

**THE SCHOOL BOARD OF OSCEOLA COUNTY, FLORIDA**

**CONSTRUCTION MANAGEMENT AGREEMENT**

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**CONSTRUCTION MANAGEMENT AGREEMENT**

This Construction Management Agreement (hereinafter the "Agreement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2008, between THE SCHOOL BOARD OF OSCEOLA COUNTY, FLORIDA, located at 817 Bill Beck Boulevard, Kissimmee, FL 34744 (hereinafter "Owner") and \_\_\_\_\_, located at \_\_\_\_\_ (hereinafter "Construction Manager").

WHEREAS, the Owner owns that certain parcel of land (hereinafter referred to as the "Site") having a street address of \_\_\_\_\_, Osceola County, Florida; and

WHEREAS, the Owner has retained the services of \_\_\_\_\_ (hereinafter referred to as the "Architect") to design the \_\_\_\_\_ (hereinafter referred to as the "Project"); and

WHEREAS, the Owner hereby retains the services of the Construction Manager to manage and construct the Project on the site as more particularly set forth in this Agreement; and

WHEREAS, the following exhibits are attached to this Agreement and incorporated herein by reference:

- Exhibit A – Truth-In-Negotiation Certificate
- Exhibit B – Youth Apprenticeship Vertical Construction Program
- Exhibit C – GMP and Amendment No. 1 (to be attached at a later date)
- Exhibit D – Owner Direct Material/Equipment Purchase Program
- Exhibit E – Supplemental Conditions of Contract
- Exhibit F – Other Pre-Construction Services

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**ARTICLE 1: GENERAL AGREEMENT PROVISIONS**

- 1.1 Recitals. The recitals set forth in the Whereas clauses are incorporated by reference and made a part of this Agreement.
- 1.2 Relationship of Parties. The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services, and use the Construction Manager's best efforts to perform the Project in an expeditious and economical manner

consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Construction Manager and other persons or entities employed by the Owner for the Project. Nothing contained in the Contract Documents shall be construed to create a contractual relationship between any other person or entity other than the Owner and Construction Manager.

- 1.3 The Contract Documents. The Contract Documents shall consist of this Agreement, the drawings and specifications and any addenda issued thereto, and modifications issued after execution of the Agreement. Any modification to this Agreement shall only be effective if it is reduced to writing, and duly executed by both parties, except a construction change directive shall be effective after approval and execution by Owner.
- 1.4 The term “Work” as used herein refers to all construction and other services required by the Contract Documents, including all labor, materials, equipment and services needed to complete the Project.
- 1.5 The term “Drawings” as used herein means the graphic and pictorial portions of the Contract Documents, which serve to show the design, location and dimensions of the Work to be performed.
- 1.6 The term “Specifications” as used herein means that portion of the Contract Documents which are the written requirements for the materials, equipment, systems, standards and workmanship for completion of the Work and performance of related services.
- 1.7 The term “provide” as used herein shall mean to furnish and install materials and equipment, together with all incidentals for a complete and ready to use item and system.
- 1.8 The general intent of the Contract Documents is to include all items necessary for the proper execution and completion of the scope of the Work by the Construction Manager. All Work mentioned or indicated in the Contract Documents shall be performed by the Construction Manager as part of this Agreement unless it is specifically indicated in the Contract Documents that such Work is to be done by others. In the event the Drawings or the Specifications disagree in themselves or with each other, the Construction Manager shall provide the better quality or better quantity of Work unless otherwise directed by a written addendum to the Agreement. In the event of discrepancies among the Contract Documents, the documents shall be construed according to the following priorities:

Highest Priority – Modifications  
Second Priority – Agreement  
Third Priority – Addenda – later date to take precedence  
Fourth Priority – Specifications  
Fifth Priority – Drawings

- 1.9 All indicates or notations which apply to one of a number of similar situations, materials or processes shall be deemed to apply to all such situations, materials or processes

wherever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

- 1.10 Where codes, standards, requirements and publications or public and private bodies are referred to in the Specifications, such references are to the latest revision prior to the date of receiving bids, except where otherwise indicated.
- 1.11 Where no explicit quality or standards for materials or workmanship are established for the Work, such Work is to be of good quality and what is reasonably inferable from the Drawings and consistent with the quality of the surrounding Work and of the construction of the Project generally.
- 1.12 All manufactured articles, materials, and equipment shall be applied, installed, connected, erected, used, cleaned, and conditioned in accordance with the manufacturer's written or printed directions and instructions unless otherwise indicated in the Contract Documents.
- 1.13 The mechanical, electrical and fire protection drawings are diagrammatic only, and are not intended to show the alignment, physical locations or configurations of such Work. Such Work shall be installed without additional cost to the Owner to clear all obstructions, permit proper clearances for the work of other trades, and present an orderly appearance where exposed. Prior to beginning such work, the Construction Manager shall prepare coordination drawings showing the exact alignment, physical location and configuration of the mechanical, electrical and fire protection installations and demonstrating to the Construction Manager's satisfaction that the installations will comply with the preceding sentence.
- 1.14 Exact locations for fixtures and outlets shall be obtained from the Architect as provided in Article 3 before the Work is roughed in. Work installed without such information from the Architect shall be relocated at the Construction Manager's expense.
- 1.15 Where the Work is to fit with existing conditions or Work to be performed by others, the Construction Manager shall fully and completely join the Work with such conditions or Work, unless otherwise specified.
- 1.16 Ownership and Use of Documents. The Drawings, Specifications and other documents prepared by the Architect, and copies thereof furnished to the Construction Manager, are for use solely with respect to this Project. They are not to be used by the Construction Manager, subcontractors, sub-subcontractors, or material suppliers on other projects, without the specific written consent of the Owner. The Construction Manager, subcontractors, sub-subcontractors, and material suppliers are granted only a limited license to use and reproduce applicable portions of the Drawings, Specifications, and other documents prepared by the Architect appropriate to and for use in the execution of their Work under the Contract Documents.

## **ARTICLE 2: OWNER'S RESPONSIBILITIES**

### 2.1 Information and Services

2.1.1 The Owner shall provide information in a timely manner regarding the requirements of the Project, including the Owner's objectives, constraints and criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements as reasonably requested by Construction Manager in writing.

2.1.2 The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies for changes in the Work and other cost which are the responsibility of the Owner.

#### 2.1.3 Structural and Environmental Tests, Surveys and Reports

2.2 Owner's Designated Representative. The Owner may designate a representative with the authority to approve matters contemplated in this Agreement where the monetary impact is less than \$10,000.00. This limit applies to each matter, and a matter may not be divided into separate matters or subparts to avoid the requirement of Owner approval.

2.3 Architect. The Owner has retained the Architect to provide basic architectural services, including normal structural, mechanical, and electrical engineering services, as described in the Owner's Agreement with the Architect. The Owner shall authorize and cause the Architect to provide those additional services, if any, which must necessarily be provided by the Architect for the preconstruction and construction phases of the Work. Such services shall be provided in accordance with time schedules agreed to by the Owner, Architect, and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's agreement with the Architect.

2.4 The Owner shall advise the Construction Manager of any known special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project.

2.5 Information or services required of the Owner by this Agreement shall be furnished by the Owner with reasonable promptness after receipt from the Construction Manager of a written request for such information or services. Construction Manager shall refer to the Drawings and Specifications for items to be provided by the Owner and installed by the Construction Manager.

2.6 The Construction Manager will be furnished, free of charge, 20 copies of the Drawings and Specifications for execution of the Work. Additional sets will be furnished at the cost of reproduction, postage and handling.

2.7 In the event the Construction Manager fails and refuses to correct any Work which is not in accordance with the requirements of the Contract Documents, or, fails and refuses to perform the Work in accordance with the Contract Documents, the Owner at the Owner's discretion may direct the Construction Manager to stop the Work or any portion thereof, until such time as the non-conforming Work has been corrected.

2.7.1 In the event the Construction Manager fails to perform the Work in accordance with the Contract Documents, within a seven (7) calendar day time period after receipt of written notice from the Owner with regard to such failure, the Owner may, without waiving its rights to pursue any and all other remedies, move forward to correct such deficiencies itself. In that event, the Owner will issue a construction change directive deducting from any and all payments due to the Construction Manager the cost of correcting such non-conforming Work, including any compensation to third parties for additional services and expenses incurred as a result of such failure by the Construction Manager. The method for determining the construction change directive value shall be determined solely by the Owner. In the event the payments due the Construction Manager are insufficient to pay for the construction change directive referenced above, then the Construction Manager shall immediately pay the difference to the Owner.

### **ARTICLE 3: CONSTRUCTION MANAGER'S RESPONSIBILITIES**

**A. Preconstruction Services.** At the Owner's sole discretion and upon the Owner's written direction, pursuant to a duly issued Work Order, the Construction Manager shall perform the Preconstruction Services. The Construction Manager shall coordinate the preparation of the Contract Documents by consulting with the Owner and the Architect regarding Drawings and Specifications as they are being prepared, and recommend alternate solutions whenever design details affect construction feasibility, cost or schedules, including without limitation, providing value engineering options. The Construction Manager shall promptly notify the Owner and Architect in writing of any apparent defects in the Contract Documents for any Project when it is discovered, as well as any apparent defects in the design documents for any Project, including without limitation, the Drawings and Specifications set forth in any Work Order affecting such Project.

3.1 In the Preconstruction Phase, the Owner shall furnish with reasonable promptness and at the Owner's expense, and the Construction Manager shall be entitled to rely upon the accuracy of such information, reports, surveys, Drawings and tests described in subparagraph 3.1-3.1.5 except to the extent that the Construction Manager knows of any inaccuracy, and the following:

3.1.1 Reports, surveys, Drawings and tests concerning the conditions of the Site which are required by law.

3.1.2 Surveys describing physical characteristics, legal limitations and utility locations for the Project, and a written legal description of the Site. The surveys and legal descriptions shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining 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.

3.1.3 The services of geotechnical engineers when such services are reasonably requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, including necessary operations for anticipating sub-soil conditions, with reports and appropriate professional recommendations.

3.1.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.

3.1.5 The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.

3.2 The Construction Manager shall coordinate and integrate the Milestone Schedule with the services and activities of the Owner and Architect. As the design of any Project proceeds, the Construction Manager shall promptly notify the Owner and Architect, in writing, if circumstances indicate that the Milestone Schedule may not be met, and the Construction Manager shall make appropriate recommendations to the Owner and Architect regarding same. As part of its scheduling responsibilities, the Construction Manager shall recommend to the Owner and Architect a schedule for procurement of long-lead time items which may constitute part of the Work. The Construction Manager shall expedite the delivery of such long-lead time items. The Construction Manager shall update this schedule of long-lead items periodically, as required by the Owner, to reflect any changes to the Milestone Schedule accepted by the Owner.

3.3 The Construction Manager, if requested by the Owner, shall provide a preliminary evaluation of the Owner's Project program and budget. At the request of the Owner, the Construction Manager shall prepare and deliver to the Owner and the Architect, Construction Estimates as follows:

3.3.1 A preliminary Construction Estimate utilizing area, volume or similar conceptual estimating techniques within twenty one (21) days of the Construction Manager's receipt of the Phase I Schematic Design documents determined by the Owner to be 100% complete.



