there and scrape up the material? Now I've got to pay to take off all this additional material, too."

So that is why it involves issues of fact and law related to the prime contract.

THE COURT: There's no counterclaim yet. It's because we're not at that point in this case. You're still determining --

MR. ALLISON: Right.

THE COURT: -- the scope of the fight, but not yet the merits of the case.

MR. ALLISON: I would characterize it -- a

counterclaim, I would call it as a setoff. It's a setoff against their change order. It would be, you know, "We had to do all these other things, so it's a setoff" argument. And I think that's an appropriate thing to do anytime on a project is, if you have setoffs, you claim them when there's a claim.

So that's going to happen no matter what, and that's something that we think needs to occur in arbitration, which will be decided in a day or two by somebody who really knows this stuff.

I think I don't have anything else to say, unless Your Honor has any additional questions.

THE COURT: Well, here's what I'm going to do. I'm going to give Mr. Aman two minutes to do a sur-opposition, and then, since it's your motion, Mr. Allison, another minute after that to respond to anything new he says.

Go ahead, Mr. Aman.

MR. AMAN: Your Honor, I'm going to take this opportunity to simply say we're going to rest on where we're at.

I think we've made it very clear that this is a limited dispute involving a decision by one of SR Construction's employees.

It's almost like the scenario counsel for SR

Construction said: Backing over, it was a mistake, it was a misguided direction. This is the means and methods that Peek Brothers chose, and thereby this dispute has nothing to do with the owner. And the master subcontract agreement, I believe, supports our position.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Allison, anything final final?

MR. ALLISON: No. I'm good.

THE COURT: Okay. Give me just a moment here to gather my thoughts. I'm going to just put you on mute, but I'll still be here. It will be just about a minute and a half.

(Off the record.)

THE COURT: All right. We're back on the record.

Two things. First thing: Motion to compel arbitration is denied.

The Court specifically finds that the dispute which underlies the Complaint here does not involve an issue of fact or law which the contractor is required to arbitrate under the terms of the prime contract.

The Court adopts the analysis of the opposition, and plaintiff shall prepare a short order, three pages or less, consistent with its argument today, the Court's observations

and questions, and its briefing, run it by defense counsel as to form only, consistent with our local rules on how much time they get, and then submit an order hopefully that defendant agrees as to form -- certainly not as to substance; they've been arguing passionately against it -- and submit it to the Court for review and entry. Submit it by e-mail to my judicial assistant, both in Word form and PDF.

In the event parties cannot agree that the form proposed by plaintiff accurately reflects what the Court has just said, defendant shall contemporaneously, with plaintiffs submitting the proposed order in Word and PDF, submit its proposed order in PDF and Word as well, and then the Court will merge or sign one or the other. That's number one.

Number two, as important as number one. The Court exercises its discretion under Nevada Supreme Court Rule 252 and Second Judicial District Court Rule 6, I'm staying this case, this litigation, other than the entry of this order, for 90 days. No Answer is required; no dispositive motion is required; no discovery; no nothing.

On or before April 30, parties are ordered to a settlement conference with a neutral of their choosing; presumably somebody with construction background, but doesn't have to be.

If counsel cannot agree on a neutral after good-faith

efforts, let the Court know by e-mail that you're at an impasse even at that level, and I'll appoint someone from my large Rolodex of qualified neutrals, the cost of the event to be shared equally, unless you're able to convince one of my colleagues or a colleague in another judicial branch to preside over your settlement conference, and move forward with a settlement conference.

I'm going to set now a status hearing for 90 days or so from now and see where everything stands. If you're unable to resolve it after a settlement conference, I don't need to know why, I don't need to know who was the stick in the mud, or which side or who -- "They offered nothing." I don't care. We're just going to go from that point forward rules of engagement; how much time do you need for discovery? We'll do it -- we'll have a concierge judge for purposes of streamlining the proceedings here; understanding that each side has a different view factually of what happened and legally of what the facts that can be proven as applied to the law, what kind of result. I get that.

I want to have everyone bear in mind -- and I'm sure they do -- that this Court's experience is, our system works really well for $50,000-or-below claims because of the mandatory Supreme Court Arbitration Program. And our system works reasonably well for claims, you know, if you add

another zero and above.

But the middle, the 50 to 250, sometimes the cost of the process can eat up the amount that's being argued, even if there's a fee-shifting provision to the prevailer. But, you know, I'm not trying to condescend here. Everyone knows that.

So I don't need to know if you're unsuccessful. I just need to know you tried in good faith, and you couldn't do it. Then we will talk about what happens next the next time I see you.

So, you know, 90 days, even in the pandemic world, should be enough time to get this settlement done, settlement conference done, like I said, by April 30.