3.3.2 An itemized and detailed Construction Estimate with supporting data along with a Memorandum of Changes within seven (7) days of the Construction Manager's receipt of the Phase II Design Development documents determined by the Owner to be 100% complete. Then, if the Owner and the Architect agree with such Memorandum of Changes, the Architect shall incorporate the changes described in the Memorandum of Changes into the Phase II Design Development documents. The Construction Manager hereby expressly acknowledges that by preparing the Memorandum of Changes, the Construction Manager represents to the best of its knowledge to the Owner that the Phase II Design Development documents (as modified by the Memorandum of Changes) and other Contract Documents related to the Project are consistent, feasible and sufficient to construct the entire scope of the Work within the Construction Estimate and with the Milestone Schedule.

3.3.3 A further refined Construction Estimate setting forth any adjustments to the previously submitted Construction Estimate along with a Memorandum of Changes within thirty (30) days of the Construction Manager's receipt of the Phase III Contract Documents determined by the Owner to be 75% complete. Then, if the Owner and the Architect agree with such Memorandum of Changes, the Architect shall incorporate the changes described in the Memorandum of Changes into the Phase III Contract Documents. The Construction Manager hereby expressly acknowledges that by preparing a Memorandum of Changes, the Construction Manager represents to the best of its knowledge to the Owner that the Phase III Contract Documents (as modified pursuant to the Memorandum of Changes) and other Contract Documents related to the Project are consistent, feasible and sufficient to contract the entire scope of the Work within the Owner's Estimate and within the Milestone Schedule.

3.4 If any Construction Estimate submitted by the Construction Manager exceeds any previously approved Construction Estimate or the Owner's budget, if any, the Construction Manager shall make appropriate recommendations to the Owner, including without limitation, recommendations to modify the design, to reduce the scope of Work and to reduce construction costs. In addition, the Construction Manager shall promptly advise the Owner of any adjustments to any Construction Estimate which would cause the Project cost to exceed the Construction Estimate or the Owner's budget, if any, and shall promptly make recommendations for corrective action.

3.5 The Construction Manager shall meet with the Owner and others, at such times, and with such frequency, as the Owner may require during the Preconstruction phase with respect to each Project. The process of meeting, reviewing design documents, Drawings and Specifications and submitting, revising and resubmitting Construction Estimates is included in the Preconstruction Services and the cost of same is included in the Compensation for Preconstruction Phase Services set out below, for each Project subject to Preconstruction Services.

3.6 Compensation for Preconstruction Phase Services.

3.6.1 For the services described in Article 3.A., the Construction Manager's compensation shall be calculated as a not to exceed fee of \$\_\_\_\_\_, to be paid on a monthly basis. Each payment shall be based on actual Work performed during the month.

3.6.2 Compensation for preconstruction phase services shall be equitably adjusted if such services extend beyond \_\_\_\_\_, or if the originally contemplated scope of services is significantly modified.

3.7 Payments. The Owner agrees to make payments by the 15<sup>th</sup> of the month providing the Construction Manager processes the invoices and delivers same to the Facilities Department by the 20<sup>th</sup> of the preceding month.

**B. Construction Services.**

3.8 General. The construction phase shall commence on the earlier of:

3.4.1 The Owner's acceptance of the Construction Manager's GMP proposal and issuance of a notice to proceed, or

3.4.2 The Owner's first written authorization to the Construction Manager to  
(a) award a subcontract, or  
(b) undertake Work with the Construction Manager's own forces, or  
(c) issue a purchase order for materials or equipment required for the Work.

3.9 The Construction Manager shall cause all Work required by the Contract Documents to be properly completed in accordance with the terms of the Contract Documents and within the Contract Time, subject to the GMP.

3.10 Guaranteed Maximum Price Proposal and Contract Time

3.10.1 When the Construction Documents are 98% complete, Construction Manager will propose a GMP, which is the total not-to-exceed estimate of the cost of Work and the Construction Manager's fee, and which is attached hereto as **Exhibit "C."** The GMP shall include all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and any other services necessary for the proper execution and completion of the Work. Except as provided in this Article 3 and Exhibit "C", the Cost of the Work shall not include:

3.10.1.1 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.

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

- 3.10.1.3 Off-site overhead and general expenses
- 3.10.1.4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
- 3.10.1.5 Any costs not specifically and expressly described in this Article 3 or Exhibit "C".

3.10.2 After the Construction Manager proposes a GMP, the Architect shall not modify the Construction Documents to include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment. If these modifications are required, all of which, if required, shall be incorporated by change order

3.10.3 The GMP cost of Work shall include the Construction Manager's contingency, which is defined as a sum estimated by the Construction Manager to cover unforeseen costs during construction. The Owner retains exclusive use of the contingency, and all expenditures must be approved in writing by the Owner.

3.10.4 Basis of Guaranteed Maximum Price. The Construction Manager shall include with the GMP proposal a written statement of its basis, which shall include:

- 3.10.4.1 A list of the Drawings and Specifications, including all addenda thereto and the conditions of the Contract, which were used in preparation of the GMP proposal.
- 3.10.4.2 A list of allowances and a statement of their basis.
- 3.10.4.3 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the GMP proposal to supplement the information contained in the Drawings and Specifications
- 3.10.4.4 The proposed GMP, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the fee that comprise the GMP.
- 3.10.4.5 The Date of Substantial Completion upon which the proposed GMP is based, and a schedule of the Construction Documents issuance dates upon which the date of substantial completion is based.

3.10.5 Included within the GMP is the Construction Manager's fee. The Construction Manager's fee is hereby established as \_\_\_\_\_% (the "Construction Manager's Fee") (to be determined at the time of the GMP). The sum of the cost of the Work and the Construction Manager's Fee shall not exceed the GMP also referred to as the Contract

Sum. The Construction Manager's Fee shall constitute Construction Manager's total compensation for profit and overhead (including General Conditions).

3.10.6 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in the GMP. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

3.10.7 The Construction Manager shall meet with the Owner and Architect to review the GMP proposal and the written statement of its basis. In the event that the Owner or Architect discovers any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the GMP proposal, its basis or both.

3.10.8 Unless the Owner accepts the GMP proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the GMP proposal shall not be effective without written acceptance by the Construction Manager.

3.10.9 Prior to the Owner's acceptance of the Construction Manager's GMP proposal and issuance of a notice to proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the cost of the Work, except as the Owner may specifically authorize in writing.

3.10.10 Upon acceptance by the Owner of the GMP proposal, the GMP and its basis shall be set forth in Amendment No. 1 to this Agreement. The GMP shall be subjected to additions and deductions by a change in the Work as provided in the Contract Documents and the date of substantial completion shall be subject to adjustment as provided in the Contract Documents.

3.10.11 The Contract Sum is guaranteed by the Construction Manager not to exceed the amount provided in Amendment No. 1 attached hereto as **Exhibit "C"** to this Agreement, subject to additions and deductions by changes in the Work provided in the Contract Documents. Costs which would cause the Contract Sum to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner.

3.11 Changes in Work. Adjustments to the GMP because of changes in the Work shall be determined by any of the methods listed in Article 7 of this Agreement.

3.12 Discounts, Rebates and Refunds. Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner. Trade discounts, rebated, refunds, and amounts received from sales of surplus materials and equipment shall accrue to the Owner and the Construction Manager shall make provisions so they can be secured.

- 3.13 All tests, inspections and approvals of portions of the Work required by the Contract Documents or any applicable laws, ordinances, rules, regulations or orders of public authorities having jurisdiction, shall be made at an appropriate time. The Construction Manager shall be responsible for making arrangements for such tests, inspections and approvals with an independent testing laboratory acceptable to the Owner, or with the appropriate public authority. The Construction Manager shall give the Architect timely prior notice of the date, time and place of the tests or inspections to be made so that the Architect may be in attendance. In the event the Architect, Owner or public authority having jurisdiction determine that portion of the Work require additional testing, inspection or approval, the Owner must approve such additional testing, inspection or approval in writing. The Construction Manager shall make arrangements for such additional testing, inspection or approval, and give timely prior notice to the Architect so that the Architect may observe such procedures. In the event the testing, inspection or approval described in this subparagraph reveals the failure of portions of the Work to be in compliance with the requirements of the Contract Documents, the Construction Manager shall bear all costs of such non-conforming Work, including the additional testing, inspection or approval, and the Architect's expenses.
- 3.14 The Construction Manager shall obtain and deliver promptly to the Architect any occupancy permit and any certificates of final inspection of any part of the Construction Manager's Work and operating permits for any mechanical apparatus, such as elevators, escalators, boilers, and air compressors, which may be required by law to permit full use and occupancy of the premises by the Owner. Receipt of such permits or certificates by the Architect shall be a condition precedent to substantial completion of the Work unless the certificates stated herein are withheld for reasons that are neither the fault nor the negligence of the Construction Manager.

**C. Other Responsibilities.**

- 3.15 Accounting Records and Audit. The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Contract; the accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to the Construction Manager's records, books, correspondence, instructions, Drawings, receipts, subcontracts, purchase orders, vouchers, memoranda, and other data relating to this Project for audit purposes, and the Construction Manager shall preserve these records, documents and data for a period of four years after final payment, or for such longer period as may be required by law. The Construction Manager shall require all of its subcontractors likewise to retain such records, documents and data. If the Construction Manager receives notification of a dispute or the commencement of litigation regarding the Project within this four-year period, the Construction Manager shall continue to maintain all Project records until final resolution of the dispute or litigation. Upon seven calendar days' written notice, from the date of this Agreement to the latest date described in the preceding two sentences, the Construction Manager shall make its records available during normal business hours to the Owner or its authorized

representative(s). Owner and its authorized representative(s) shall be entitled to inspect, examine, review and copy the Construction Manager's records at the Owner's reasonable expense, within adequate work space at the Construction Manager's facilities. Failure by the Construction Manager to supply substantiating records shall be reason to exclude the related costs from amounts which might otherwise be payable by the Owner to the Construction Manager pursuant to this Agreement.

- 3.16 The Construction Manager is solely responsible for reviewing and comparing the Contract Documents with each other and shall immediately report to the Architect any and all errors, inconsistencies or omissions. In the event the Construction Manager performs any Work with the knowledge that it involves an error, inconsistency or omission in the Contract Documents, the Construction Manager shall be responsible for such erroneous, inconsistent, or omitted Work. The Construction Manager is also responsible for taking such field measurements as are necessary in order to verify field conditions and to compare such field measurements and conditions with the Contract Documents. Any and all errors, inconsistencies or omissions shall be immediately reported to the Architect.
- 3.17 The Construction Manager shall be solely responsible for supervising and directing the Work, and shall have sole responsibility for determining appropriate construction means, methods, techniques, sequences and procedures, and for coordinating the Work under the Contract Documents. The Construction Manager shall be solely responsible to the Owner for the acts and omissions of all entities or persons performing or supplying any portion of the Work for which the Construction Manager has contracted.
- 3.18 The Construction Manager is not relieved of its obligations to perform the Work in accordance with the Contract Documents by any activity of the Architect, unless such change to the Work has been reduced to writing and executed by the Owner.
- 3.19 Warranty. The Construction Manager hereby warrants to the Owner that all materials and equipment furnished under the Agreement will be of good quality and new, and that the Work performed will be free from any and all defects and will be in conformity with the requirements of the Contract Documents. All Work not conforming to these requirements may be declared defective by the Owner. If requested, the Construction Manager shall furnish evidence to the satisfaction of the Owner of the quality of the materials and equipment supplied. The warranty provided in this paragraph shall be in addition to and not in limitation of any other warranty required by the Contract Documents or otherwise prescribed by law. Prior to Final Payment the Construction Manager shall procure and deliver to the Architect and Owner all special warranties required by the Contract Documents.
- 3.20 In no case shall a substitution be granted where the Owner requires a sole source item to match existing School District standards.
- 3.21 In requesting approval of deviations or substitutions, the Construction Manager shall provide evidence leading to a reasonable certainty that the proposed substitution or

deviation will provide a quality of result at least equal to that otherwise attainable. If, in the opinion of the Architect or Owner, the evidence presented by the Construction Manager does not provide a sufficient basis for such reasonable certainty, the Architect may reject such substitution or deviation without further investigation. The Architect shall not unreasonably reject the request of the Construction Manager.

- 3.22 The contract documents are intended to produce a building of consistent character and quality of design. All components of the building including visible items of mechanical and electrical equipment have been selected to have a coordinated design in relation to the overall appearance of the building. The Architect shall judge the design and appearance of proposed substitutes on the basis of their suitability in relation to the overall design of the project, as well as for their intrinsic merits. The Architect will not approve as equal to materials specified proposed substitutes which, in the Architect's opinion, would be out of character, obtrusive, or otherwise inconsistent with the character or quality of design of the Project. In order to permit coordinated design of color and finishes the Construction Manager shall, if required by the Architect, furnish the substituted material in any color, finish, texture, or pattern which would have been available from the manufacturer originally specified, at no additional cost to the Owner.
- 3.23 The Construction Manager shall pay all applicable sales, consumer, use and similar taxes for the Work which are legally required.
- 3.24 No city or county permits or inspection fees are required on school property. The Owner will pay costs of any impact, pollution control, any and all state and federal environmental permits including but not limited to clean water act permits, or connection fee charged to cover costs of central plants and main trunk line. When the Contract Documents require connection from the Work into utility lines or streets, the Construction Manager shall pay all costs of such connections, including any required permits or inspection fees, regardless of whether Work is done by the Construction Manager or by the utility supplier. Permits for such Work may need to be coordinated by the Architect for permit application.
- 3.25 In-progress inspections by city or county officials or the inspectors are not required on school property. State certified inspectors or representative employed by the Owner will check for compliance with applicable codes and monitor the course of construction on the Owner's behalf. This inspector may call to the Construction Manager's attention, Work which is considered to be not in accordance with the Drawings and Specifications, and therefore unacceptable. The Construction Manager will either repair or replace such construction, or appeal to the Architect for a ruling. The Architect will be the final authority as to acceptability of Work, and the inspector will not by inference, be accepting Work on the Architect's behalf. The inspector may from time to time request changes in the Work which will enhance the job or remove an undesirable condition. In such instances, the Owner's request will be in writing to the Construction Manager through the Architect.

- 3.26 The Construction Manager shall comply with and give notices required by all applicable laws, ordinances, rules, regulations and lawful orders of public authorities with regard to the performance of the Work. In the event the Construction Manager observes that any portions of the Contract Documents are not in compliance with the above, the Construction Manager shall immediately notify the Architect and Owner in writing of such variances. In the event the Construction Manager performs any Work with knowledge that it is at variance with applicable laws, ordinances, rules, regulations and lawful orders of public authorities without giving such notice, then the Construction Manager shall be responsible for the attributable costs for such Work.
- 3.27 The Construction Manager shall employ a competent superintendent who shall be the Construction Manager's representative, reasonably acceptable to the Owner, and necessary assistants who shall be in attendance at the Project Site full time during the progress of the Work until the date of substantial completion, and for such additional time thereafter as the Owner and Construction Manager both agree to be necessary for the expeditious completion of the Work. The Construction Manager shall remove the superintendent if requested to do so in writing by the Owner, and shall promptly replace her/him with a competent person reasonably acceptable to the Owner.
- 3.28 The Construction Manager shall retain a competent registered professional engineer or registered land surveyor, acceptable to the Architect, who shall establish the exterior lines and required elevations of all buildings and structures to be erected on the site and shall establish sufficient lines and grades for the construction of associated Work such as, but not limited to, roads, utilities and site grading. The engineer or land surveyor shall certify the actual location of the constructed facilities in relation to property lines, building lines, easements, and other restrictive boundaries.
- 3.29 The Construction Manager shall establish the building grades, lines, levels, column, wall and partition lines required by the various subcontractors in laying out their Work.
- 3.30 The Construction Manager shall arrange for and attend job meetings with the Architect, Owner and such other persons as the Architect and Owner may from time to time wish to have present. The Construction Manager shall be responsible for recording and distributing meeting minutes. The Construction Manager shall be represented by a principal, project manager, general superintendent or other authorized main office representative, as well as by the Construction Manager's own superintendent. An authorized representative of any subcontractor or sub-subcontractor shall attend such meetings if the representative's presence is required by the Architect or Owner. Such representatives shall be empowered to make binding commitments on all matters to be discussed at such meetings, including costs, payments, change order, time schedules, manpower and construction change directive, unless the above listed items require approval by the Owner. Any notices required under the Agreement may be served on such representatives.



- 3.31 The superintendent as designated by the Construction Manager and accepted by the Owner and Architect, shall not be reassigned from the job prior to final completion, except with the approval of the Owner.
- 3.32 The Construction Manager shall be required to prepare a schedule of submittals for the Architect's approval which is coordinated with the construction schedule, allowing sufficient time for architectural review. The submittals shall reference progress schedule dates for installation and Specification section. The Owner shall be provided with one copy of the accepted schedule of submittals for the Owner's records.
- 3.33 The Construction Manager shall maintain at the Project site one record copy of the Drawings, Specifications, addenda, change orders and any other modifications, which serve to indicate all current changes, in addition to all approved shop drawings, product data samples, and all other similar submittals. The Construction Manager shall maintain as built drawings at the Project site. The as built drawings shall document all changes in the Drawings and Specifications made during the course of the Work. The as built drawings shall be in sufficient form and detail to permit the Owner to maintain and repair the Work after its completion. At the completion of the Work, these items shall be delivered to the Architect for transmittal to the Owner.
- 3.34 The Construction Manager shall review, approve and submit to the Architect any and all shop drawings, product data, samples and any other similar submittals which are required by the Contract Documents, and allow a reasonable amount of time for review by the Architect, without impacting the Work schedule. The Construction Manager shall not perform any part of the Work relating to the shop drawings, product data, samples or any other similar submittals, until such items have been approved by the Architect.
- 3.35 The Architect's approval of any shop drawing, product data, sample or other similar submittal does not in any way relieve the Construction Manager of responsibility for deviations from the requirements of the Contract Documents. Further, the Construction Manager shall not be relieved of responsibility for any errors or omissions in the shop drawings, product data, samples or any other similar submittals simply by the Architect's approval. In the event a deviation is requested, the Construction Manager shall specifically identify the deviation in writing to the Architect at the time of the submittal and the Architect is required to respond in writing to approve the specified deviation.
- 3.36 By approving and submitting shop drawings, product data, samples, and similar submittals, the Construction Manager represents that the Construction Manager has determined and verified all dimensions, quantities, field dimensions, relations to existing Work, coordination with Work to be installed later, coordination with information on previously accepted shop drawings, product data, samples, or similar submittals and verification of compliance with all the requirements of the contract documents. The accuracy of all such information is the responsibility of the Construction Manager.
- 3.37 When professional certification of performance criteria of materials, systems or equipment is required by the contract documents, the Owner shall be entitled to rely upon

such certifications, and neither the Owner nor the Architect shall be expected to make any independent examination with respect thereto.

- 3.38 The right of possession of the premises and the improvements made thereon by the Construction Manager shall be retained at all times by the Owner. The Construction Manager's right to enter arises solely from the permission granted by the Owner under the Contract Documents. The Construction Manager shall confine the Construction Manager's equipment, the storage of materials and the operations of the Construction Manager's workmen to the Project site and according to the directions of the Architect, and shall not unreasonably encumber the premises with the Construction Manager's materials.
- 3.39 The Construction Manager shall keep the premises, the surrounding area and property free from all waste, construction debris, or trash. At the completion of the Work, the Construction Manager shall remove all tools, construction equipment, machinery and surplus materials. In the event the Construction Manager fails to keep the premises, surrounding area and property in a clean condition, the Owner may do so and charge the cost back to the Construction Manager.
- 3.40 Immediately prior to the Architect's inspection for substantial completion, the Construction Manager shall completely clean the premises utilizing a licensed cleaning service. Concrete and ceramic surfaces shall be cleaned and washed. Resilient coverings shall be cleaned, waxed and buffed. Woodwork shall be dusted and cleaned. Sash, fixtures and equipment shall be thoroughly cleaned. Stains, spots, dust, marks and smears shall be removed from all surfaces. Hardware and all metal surfaces shall be cleaned and polished. Glass and plastic surfaces shall be thoroughly cleaned by professional window cleaners. All damaged, broken or scratched glass or plastic shall be replaced by the Construction Manager at the Construction Manager's expense.

#### **ARTICLE 4: ADMINISTRATION OF THE AGREEMENT**

- 4.1 The Architect will provide administration of this Agreement and will serve as the Owner's representative during the Preconstruction Phase, during the Construction Phase, and during any corrective Work.
- 4.2 The Construction Manager shall endeavor to communicate with the Owner through the Architect. Any needed communications by and with subcontractors or material suppliers shall be through the Construction Manager to the Architect.
- 4.3 The Architect shall be responsible for reviewing the Construction Manager's applications for payment and certifying amounts as due. Further, the Architect on behalf of the Owner shall have the authority to reject Work which the Architect determines does not conform to the Contract Documents. However, this authority does not in any respect serve to release or otherwise discharge the Construction Manager's responsibility with regard to performing the Work in compliance with the Contract Documents.