The case is stayed for 90 days. I'll set a status hearing for, I guess, early May. And then game on.

MR. ALLISON: Your Honor --

THE COURT: So let's start with if either side has any questions.

Let me start with counsel for plaintiffs. Any questions about what I'm asking you to do with respect to this order and what I'm asking you -- directing you to do with respect to going through a settlement conference to try really hard to work this matter out?

MR. AMAN: No, Your Honor. Perfectly understood.

THE COURT: All right. Thank you.

Mr. Allison, any questions from the defense?

MR. ALLISON: Just a timing issue, Your Honor.

I appreciate your order. However, it's my understanding of the law that, on a motion to deny a motion to compel arbitration, that is immediately appealable to the appellate level.

THE COURT: Well, the stay doesn't apply to that.

MR. ALLISON: I want to make sure my 30 days isn't threatened. I need -- if I need to do that, I just need to know -- we could stay the entry of the order, which would prevent me from having to worry about my appeal rights.

THE COURT: Okay. I like that option. I think that's a splendid option as opposed to others.

We can stay entry of the order. Yeah. Since it's fresh in everyone's minds, I would like the drafts on my desk, you know, within a week or two.

And I'm not trying to have people work unnecessarily, particularly when you're directed to a resolution event. On the other hand, I don't want this to be something that has to be dusted off and re-learned again 90 days from now if the resolution is unsuccessful.

But, yes, for purposes of challenging for appellate review this Court's decision to deny the request to order

arbitration, I don't want this order to affect the rights of the aggrieved.

So, Mr. Aman, any objection if we -- the Court doesn't enter this order; it's just deemed held in abeyance pending the settlement conference?

MR. AMAN: No objection, Your Honor.

THE COURT: Mr. Allison, does that address your concerns?

MR. ALLISON: Yes.

THE COURT: All right. So let me -- let's get some dates then.

Settlement conference, let's say by April 15th. That's 90 days from today, roughly. Tax day; right? An easy day to remember.

And then, a week or two after that I'm going to give you some proposed dates. If you can quickly at least preliminarily check your calendars and see if you're available; and, if not, we'll give you a new date. If you say yes now, and it turns out there's a conflict you were not aware of, we can pick a new date. But let me throw some proposed dates out there the last two weeks of April, see if that works.

Ms. DeGayner.

THE CLERK: Wednesday, April 21st, at 2:00 o'clock.

THE COURT: Okay. Let me start with plaintiff's counsel.

MR. AMAN: That works for us, Your Honor.

THE COURT: Thank you.

And defense counsel.

MR. ALLISON: I'm open that day, yes.

THE COURT: Okay. That will be the order of the Court. Status hearing at that time.

Go ahead, Mr. Allison.

MR. ALLISON: One more question.

THE COURT: Go ahead.

MR. ALLISON: I'm processing your -- you know, remember I have an owner UHS that I have to deal with, as well.

THE COURT: Well, they're not before me.

MR. ALLISON: May I involve them in the settlement conference?

THE COURT: Sure. At their discretion. I would certainly encourage it, but they're not under the Court's authority. They're not parties here, so I can't order them to be here.

Now, if you want to truthfully tell them that "Judge Breslow thinks it's a very good idea if they are available and could participate because there might be issues that

transcend this case," sure. I would think that would be a very good idea. And I will not preclude them. But I'm not ordering them because I don't have jurisdiction over them at this time.

MR. ALLISON: Okay. Thank you.

THE COURT: You're welcome.

All right. Show of hands. Anybody else with a question or comment that they'd like to put on the record?

All right. Well, thank you very much, counsel. That will conclude this hearing.

I wish everybody a pleasant rest of the afternoon. To you, your families, your staff, I hope you have a safe and healthy rest of the winter.

The Court will be in recess.

Have a nice afternoon.

MR. ALLISON: Thank you, Your Honor.

MS. HAMMOND: Thank you, Your Honor.

THE COURT: Thank you.

(Recess.)

STATE OF NEVADA)

COUNTY OF WASHOE)

I, ISOLDE ZIHN, a Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department 8 of the above-entitled court on Thursday, January 14, 2021, at the hour of 11:05 a.m. of said day, and took verbatim stenotype notes of the proceedings had upon the matter of PEEK BROTHERS CONSTRUCTION, Plaintiff, versus SR CONSTRUCTION, Defendant, Case No. CV20-01375, and thereafter reduced to writing by means of computer-assisted transcription as herein appears;

That the foregoing transcript, consisting of pages 1 through 46, all inclusive, contains a full, true and complete transcript of my said stenotype notes, and is a full, true and correct record of the proceedings had at said time and place.

Dated at Reno, Nevada, this 19th day of January, 2021.

/s/ Isolde Zihn
Isolde Zihn, CCR #87