- 4.4 The term “claim” as used herein shall mean a demand by either the Construction Manager or Owner seeking an adjustment to or interpretation of an Agreement term, payment of money, extension of time, or any other relief with regard to the terms of this Agreement or the Construction Documents. All claims are required to be made in writing by the parties asserting the claim.
- 4.4.1 Claims arising prior to final payment or the earlier termination of the Agreement shall be initially referred to the Architect for action.
- 4.4.2 All claims by either party must be made within 21 days after the incident giving rise to the claim or within 21 days after the complaining party first knew or should have known the condition giving rise to the claim, whichever is later. Pending final resolution of any claim, unless otherwise mutually agreed between the parties in writing, the Construction Manager shall proceed with the performance of the Work and the Owner shall proceed to make uncontested payments in accordance with the Contract Documents.
- 4.4.3 The making of any progress payment or a final payment shall not in any respect constitute a waiver of any claim by the Owner.
- 4.5 If the Construction Manager encounters conditions at the site which are sub-surface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents, or unknown physical conditions of an unusual nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities as set out in the Contract Documents, then the Construction Manager shall immediately provide notice to the Owner and Architect of the conditions, no later than 21 days after the first observance of the condition. After investigation, the Architect will determine if conditions differ materially, and what, if any, adjustment is needed to the Contract Sum or contract time. The Architect’s findings shall be reduced to writing and provided to both the Owner and Construction Manager. Either party may submit a claim as described in this Article in opposition to the Architect’s determination within 21 days after the Architect has given notice of its decision.
- 4.6 In the event the Construction Manager wishes to make a claim for an increase in the GMP, the Construction Manager shall provide written notice prior to proceeding to execute the Work. However, prior notice is not required for claims involving an immediate emergency endangering health, safety, welfare or property, but shall be provided as soon as possible.
- 4.7 In the event the Construction Manager wishes to make a claim for an increase in the contract time, the Construction Manager is required to provide written notice. The Construction Manager shall have the burden of demonstrating the effect of the claimed delay on the contract time, and shall furnish the Architect with such supporting documents as the Architect may reasonably require. In the event adverse weather conditions are the basis for a claim for additional time, such claim shall be documented

by data, establishing that the weather condition was abnormal, could not have been reasonably anticipated, and had an adverse effect on the scheduled Work.

4.8 In the event either party to this Agreement suffers injury or damage to person or property as a result of an act or omission of the other party, of any of the other party's employees or agents, written notice of such injury or damage shall be provided to the other party immediately, and in no event later than 21 days after the injury or damage. In the event there is to be a claim for additional cost or time, it shall be provided as described in this Article.

4.9 The Architect shall review claims and may (1) defer any action with respect to all or any part of a claim and request additional information from either party; (2) decline to render a decision for any reason which the Architect deems appropriate; or (3) render a decision on all or a part of the claim within ten days from the date of the claim. The Architect shall notify the parties in writing of the disposition of such claim. If the Architect decides that the Work relating to such claim should proceed regardless of the disposition of such claim, the Architect shall issue to the Construction Manager a written order to proceed.

The Construction Manager shall proceed as instructed, and all rights of both parties with respect to such claim shall be deemed to have been reserved.

4.10 Either party may pursue any claim against the other in the Court having jurisdiction in Osceola County, Florida, as provided in Article 15 of this Agreement, provided the party has first complied with the provisions of this Article 4 with respect to such claim.

#### **ARTICLE 5: SUBCONTRACTORS AND MATERIAL SUPPLIERS**

5.1 The Construction Manager shall continue to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors, including material suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner knows of any objection to such subcontractor or material supplier. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed subcontractors or material suppliers, nor shall it waive the right of the Owner or Architect later to object to or reject any proposed subcontractor or supplier.

5.2 Equal Employment Opportunity and Affirmative Action. The Construction Manager shall comply with applicable laws, regulations, and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

5.3 Youth Apprenticeship Vertical Construction Program. The Owner desires to use vertical construction projects as a vehicle for providing on the job training for youth apprentices in the construction trades. The Construction Manager shall comply with the

requirements of the School District of Osceola County Youth Apprenticeship Vertical Construction Program attached hereto as **Exhibit “B.”**

- 5.4 The Construction Manager shall not subcontract with any proposed person or entity to whom the Owner or Architect has made a reasonable and timely objection. If the Owner or Architect has a reasonable objection to a person or entity proposed by the Construction Manager, the Construction Manager shall promptly propose another person or entity for that portion of the Work. Further, the Construction Manager shall not change a subcontractor, person or entity previously selected, in the event the Owner or Architect makes a reasonable objection to such change.
- 5.5 The Construction Manager is required to enter into written agreements with each subcontractor who will perform any portion of the Work on the Project. The subcontract agreement shall incorporate the terms of the Contract Documents, and the terms of this Agreement. Further, where appropriate, the Construction Manager shall require each subcontractor to enter into similar agreements with sub-subcontractors and material suppliers.
- 5.6 Each subcontract agreement for a portion of the Work shall be assignable by the Construction Manager to the Owner in the event of a termination of this Agreement by the Owner with or without cause, and only for those subcontract agreements which the Owner accepts by notifying the subcontractor in writing.

#### **ARTICLE 6: CONSTRUCTION BY OWNER**

- 6.1 The Owner has the right to perform construction work related to the Project with the Owner’s own employees, or by contracting with other individuals or entities. The Owner shall be responsible for coordination of activities of Owner’s own employees or of any separate contractors, with the Work performed by the Construction Manager. The Construction Manager shall cooperate or participate with any separate contractor and the Owner in reviewing and coordinating construction schedules.
- 6.2 The Construction Manager shall not interfere with either the Owner or any separate contractor’s ability to store materials and equipment, or perform construction work. In the event the Construction Manager’s Work depends upon, or connects to, the construction by the Owner or any separate contractor, the Construction Manager is required, prior to proceeding with that portion of the Work, to immediately report to the Architect any and all discrepancies or defects which would render it unsuitable for continuation of the Work. In the event the Construction Manager fails to report, such failure shall be deemed an acceptance of the Work performed by the Owner or separate contractor by the Construction Manager and that the Work is fit and proper.
- 6.3 Any and all costs caused by delays or by improperly timed or coordinated activities, or defective construction Work, shall be borne by the party responsible. The Construction Manager shall promptly repair any damage caused by the Construction Manager to any Work or to the property of the Owner or any separate contractor.

## **ARTICLE 7: CHANGES TO THE WORK**

7.1 Changes to the Work may be accomplished by preparation of and execution of a change order or construction change directive. Change orders or construction change directives will be preceded by a change proposal request initiated by the Architect. The Construction Manager shall provide prices and details within 30 days of receipt of a change proposal request, and the Architect shall forward the completed change proposal request to the Owner within 15 days after receipt of the information provided by the Construction Manager.

7.2 For the purposes of this Agreement, a change order is a written document prepared by the Architect, and executed by the Owner, Construction Manager, and Architect, setting out in detail the specific change in the Work, the dollar amount of any adjustment to the GMP, if any, and any adjustment to the contract time.

7.3 For the purposes of this Agreement, a construction change directive is a written document prepared by the Architect and executed by the Owner, which serves to change the work and provides for any proposed adjustment in the GMP or contract time. A construction change directive shall be used in the event the parties to this Agreement cannot reach an agreement on the terms of a change order.

7.3.1 Upon request of the Owner or the Architect, the Construction Manager shall, without any increase in the GMP, submit to the Architect within 15 days, in such form as the Architect may require, an accurate written estimate of the cost of any proposed Work set forth in the construction change directive.

7.3.2 The estimate shall indicate the quantity and unit cost of each item of materials, and the number of hours of work and hourly rate for each class of labor, as well as the description and amounts of all other cost chargeable under the terms of this subparagraph. Unit labor costs for the installation of each item of materials shall be shown if required by the Architect. The Construction Manager shall promptly revise and resubmit such estimate if the Architect determines that it is not in compliance with the requirement of this Article, or that it contains errors of fact or mathematical errors. If required by the Architect, in order to establish the exact cost of new work added or of previously required work omitted, the Construction Manager shall obtain and furnish to the Architect bona fide proposals from recognized suppliers for furnishing any material included in such Work. Such estimates shall be furnished promptly so as to occasion no delay in the Work, and shall be furnished at the Construction Manager's expense. The Construction Manager shall state in the estimate any extension of time required for the completion of the Work if the change or extra work is ordered. Notwithstanding any other provision of this Agreement, and without limitation, the Construction Manager shall obtain and maintain: (i) documentation that clearly identifies, and permits evaluation by School Board of, the mark up on change orders; (ii) supporting documentation for change orders that reports detailed and specific amounts for labor, materials and equipment charges; and (iii) supporting documentation showing labor

burden percentages, if applicable and if specifically provided for in writing by School Board.

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, as selected by the Owner.

- (a) By unit prices stated in the Contract Documents or otherwise mutually agreed upon.
- (b) By cost and percentages estimated by the Construction Manager as define in this subparagraph and accepted by the Owner. The Construction Manager's estimate shall become a fixed price which shall not be changed by any variation in the actual cost of executing the Work covered by the change.
- (c) By actual cost determined after the Work covered by the change is completed, plus percentage.
- (d) By submission to a Court, which shall determine the fair value of the work covered by the change.

As used in this subparagraph, "cost" shall mean the estimated or actual net increase or decrease in cost to the Construction Manager, subcontractor, or sub-subcontractor for performing the work covered by the change, including actual payments for materials, equipment rentals, expendable items, wages and associated benefits to workmen and to supervisors employed full time at the site, insurance bonds and other provable direct costs, but not including any administrative, accounting, or other indirect or overhead costs, or any wages or benefits of supervisory personnel not assigned full time to the site, or any amount of profit or fee to the Construction Manager, subcontractor or sub-subcontractor.

As used in this subparagraph, "percentage" shall mean an allowance to be added to or subtracted from the cost in lieu of overhead and profit and of any other expense which is not included in the cost of the Work covered by the change, as defined above. Percentage for the Construction Manager, a subcontractor, a sub-subcontractor or any other lower tier subcontractors for any work performed by their own forces shall be a maximum of 15% of any net increase, and 5% of any net decrease when the decrease results in a reduction of overhead requirements. The maximum percentage of 15% as applied to subcontractors shall be a cumulative percentage, inclusive of sub-contractor, sub-subcontractors and other subordinate contracting parties. In the event the Construction Manager does not perform any of the Work with its own forces, the percentage for the Construction manager shall be the same percentage increase or decrease as the Construction Manager Fee set out in paragraph 3.10.5 above.

- 7.4 When in the reasonable judgment of the Architect a series of construction change directives or change orders effect a single change, percentage shall be calculated on the cumulative net increase or decrease in cost, if any.
- 7.5 Notwithstanding the inclusion of unit prices in the Contract Documents, it shall be the Owner's option to require the cost of any change to be determined by one of the other methods stated in 7.3.3. If the Owner elects to determine the cost of the change to the Work by unit prices and the nature of the work is such that it cannot readily be measured after the completion of such work or any subsequent work, the Construction Manager shall keep daily records, available at all times to the Architect for inspection, of the actual quantities of such work put in place, and delivery receipts or other adequate evidence, indicating the quantities of materials delivered to the site for use in such unit price work, and distinguishing such from other similar material delivered for use in work included in the GMP.
- 7.6 If Owner elects to determine the costs of the work as provided in paragraph 7.3.3 (c) or (d) ,or if the method of determining the costs has not been established before the Work is begun, the Construction Manager shall keep detailed daily records of labor and materials costs applicable to the work.
- 7.7 Upon receipt of a construction change directive, the Construction Manager shall promptly proceed with the change in the Work. In the event the Owner and Construction Manager do not agree with the adjustment in the contract time as a result of the construction change directive, the dispute shall be referred to the Architect for determination. Once the Owner and Construction Manager reach agreement concerning the adjustment in the contract time, such agreement shall be reduced to writing and executed in an appropriate change order.
- 7.8 The Architect shall have the authority to order minor changes in the Work which do not involve any adjustment to the GMP or the contract time, and that are consistent with the original intent of the Contract Documents. Any such minor changes shall be reduced to writing and the Construction Manager shall promptly carry out the Work.

## **ARTICLE 8: TIME**

- 8.1 For the purposes of this Agreement, the phrase "contract time" shall mean the period of time provided in the Contract Documents for substantial completion of the Work. The date of commencement of the Work is the date established in a separate written document, issued by the Owner, authorizing the Construction Manager to commence the Work. The date of substantial completion is the date certified by the Architect and accepted by the Owner.
- 8.2 The Construction Manager shall promptly proceed with the Work and achieve substantial completion within the agreed upon contract time.



- 8.3 Within 30 working days after award of the contract, the Construction Manager shall submit to the Architect a progress schedule for each class of work included in the schedule of values, broken down to a level of detail so that the Work can be properly monitored by the Owner, Construction Manager and Architect.
- 8.4 If the Architect has determined that the Construction Manager should be permitted to extend the time for completion, the dates in the progress schedule shall be adjusted accordingly to retain their same relationship to the adjusted date of substantial completion, and the dollar value of work to be completed as of the first of each month shall be adjusted prorata.
- 8.5 Nothing herein shall limit the Owner's right to liquidated or other damages for delays by the Construction Manager or to any other remedy which the Owner may possess under other provisions of the Contract Documents or by law.
- 8.6 Liquidated Damages. Time is of the essence in the performance of the Work under the Contract Documents. The Owner and Construction Manager agree that the losses suffered by Owner, if substantial completion of the Work is not achieved, are not ascertainable at this time. Construction Manager acknowledges and agrees that, since time is of the essence, the Owner will suffer financial and other losses if substantial completion of the Work is not achieved within the Contract Time, as said Contract Time may be adjusted pursuant to the terms of the Contract Documents. Should the Construction Manager fail to achieve substantial completion of the Work within the Contract Time, Owner shall be entitled to assess, as liquidated damages, but not as a penalty, the sum of \$2,000.00 for each calendar day thereafter until substantial completion is achieved and \$1,500.00 for each calendar day thereafter until final completion. Construction Manager hereby expressly waives and relinquishes any right which it may have to seek to characterize the above noted liquidated damages as a penalty, which the parties agree represents a fair and reasonable estimate of the Owner's actual damages at the time of contracting if Construction Manager fails to achieve substantial completion of the Work within the Contract Time. Further, the parties acknowledge that it would be extremely difficult, if not impossible, to ascertain Owner's actual damages with any degree of certainty in the event Construction Manager fails to achieve substantial completion of the Work within the Contract Time.

## **ARTICLE 9: PROGRESS PAYMENTS AND COMPLETION OF CONSTRUCTION**

- 9.1 Progress Payments. 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.

9.1.1 At the time or times established in this Agreement, the Construction Manager shall submit to the Architect an itemized application for payment for Work completed in accordance with the previously submitted schedule of values. The application for payment shall be signed by the Construction Manager, and notarized, and shall be

supported by sufficient data which serves to establish the Construction Manager's right to the payment, such as requisitions from subcontractors or material suppliers, and reflecting retainage of 10% which may be withheld until substantial completion or final completion. If agreed to by the Owner, the amount of retainage withheld may be reduced to 5% upon 50% completion of the Agreement value. The period covered by each application for payment shall be one calendar month ending on the last day of the month. The format and number of copies of such applications for payment shall be in a format as requested by the Owner. Retainage withheld may be reduced upon substantial completion of the Work to 150% of the estimated cost of all outstanding punch list items, upon approval by the Owner.

9.1.2 The Owner agrees to make payments by the 15th of the month providing the Construction Manager processes the invoices and delivers same to the Facilities Department by the 20th of the preceding month.

9.1.3 The application for payment shall reflect the amount of Work completed each month separated by materials stored and labor, inclusive of Construction Manager's Fee, as a percent complete of each line item within the schedule of values for the Project. The Construction Manager shall, upon request from the Owner, provide all required invoices, payrolls, petty cash accounts and any other evidence required by the Owner to verify the values indicated as percent complete in the application for payment.

9.1.4 Applications for payment may also include requests for payment for changes in the work which have been authorized by construction change directives, but not yet documented in a change order, only when such construction change directives have documented an adjustment to the Contract Sum. Further, applications for payment shall not include any requests for payment of amounts the Construction Manager does not intend to pay to a subcontractor or material supplier, for any reason.

9.1.5 Applications for payment shall only be made on account of materials and equipment delivered and suitably stored at the Site for incorporation into the Work. Payments shall not be made for materials which are not suitably stored at the Site.

9.1.6 By submitting an application for payment, the Construction Manager warrants that full and complete title will vest in the Owner with regard to all Work covered by an application for payment, no later than the time of such payment. Additionally, all Work represented by a submitted application for payment shall be free and clear of any and all liens, claims, security interests or encumbrances in favor of any person or entity. Each application for payment shall be accompanied, at the Owner's option, by a waiver of lien from each subcontractor or a certificate from each subcontractor stating that the subcontractor has been paid all amounts due the subcontractor from previous applications.

9.1.7 Upon receipt of the Architect's certificate for payment, the Owner shall make payment to the Construction Manager. The Construction Manager shall promptly pay each subcontractor out of the amounts paid to the Construction Manager on account of

such subcontractor's portion of the Work, minus any percentages retained as retainage from payments made to the Construction Manager on account of such subcontractor's portion of the Work. The Construction Manager shall, by appropriate written agreement with each subcontractor, require each subcontractor to make payments to sub-subcontractors and material suppliers in a similar manner. However, neither the Owner nor the Architect shall have an obligation to pay or to see the payment of money to a subcontractor, sub-subcontractor or material supplier.

9.1.8 Any certificate for payment, progress payment, or partial or entire use or occupancy of the Project by the Owner, shall not constitute acceptance of any work not in accordance with the Agreement or Contract Documents.

9.1.9 If the Owner so desires, the Owner's accountants 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 accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of final payment have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, 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 reason for withholding a certificate.

9.1.10 In the event that the total of cost of the Work, including the Construction Manager's Fee, is less than the GMP after giving effect to adjustments for changes in the Work, then the difference between cost of the Work, including Construction Manager's Fee and the GMP is defined herein as "Savings". All Savings shall inure and be paid to the Owner.

9.2 Prior to the first application for payment, the Construction Manager shall submit to the Architect a schedule of values for the Work to be performed, in a format and with sufficient supporting data, as may be required by the Architect. This schedule of values, unless objected to by the Architect or otherwise found to be inaccurate, shall be the basis for review of the Construction Manager's application for payment.

9.3 The phrase "substantial completion" as used in this Agreement shall mean the date when the Work or any portion thereof is sufficiently complete so that the Owner may occupy or utilize the Project for its intended use, and only minor items which can be corrected or completed without any material interference with the Owner's use of the Project remain to be corrected or completed. When the Construction Manager deems the Work or a portion thereof to be substantially complete, the Construction Manager shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected, which comprehensive list shall be referred to as the "punch list." The Construction Manager shall be responsible for completion and correction of all items on the punch list. Any item not included on the punch list which does not comply with the Contract Documents, shall be added to the punch list and promptly corrected by the Construction Manager. The submission of the punch list by the Construction Manager does not in any respect

alter the ultimate responsibility of the Construction Manager to complete the project in accordance with the Contract Documents.

- 9.4 Upon receipt of the Construction Manager's list, the Architect, after inspection of the Work, may add additional items to the punch list which the Construction Manager shall promptly correct. When the Architect determines that the Work or designated portion thereof is substantially complete, the Architect shall issue a certification of substantial completion which establishes the date of substantial completion, the date the Construction Manager will have completed all items on the punch list, and such other items as the Architect and Owner deem appropriate. The certificate of substantial completion shall be executed by the Architect, Construction Manager and Owner.
- 9.5 Upon full execution of the certificate of substantial completion, and upon the application for payment by the Construction Manager and the issuance of certification for payment by the Architect, the Owner may make payment to the Construction Manager adjusting the retainage withheld for the Work or portion thereof reflected in the certificate of substantial completion.
- 9.6 The Owner may, at its discretion, occupy or use any completed or substantially completed portion of the Work, prior to the final completion of the Project. Prior to such Owner partial occupancy or use, the Owner, Construction Manager and Architect shall inspect the area to be occupied in order to document the condition of the Work. However, in no event, shall the Owner's partial occupancy or use of the Work constitute acceptance of any Work not in compliance with the requirements of the Contract Documents.
- 9.7 Final payment of the Contract Sum will be made after the Architect certifies that the Work is complete, and Owner's representatives complete their final acceptance report, and the "certificate of final inspection" by the State Department of Education is received. It is understood and agreed, that final payment will not be withheld if a certificate of final inspection is issued by the Owner's Uniform Building Code Inspector, or if any other government agency refuses to give final acceptance for any reason other than the failure of the Construction Manager to complete the Work in accordance with the Contract Documents. Further, neither final payment nor any remaining retainage shall be paid to the Construction Manager until the Architect has received an affidavit in a form sufficient to the Owner that all indebtedness in connection with the performance of the Work for which the Owner or the Owner's property may be held liable or encumbered, have been fully paid or otherwise satisfied; a certification in a form acceptable to the Owner which establishes that all required insurance will remain in full force and effect after final payment and will not be cancelled or allowed to expire until at least 30 days prior written notice has been provided to the Owner; consent of the surety to final payment; and any other certifications reasonably required by the Owner establishing full payment or satisfaction of any obligations. In the event the Construction Manager fails to furnish such certifications as the Owner reasonably requires to satisfy the Owner that there are no outstanding liens, the Owner may require the Construction Manager as a condition of final payment and at the Construction Manager's expense, to furnish a bond

in a form and amount satisfactory to the Owner to indemnify the Owner against such liens or claims.

- 9.8 Final payment by the Owner to the Construction Manager shall not constitute a waiver of any claim the Owner may have against the Construction Manager for Work not in compliance with the Construction Documents. However, acceptance of final payment by the Construction Manager, a subcontractor or material supplier shall constitute a waiver of any claims by that entity or individual, except those previously made in writing and clearly identified as unsettled at the time of the final application for payment and payment thereon.

#### **ARTICLE 10: CONSTRUCTION MANAGER'S SAFETY PROGRAM**

- 10.1 The Construction Manager shall be responsible for initiating, maintaining and supervising a safety program in connection with its Work under the Agreement and Construction Documents.
- 10.2 In the event the Construction Manager encounters on the site material reasonably believed to be asbestos or polychlorinated biphenyl (PCB) which has not been rendered harmless, petroleum waste, biohazardous substances, radioactive waste or any other substance falling within the category of hazardous or toxic waste under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or any other state or federal environmental statute or regulation, hereinafter collectively referred to as "hazardous waste," the Construction Manager shall immediately stop work in the area affected and report the condition to the Owner in writing. Owner shall thereafter as soon as reasonably possible conduct a thorough investigation to determine if the suspected material in the affected area is in fact hazardous waste and shall certify to Construction Manager that such material is not hazardous waste or if such material is in fact hazardous waste that such hazardous waste has been abated and that it is safe to return to the affected area and resume work. Construction Manager may require Owner to furnish copies of reports of tests conducted by a qualified testing laboratory verifying the absence of such hazardous waste before Construction Manager will be required to resume work. The contract time may be equitably adjusted to account for the time lost due to the encountering of the hazardous waste and the reasonable cost associated therewith, pursuant to the procedure for making a claim set forth in Article 4.
- 10.3 The Construction Manager shall not be required pursuant to the changes clause herein to perform without consent any work relating to hazardous waste.
- 10.4 The Construction Manager shall take all reasonable precautions for the safety of and shall provide all reasonable protection to prevent damage, injury or loss to employees and other persons on the Work Site, the Work and all materials and equipment to be incorporated into the Work, other property at the Work Site or adjacent thereto, and any other property of the Owner, whether or not forming part of the Work located at the Site or adjacent thereto and areas to which the Construction Manager has access.

- 10.5 The Construction Manager shall erect and maintain all reasonable safeguards for safety and protection, including signs and other warnings as appropriate, in its performance of the Agreement. In the event the Work requires the use or storage of explosives or other hazardous materials, equipment, or means or methods, the Construction Manager shall exercise the utmost care and carry on such activities under the continuous supervision of properly qualified individuals.
- 10.6 The Construction Manager shall promptly remedy any and all damage and loss to property referred to above. In the event the damage or loss is due in whole to the Construction Manager's negligence, the Construction Manager shall bear the entire cost of the loss or damage, if the damage or loss is due in part to the Construction Managers negligence, the Construction Manager shall bear the cost that is determined, by the Owner, to be their portion of the loss or damage.
- 10.7 The Construction Manager shall designate its superintendent on the Project as its safety program representative.
- 10.8 The Construction Manager shall provide and maintain in good, operating condition suitable and adequate fire protection equipment and services, and shall comply with all reasonable recommendations regarding fire protection made by the representatives of the fire insurance company carrying insurance on the Work or by the local fire chief or fire marshal. The area within the site limits shall be kept orderly and clean, and all combustible rubbish shall be promptly removed from the site.
- 10.9 The Construction Manager shall at all times protect excavations, trenches, buildings and materials, from rain water, ground water, backup or leakage of sewers, drains and other piping, and from water of any other origin and shall remove promptly any accumulation of water. The Construction Manager shall provide and operate all pumps, piping and other equipment necessary to this end.
- 10.10 During the progress of the Work and at all times prior to the date of substantial completion or occupancy of the Work by the Owner, whichever is earlier, the Construction Manager shall provide temporary heat, ventilation, and enclosure, adequate to permit the Work to proceed in a timely fashion, and to prevent damage to completed work or work in progress, or to materials stored on the premises. The permanent heating and ventilation systems may be used for these purposes when available unless otherwise provided in the Contract Documents.
- 10.11 In the event of an emergency affecting the safety of persons or property, the Construction Manager shall utilize its judgment and discretion to prevent any threatened damage, injury or loss. In the event of such an emergency, the Construction Manager shall immediately notify the Owner and Architect, and coordinate and cooperate in the resolution of all such emergencies.

## **ARTICLE 11: INSURANCE AND BOND REQUIREMENTS**

- 11.1 The Construction Manager shall deliver the required bonds and proofs of insurance to the Owner prior to the commencement of any Work, and in no event any later than 7 days after the execution of this Agreement.
- 11.2 The Construction Manager shall, throughout the performance of its services under this Agreement and throughout the term of this Agreement maintain and provide to the Owner the insurance coverages listed in this Article. The insurance policies shall be issued and underwritten by a licensed insurer, licensed as such in the State of Florida. The Construction Manager shall provide insurance that may not be reduced, terminated, or cancelled unless 30 days prior written notice thereof is furnished to the Owner. Certificates of insurance and copies of all policies (if required by the Owner) shall be furnished to the Owner within 7 days after the execution of this Agreement. In the event of any cancellation or reduction in insurance coverage, the Construction Manager shall obtain substitute coverage, without any lapse of coverage whatsoever. The insurance policies shall name the Owner, the Owner's representatives, and the officers, directors, agents, employees and assigns of the Owner as additional insureds (except for the professional liability and worker's compensation insurance).
- 11.3 The insurance required by in this Article shall include all major divisions of coverage, and shall be on a commercial general basis including premises and operations (including X-C-U), Independent Contractor Hired Products and Completed Operations, and Owned, Nonowned, and Hired Motor Vehicles. Such insurance shall be written for not less than any limits of liability required by law or others set forth in the Contract Documents, whichever is greater. All insurance shall be written on an occurrence basis, unless the Owner approves in writing coverage on a claims-made basis. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the work until date of final payment and termination of any coverage required to be maintained after final payment.
- 11.4 The Construction Manager shall furnish to the Owner copies of any endorsements that are subsequently issued amending limits of coverage.
- 11.5 Liability insurance shall include all major divisions of coverage and be on a comprehensive basis including:
1. Premises Operation (including X-C-U as applicable)
  2. Independent Contractor's Hired
  3. Products and Completed Operations
  4. Personal Injury Liability
  5. Construction Manager Liability including the provision for Construction Manager's obligation of indemnification and hold harmless
  6. Owned, non-owned and hired motor vehicles
  7. Broad Form Property Damage including Completed Operations
- 11.6 The insurance required by this Article shall be written for not less than the following, or greater if required by law.

1. Workers' Compensation:
  - (a) State: As required by Chapter 440, Florida Statutes
  - (b) Applicable Federal (e.g. Longshoremen's Statutory)
  - (c) Employer's Liability: \$500,000.00
  
2. Commercial General Liability (including Premises Operations; Independent Contractor Hired; Products and Completed Operations; Broad Form Property Damage):
  - (a) Bodily Injury:  
\$1,000,000.00 per incident or occurrence
  - (b) Property Damage:  
\$1,000,000.00 per incident or occurrence
  - (c) Products and Completed Operations to be maintained for one year after final payment
  - (d) Property Damage Liability Insurance shall provide S, C or U Coverage as applicable
  
3. Contractual Liability:
  - (a) Bodily Injury:  
\$1,000,000.00 per incident or occurrence
  - (b) Property Damage:  
\$1,000,000.00 per incident or occurrence
  
4. Personal Injury, \$1,000,000.00 per claimant
  
5. Commercial Automobile Liability: The State of Florida has no-fault automobile insurance requirements. The Contractor shall be certain coverage is provided which conforms to any specific stipulation in the law.
  - (a) \$1,000,000.00 per incident or occurrence combined single limit for bodily injury and property damage.
  
- 11.7 The Construction Manager shall procure property insurance for any portion of the Work stored off Site or in transit, and the cost for such shall be borne by the Construction Manager.
  
- 11.8 Boiler and Machinery Insurance. The Construction Manager shall purchase and maintain boiler and machinery insurance if applicable to the Contract Documents. This insurance



shall remain in full force and effect until final acceptance of the insured items by the Owner.

- 11.9 Performance and Payment Bonds. The Construction Manager shall furnish bonds covering the faithful performance of the Agreement and payment of any and all obligations arising under the Agreement as required by Florida law. Upon request, the Construction Manager shall furnish a copy to any person or entity requesting a copy. Such bonds shall be in conformance and compliance with sec. 255.05, Florida Statutes, and shall contain the information and provisions set forth in the referenced section. Pursuant to sec. 255.05, the Construction Manager shall record the performance and payment bonds in the public records of Osceola County, Florida. The Construction Manager shall provide the recorded copy of the bonds to the Owner.
- 11.10 Insurance as Additional Remedy. Compliance with the insurance requirements of this Agreement shall not limit the liability of the Construction Manager, its subcontractors, sub-subcontractors, material suppliers, employees, or agents to the Owner or others. Any remedy provided to the Owner, or the Owner's officers, employees, agents or assigns, by the insurance shall be in addition to and not in lieu of any other remedy available under the Agreement or otherwise.
- 11.11 No Waiver by Approval/Disapproval. Neither approval by the Owner nor failure to disapprove the insurance furnished by the Construction Manager shall relieve the Construction Manager of its full responsibility to provide the insurance as required by this Agreement.

## **ARTICLE 12: UNCOVERING AND CORRECTION OF THE WORK**

- 12.1 In the event the Construction Manager covers a portion of the Work contrary to the request of the Architect or prior to an inspection by the Architect, the Construction Manager must if requested in writing uncover the Work, and then shall be required to replace the work at the Construction Manager's sole expense, without any change to the contract time.
- 12.2 In the event the Construction Manager covers a portion of the Work which the Architect has not specifically requested to inspect, the Architect may request the Construction Manager to uncover the Work. If such Work is in compliance with the Contract Documents, the costs of uncovering the Work and replacement of the Work shall be reimbursed to the Construction Manager and Owner will charge the Architect. If such Work is not in compliance with the Contract Documents, the Construction Manager shall bear such costs.
- 12.3 The Project is subject to and shall be constructed in accordance with the Florida Building Code, and to all applicable codes referenced therein.
- 12.4 The Construction Manager shall promptly correct any and all Work rejected by the Architect and any and all Work which fails to comply with the requirements of the

Contract Documents. The Construction Manager shall bear all of the costs for correcting such Work, including any compensation for the Architect's services.

- 12.5 If within one (1) year after the date of final completion of the Work or after the date for commencement of warranties, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Construction Manager shall promptly return to the Project and correct the deficient Work upon receipt of written notification from the Owner to do so. The obligation set forth in this subparagraph shall survive acceptance of the Work under this Agreement and any termination of the Agreement. The Owner shall give such written notice promptly after discovery of the deficient Work. This one (1) year Construction Manager warranty described in this subparagraph does not impact or impair any manufacturer's warranty or the Owner's ability to make any other claim against the Construction Manager as allowed under Florida law.
- 12.6 The Construction Manager shall immediately remove from the Work Site any and all portions of the Work which are not in compliance with the requirements of the Contract Documents. In the event the Construction Manager fails to correct any non-conforming Work within a reasonable time, the Owner may correct such non-conforming Work in accordance with paragraph 2.7. In the event the Owner corrects the non-conforming Work, the Owner may remove and store any salvageable materials or equipment at the Construction Manager's expense. If the Construction Manager fails to reimburse the Owner for such expenses, within 7 days after written notice, the Owner may take any and all action it deems appropriate in order to obtain reimbursement of its expenses under this subparagraph. Any action taken by the Owner under this subparagraph shall not in any respect serve to limit in law or equity the Owner's ability to place any other claim against the Construction Manager.
- 12.7 The Owner has the discretion to accept Work that is not in compliance with the requirements of the Contract Documents. In this event, the Owner shall reduce its decision to writing, which shall include any reduction, if any, to the Contract Sum as a result of the acceptance of non-conforming Work. Any such adjustment to the Contract Sum shall apply whether or not final payment has been made under this Agreement.

## **ARTICLE 13: TERMINATION OF THE AGREEMENT**

### **A. Termination by Construction Manager**

- 13.1 The Construction Manager may terminate the Agreement if the Work is stopped for a period of 30 days through no act or fault of the Construction Manager, or a subcontractor, sub-subcontractor, material supplier, or their agents or employees, for any of the following reasons:
- (a) The issuance of an order of a Court or any other public authority having jurisdiction;
  - (b) An act of government, such as a declaration of national emergency, making materials unavailable;

- (c) In the event the Owner has not made payment on an uncontested certificate for payment within the time stated in the Contract Documents.
- 13.2 In the event the Construction Manager elects to terminate the Agreement for one of the above enumerated reasons, the Construction Manager shall provide the Owner with 7 day written notice, and thereafter terminate the Agreement and receive from the Owner payment for any non-deficient Work executed up to the date of such termination notice.
- 13.3 In the event the Work is stopped for a period of 60 days through no act or fault of the Construction Manager, a subcontractor, sub-subcontractor or material supplier, because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to substantive matters relating to the progress of the Work, the Construction Manager may, upon giving the Owner an 7 day written notice, terminate the Agreement and recover from the Owner payment for any non-deficient Work executed up to the date of said termination notice.

**B. Termination by Owner for Cause**

- 13.4 The Owner may terminate the Agreement for cause for any of the following reasons:
  - (a) Repeated refusal or failure of the Construction Manager to supply sufficient, properly skilled workers, or proper materials to the Work Site;
  - (b) Failure to make payment to subcontractors for materials or labor in accordance with the required agreements between the Construction Manager and subcontractors;
  - (c) Disregard by the Construction Manager of any applicable laws, ordinance, or rules, regulations or orders of a public authority having jurisdiction;
  - (d) Any substantive breach of a provision of the Contract Documents.
- 13.5 If any of the above enumerated causes exist, the Owner may, without prejudice to any other rights or remedies, and after giving the Construction Manager and the Construction Manager's surety, if any, 7 days written notice, terminate this Agreement with the Construction Manager and may, subject only to any prior rights of the surety, take possession of the Site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Construction Manager; accept assignment of subcontracts pursuant to this Agreement; and finish the Work by whatever reasonable method the Owner may deem appropriate. The Construction Manager shall not be entitled to receive any further payment under this Agreement. In the event the costs for completing the Work, including compensation for any Architect services and expenses, exceed the unpaid balance of the Contract Sum, the Construction Manager shall pay the difference to the Owner. This obligation for payment shall survive termination of this Agreement.

**C. Suspension or Termination by Owner Without Cause**

- 13.6 The Owner may, without cause, require the Construction Manager to suspend, delay or terminate the Work in whole or in part for such period of time as the Owner may determine. Such requirement shall be in writing, signed by the Owner. An adjustment will be made for any increases in the cost of performance of the Agreement, caused by the suspension, delay or termination. No adjustment shall be made to the extent that the Construction Manager is responsible for any cause which would also have suspended, delayed, or interrupted the work or to the extent that the Construction Manager has previously requested an equitable adjustment under another provision of this Agreement and such request has either been granted or denied. Any such adjustments made in the cost of performance, shall only be upon a mutually agreed fixed or percentage fee and will be agreed upon before the Construction Manager is required to recommence work.
- 13.7 In the event the Work is temporarily suspended or terminated under this sub-paragraph, the Owner shall pay the Construction Manager for any non-deficient Work executed up to the date of said temporary suspension or termination.

#### **ARTICLE 14: TAX EXEMPT OWNER DIRECT MATERIAL/EQUIPMENT PURCHASE PROGRAM**

- 14.1 The Owner shall appoint the Construction Manager as the Owner's authorized representative with respect to any matter arising out of the purchase orders under this program. The Construction Manager will cooperate fully with the Owner with respect to the implementation of a tax exempt direct material/equipment purchase program involving the direct purchase of various construction materials, supplies and equipment that is currently part of this Contract. The Owner shall obtain, with the assistance of the Construction Manager, the proper authorization from the State of Florida in the form of a Technical Assistance Advisement (TAA).

The Owner Direct Purchase Program is attached hereto as **Exhibit "D,"** controls the Direct Purchase Program for the Project. The Direct Purchase Program will be operated in accordance with the following provisions:

- 14.1.(a) The Owner will issue its own purchase orders directly to the third party vendor or supplier of material and equipment purchased under the Direct Purchase Program. The purchase order will be accompanied by the Owner's Exemption Certificate which includes its name, address, and the exemption number with issuance and expiration date.
- 14.1. (b) All material and equipment purchased under the Direct Purchase Program is sold directly to the Owner and is directly to the Owner and is directly invoiced by the vendor or supplier.
- 14.1. (c) The Owner takes title and possession of all materials and equipment purchased under the Direct Purchase Program from the vendor or seller before they are incorporated into the Project.

- 14.1. (d) The Owner assumes all risk of loss on all material and equipment purchased under the Direct Purchase Program. The Construction Manager cannot be held liable for damage or loss to the material or equipment.
- 14.1. (e) The Owner is responsible for and pays the premiums on all insurance and/or bonding on materials or equipment purchased under the Direct Purchase Program. The Construction Manager does not share any economic benefits of proceeds from bond or insurance covering risk of damage or loss of the material or equipment.
- 14.1. (f) The Owner makes direct payment to the third party vendor or seller for all purchases from its own funds or accounts for all purchases under the Direct Purchase Program.
- 14.2 The Owner agrees to process its purchase orders so that the progress of construction is not jeopardized. Should the Owner fail to process the purchase orders within a time frame so as not to delay the construction, the Construction Manager shall, at its sole discretion, void the Owner purchase order and purchase the item direct thereby waiving any rights the Owner may have for a direct purchase tax savings. Should the items included in the purchase order represent any materials, supplies or equipment that is part of a subcontractor's scope of Work, any terms and conditions that the subcontractor deems to be warranted to protect their interest, shall also be included and/or substituted. Vendors and suppliers must be approved by the Owner prior to the processing of purchase orders.
- 14.3 The items being purchased shall be purchased from the vendors and suppliers selected by the Construction Manager and/or the subcontractor for prices negotiated by the Construction Manager and/or subcontractor.
- 14.4 The Construction Manager is responsible for establishing an accounting system that will adequately track and monitor the direct purchases made by the Owner. The determination of the adequacy of the accounting system shall be mutually agreed upon between the Construction Manager and the Owner. The system developed by the Construction Manager shall track and monitor that materials purchased (and shall adequately identify the same), costs, tax savings, and such other charts of accounts or information as may be reasonable requested by the Owner. The Construction Manager shall submit a monthly accounting report of this information with the Construction Manager's application for payment.
- 14.5 The Construction Manager shall provide all rough drafts of purchase orders to the Owner for processing in such time and sequence that the Work will not be impeded or delayed in any manner. Notwithstanding anything in this Article 10.3 to the contrary, the Construction Manager remains fully responsible under it's Contract with the Owner, and the implementation of this direct purchase program shall not be used in any manner by the Construction Manager to justify any delay unless such delay is a direct result of the Owner's failure to comply with the terms of the Direct Owner Purchase Program through no fault of the Construction Manager. Should a delay be incurred that is not the result of

the Owner's failure, as stated above, the Construction Manager shall be held accountable for such a delay. The Construction Manager, for \$10.00 and other valuable consideration, the adequacy of receipt of which is hereby acknowledged and deemed to be sufficient, does hereby release, waive and hold harmless the Owner from and against any claim for damages, acceleration damages, or any other matter, claim or damage that may arise from or be related to in any way the Owner's Direct Purchase Program to the extent stated herein.

- 14.6 The Construction Manager shall be responsible for all purchases in the same manner as if the Construction Manager had purchased the items, inclusive of managing the warranties for the Owner. The Construction Manager shall cooperate with the Owner and take all action necessary to assure that all warranties with respect to any materials or equipment which may be available from any vendor are passed-through to the Owner.
- 14.7 Modification of the Contract Sum will be made by one (1) change order (or additional change orders in the sole discretion of the Owner) prior to final payment unless the Contract period crosses the Owner's fiscal year, in which case, one (1) change order will occur for each fiscal year, one prior to the close of the first year, and the other during the second fiscal year.
- 14.8 The Construction Manager and its surety hereby agree that the performance bond penal amount shall be unaffected by any direct purchase deductive change order which is made pursuant to this program.
- 14.9 The Construction Manager agrees that its builder's risk insurance coverage amount shall be unaffected by any direct purchase deductive change order implemented pursuant to this program.
- 14.10 Payment shall be directly made by the Owner to the vendor for any Direct Purchases.
- 14.11 To the extent authorized under Florida law, Owner agrees to indemnify and hold harmless Contractor, its subcontractors and suppliers of and from any claims, liability, or responsibility to the State of Florida for any action the State may take against any of them for the payment of any sales or use taxes as a result of Owner's direct purchase of such materials, supplies or equipment.
- 14.12 The Owner shall have the sole option to require the vendor to include a supply bond in the amount of 100% of the purchase order price. The bond shall be from a qualified surety company authorized to do business in the State of Florida and acceptable to the Owner and Construction Manager. The cost of the supply bond shall be included in Construction Manager's GMP.
- 14.13 The Owner agrees to make payments by the 15th of the month providing the Construction Manager processes the invoices and delivers same to the Facilities Department by the 20th of the preceding month.

14.14 Owner shall not withhold retainage on any payments made to the vendor.

## **ARTICLE 15: MISCELLANEOUS PROVISIONS**

- 15.1 Recitals. The recitals set forth in the Whereas Clauses are incorporated herein by reference and made a part of this Agreement.
- 15.2 Defining Terms. Unless otherwise noted, the terms used in the Agreement shall have their ordinary and customary meanings as used in the industry.
- 15.3 Indemnity and Hold Harmless. The Construction Manager shall hold harmless and indemnify the Owner, its agents and employees from and against any and all losses, damages, claims made by third parties, liabilities to third parties, litigation and other matters which may arise from, be caused, or result during or as a result of any act or omission of the Construction Manager, the performance of the Agreement, or breach of performance of the Agreement by the Construction Manager, or the performance or failure of performance of any product or service furnished by the Construction Manager under this Agreement with the Owner, or in any way or manner whatsoever related to any duty imposed on the Construction Manager related to, occurring during, or rising from the construction and subsequent occupancy of the Project. This hold harmless and indemnification provision shall include a duty to defend the Owner and to pay all reasonable attorneys' fees and expenses, including administrative and on appeal, incurred by the Owner in the defense of any matter covered by this provision. This hold harmless and indemnity shall survive the termination or expiration of this Agreement. The parties acknowledge that \$100.00 of the Owner's first payment to the Construction Manager shall be in consideration for this indemnification. This indemnity shall not be deemed to include matter which may be cause or results from an act or omission of the Owner in whole or in part.
- 15.4 Limitation of Liability. The Owner shall be liable only to the extent of its interest in the Project, and no officer, director, partner, agent or employee of the Owner shall ever be personally or individually liable with respect to this Agreement or the Work. Any subcontract entered into by the Construction Manager shall include the forgoing limitation, which shall be effective in the event the Owner ever succeeds to the Construction Manager's rights and obligations under a subcontract.
- 15.5 Unless the context of this Agreement otherwise clearly requires, references to the plural include the singular, references to the singular include the plural, the term "including" is not limiting, and the terms "hereof", "herein", "hereunder", and similar terms in the Contract Documents refer to the Contract Documents as a whole and not to any particular provision thereof, unless stated otherwise.
- 15.6 Gender. Unless the context clearly indicates to the contrary, pronouns having a neuter, masculine or feminine gender shall be deemed to include the others.

- 15.7 Entire Agreement. This Agreement and the Construction Documents incorporated herein by reference constitute the entire Agreement between the parties with respect to the matters covered by this Agreement. All prior negotiations, representations and agreements not incorporated in this Agreement are cancelled. This Agreement can be modified or amended only by a written document duly executed by the parties or their duly appointed representative.
- 15.8 Binding Effect. Each and all of the covenants, terms, provisions and agreements contained in this Agreement shall be binding upon and inure to the benefits of the parties and their respective assigns, successors, subsidiaries, affiliates, holding companies and legal representatives, as allowed in this Agreement.
- 15.9 Notices. All notices shall be in writing, and may be served by (a) depositing the same in the United States mail addressed to the party to be notified, postpaid, and registered or certified with return receipt requested, (b) by delivering the same in person to such party, (i) personal delivery, or (ii) overnight courier, or (c) by facsimile transmission provided that a copy is sent on the same day, by 5 p.m., by either of the methods described in (a) or (b). Notice deposited in the mail shall be deemed to have been given on the third day next following the date postmarked on the envelope containing such notice, or when actually received, whichever is earlier. Notice given in any manner shall be effective only if and when received by the party to be notified. All notices to be given to the parties shall be sent to or delivered at the addresses or facsimile numbers set forth below:

If to School Board:	Attention: Eric Shawn Houston Assistant Superintendent Maintenance and Facilities School District of Osceola County, Florida 809 Bill Beck Boulevard Kissimmee, FL 34744 Telecopy: (407) 343-8603
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If to Construction Manager: Attention:

Telecopy:

By giving the other party at least 15 days written notice, each party shall have the right to change its address and specify as its new address as any other address in the United States of America.



- 15.10 Waiver. No consent or waiver, express or implied, by either party to this Agreement to or of any breach or default by another in the performance of any obligations shall be deemed or construed to be consent or waiver to or of any other breach or default by that party. Except as otherwise provided in this Agreement, failure on the part of any party to complain of any act or failure to act by another party or to declare the other party in default, irrespective of how long such failure continues, shall not constitute a waiver of the rights of that party.
- 15.11 Captions. The headings used for the various portions of this Agreement and the Construction Documents are inserted only as a matter of convenience, and for reference, and in no way define, limit or describe the scope or the intent of this Agreement, any section of this Agreement, or any section of the Contract Documents.
- 15.12 Severability. In the event the provisions of this Agreement are determined by a Court of competent jurisdiction to be illegal or unenforceable, then such unenforceable or unlawful provision shall be excised from this Agreement, and the remainder of this Agreement shall continue in full force and effect. Notwithstanding the foregoing, if the result of the deletion of such provision will materially and adversely affect the rights of a party, such party may elect, at its option, to terminate this Agreement in its entirety.
- 15.13 Cumulative Remedies. All rights, powers, remedies, benefits, and privileges are available under any provision of this Agreement to any party, is in addition to and cumulative of any and all rights, powers, remedies, benefits and privileges available to such party under all other provisions of this Agreement, at law or in equity.
- 15.14 Approval. Whenever any review or approval is required by any party, such party agrees that such review or approval will be promptly and expeditiously prosecuted to conclusion.
- 15.15 Further Assurances. The parties agree to execute any and all further instruments and documents, and take all such action as may be reasonably required by any party to effectuate the terms and provisions of this Agreement and the transactions contemplated in this Agreement.
- 15.16 No Partnership or Joint Venture. It is understood and agreed that nothing contained in this Agreement shall be deemed or construed as creating a partnership or joint venture between the parties or any third party, or cause any party to be responsible in any way for the debts and obligations of the other party.
- 15.17 No Construction Against Drafter. Each of the parties have been represented by legal counsel who have had ample opportunity to, and have, participated in the drafting of this Agreement. Therefore, this Agreement shall not be construed more favorably or unfavorably against any party.

- 15.18 Third Party Beneficiary. This Agreement has been made and entered into for the sole protection and benefit of the Owner, and its respective successors, and no other person or entity shall have any right or action under this Agreement.
- 15.19 No Assignments. This Agreement is for the personal services of the Construction Manager, and may not be assigned by the Construction Manager in any fashion, whether by operation of law or by conveyance of any type, including without limitation, transfer of stock in the Construction Manager, without the prior written consent of the Owner, which consent the Owner may withhold in its sole discretion.
- 15.20 Force Majeure. With regard to the performance under this Agreement, a party shall not be deemed to be in default of this Agreement, or have failed to comply with any term or conditions if, for reasons beyond the parties reasonable control, including without limitation acts of God, natural disaster, labor unrest, war, declared or undeclared, the existence of injunctions or requirements for obtaining licenses, easements, permits or other compliance with applicable laws, rules and regulations, such performance is not reasonably possible within such time periods, then the time for such performance shall be extended until removal of such reasons beyond the parties reasonable control, provided that the party commences such performance as soon as reasonably possible and diligently pursues such performance..
- 15.21 Governing Law and Venue. This Agreement shall be governed and construed under the laws of the State of Florida. Except for a suit in federal court, Osceola County, Florida shall be the proper place of venue for all suits to enforce this Agreement. Any legal proceeding arising out of or in connection with this Agreement shall be brought in the Circuit Courts of Osceola County, Florida, or if appropriate, the United States District Court for the Middle District of Florida, Orlando Division. Notwithstanding any other provision of the Contract Documents, the Owner does not agree to, nor shall the parties, arbitrate in any matter whatsoever any issue arising out of this Agreement, the Contract Documents or the performance thereof. The Owner does not agree to pay attorneys' fees to the prevailing party in connection with a dispute arising out of this Agreement or the Contract Documents.
- 15.22 Waiver of Jury Trial. The parties expressly waive the right to a jury trial.
- 15.23 Dispute Resolution. Prior to initiating any litigation arising out of the Agreement, the parties to submit the dispute to non-binding mediation by a mediator who is certified in Florida in an effort to resolve disputes in an expedient manner. Each party shall bear their own attorneys' fees, and the cost of the mediator shall be split between the parties.
- 15.24 Right to Enter this Agreement. Each party warrants and represents, with respect to itself, that neither the execution of this Agreement nor the performance of its obligations under this Agreement shall violate any legal requirement, result in or constitute a breach or default under any indenture, contract, or other commitment or restriction to which it is a party or by which it is bound. Each party also warrants and represents, with respect to itself, that the execution of this Agreement and the performances and obligations

under this Agreement shall not require any consent, vote, or approval which has not been obtained, or at the appropriate time shall not have been given or obtained. Each party agrees that it has or will continue to have throughout the term of this Agreement the full right and authority to enter into this Agreement and to perform its obligation under this Agreement. Upon written request, each party agrees to supply the other party with evidence of its full right and authority.

- 15.25 Conduct While on School Property. The Construction Manager acknowledges that its employees and agents must behave in an appropriate manner while on the premises of any school facility and shall at all times conduct themselves in a manner consistent with School Board policies and subject to the administrator or designee. It will be considered a breach of this Agreement for any agent or employee of the Construction Manager to behave in a manner which is inconsistent with good conduct or decorum, or to behave in any manner which will disrupt the educational program or constitute any level of threat to safety, health, and well being of any student or employee of the School Board. The Construction Manager agrees to immediately remove any agent or employee if directed to do so by the building administrator or designee.
- 15.26 Owner Transfer of Interest. If the Owner conveys its interest in the Project to a third party, any rights which the Owner may have against the Construction Manager arising from this Agreement shall automatically transfer to such third party without the necessity of a written document or consent from the Construction Manager.
- 15.27 Public Entity Crime Information Statement and Debarment – Section 287.133(2)(a) of the Florida Statutes states: “A person or affiliate who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid on a contract to provide any goods or services to a public entity, may not submit a bid on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to a public entity, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity in excess of the threshold amount provided in Section 287.017, for CATEGORY TWO for a period of thirty-six (36) months from the date of being placed on the convicted vendor list.”

By signing this Agreement, Construction Manager certifies, to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from covered transactions by a federal department or agency.

(b) Have not, within a five-year period preceding the issuance of RFQ #SDOC-0\_\_- been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state or local) transaction or contract under public

transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property.

(c) Are not presently indicted or otherwise criminally charged by a governmental entity (federal, state or local) with commission of any of the offenses enumerated in the preceding paragraph (b).

(d) Have not within a five-year period preceding the issuance of RFQ #SDOC-0\_\_- had one or more public transactions (federal, state or local) terminated for cause or default.

Construction Manager agrees to notify School Board within 30 days after the occurrence of any of the events, actions, debarments, proposals, declarations, exclusions, convictions, judgments, indictments, informations, or terminations as described in paragraphs (a) – (d) above, with respect to Construction Manager or its principals.

15.28. Background Check. The Construction Manager agrees to comply with all requirements of sections 1012.32 and 1012.465, Florida Statutes, and all of its personnel who (1) are to be permitted access to school grounds when students are present, (2) will have direct contact with students, or (3) have access or control of school funds, shall successfully complete the background screening required by the referenced statutes and meet the standards established by the statutes. This background screening will be conducted by the School Board in advance of the Construction Manager or its personnel providing any services under the conditions described in the previous sentence. The Construction Manager shall bear the cost of acquiring the background screening required by section 1012.32, Florida Statutes, and any fee imposed by the Florida Department of Law Enforcement to maintain the fingerprints provided with respect to the Construction Manager and its personnel. The parties agree that the failure of the Construction Manager to perform any of the duties described in this section shall constitute a material breach of this agreement entitling the School Board to terminate immediately with no further responsibilities or duties to perform under this agreement. The Construction Manager agrees to indemnify and hold harmless the School Board, its officers and employees from any liability in the form of physical or mental injury, death or property damage resulting from Construction Manager's failure to comply with requirements of this section or with sections 1012.32 and 1012.465, Florida Statutes. Construction Manager shall require each of Construction Manager's subcontractors on the project to agree, in writing, to the provisions of this paragraph.

15.29. No Waiver of Sovereign Immunity. Nothing herein is intended to serve as a waiver of sovereign immunity by any agency or political subdivision to which sovereign immunity may be applicable.

15.30 Non-Discrimination. The parties shall not discriminate against any employee or participant in the performance of the duties, responsibilities and obligations under this

agreement because of race, color, religion, gender, age, marital status, disability, political or religious beliefs, national or ethnic origin.

- 15.31 Compliance with Federal Grant Requirements. If made applicable by the use of federal grant funds in the Project or any other requirement as set out below, Construction Manager and its subcontractors shall comply with the following enactments, rules, regulations and orders:

Executive Order 11246 of September 24, 1965, entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees).

Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 3145) as supplemented in Department of Labor regulations (29 CFR part 3).

Davis-Bacon Act (40 U.S.C. 3141 et seq.) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of \$2000 awarded by grantees and subgrantees when required by Federal grant program legislation).

Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 701 et seq.) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2000, and in excess of \$2500 for other contracts which involve the employment of mechanics or laborers).

All applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 7606), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000).

Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

**THE SCHOOL BOARD OF OSCEOLA  
COUNTY, FLORIDA**

By: \_\_\_\_\_  
John McKay, Chairman

Date: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
Blaine A. Muse, Superintendent

**CONSTRUCTION MANAGER**

By: \_\_\_\_\_  
Name: \_\_\_\_\_

Title: \_\_\_\_\_  
Date: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_