

Facilities Construction Contract (Lump Sum)

This Facilities Construction Contract (“Agreement”) is made effective as of (DATE), by and between the following parties, for services in connection with the Project identified below.

OWNER:

CONTRACTOR:

PROJECT:

In consideration of the mutual covenants and obligations contained herein, Owner and Contractor agree as set forth herein.

Article 1

Scope of Work

1.1 Description Of Work. Contractor shall complete the “Work” in accordance with the terms and conditions of this Agreement. For purposes of this Agreement, the term “Work” shall include (i) all construction and other services required to complete the Project, including the completion of all construction, alterations, repairs, renovations, replacements, installations and/or other matters described in the drawings, plans and/or specifications attached as Exhibit “A” to this Agreement (collectively the “Plans”); (ii) procuring and furnishing all professional services, materials, equipment, services and labor described in the Plans or reasonably inferable from the Plans or from prevailing trade customs or trade standards as being necessary to produce the intended results of the Plans; and (iii) all labor, equipment, material, technology and supervision that are customarily performed or provided by competent contractors providing construction services for projects similar in size, quality and complexity to the Project and necessary to fulfill the undertakings, covenants, representations and warranties set forth in this Agreement. If some of the drawings, plans and/or specifications attached as Exhibit “A” to this Agreement are produced, drafted, prepared and/or generated by Owner (collectively “Owner Produced Plans”) and other of the drawings, plans and/or specifications attached as Exhibit “A” to this Agreement are produced, drafted, prepared and/or generated by Contractor (collectively “Contractor Produced Plans”) and there is any conflict and/or ambiguity between the Owner

Produced Plans and the Contractor Produced Plans, then the Owner Produced Plans shall control as to any such conflict and/or ambiguity.

1.2 Legal Requirements. For purposes of this Agreement, the term “Legal Requirements” means all applicable federal (including, but not limited to, the Americans With Disabilities Act), state and local statutes, laws, codes, ordinances, rules and regulations, and all applicable orders and decrees of any government or quasi-government entity having jurisdiction over the Project, having jurisdiction over the acts, practices or operations of Contractor, any Subcontractors and/or any Sub-Subcontractors regarding the performance of the Work, and/or having jurisdiction over any Work. Any services, labor or equipment necessary to fully comply with Legal Requirements in the performance of the Work shall be included in the Work, whether or not specifically required by this Agreement.

1.3 Performance Of Work. Contractor shall perform all Work in strict conformance to the requirements of this Agreement and Contractor shall perform all Work and all operations in connection with the Work in strict conformance with all Legal Requirements.

Article 2

Subcontractors

2.1 Subcontractors and Sub-Subcontractors. For purposes of this Agreement, the term “Subcontractor” means any person, entity, manufacturer, fabricator, distributor, materialman, supplier, vendor, or agent retained by Contractor as an independent contractor for the performance of a portion of the Work. For purposes of this Agreement, the term “Sub-Subcontractor” means any person, entity, manufacturer, fabricator, distributor, materialman, supplier, vendor, or agent of any tier who has a direct or indirect contractual relationship with a Subcontractor for the performance of a portion of the Work.

2.2 Approval of Subcontractors. Contractor shall employ only Subcontractors who are duly licensed and legally authorized to perform their portion of the Work, and who possess the requisite skill and experience to perform the Work in strict conformance with this Agreement. As soon as practicable, Contractor shall furnish in writing to Owner the names of persons or entities proposed as Subcontractors for any portion of the Work and shall obtain Owner’s written approval of all Subcontractors. Contractor shall not contract with a proposed person or entity to whom Owner has made reasonable objection. Once a Subcontractor has been approved by Owner, the Subcontractor shall not be changed without Owner’s written approval.

2.3 Contractor Remains Responsible. Notwithstanding anything to the contrary, including any approval by Owner of any Subcontractors, Contractor shall be responsible to Owner for the proper performance of the Work of Subcontractors and Sub-Subcontractors and for any acts and omissions of Subcontractors and Sub-Subcontractors in connection with such performance and Contractor shall be responsible to Owner for the performance of all Work in strict conformance to the requirements of this Agreement. Contractor shall require by written agreement that each Subcontractor, to the extent of the Work to be performed by the Subcontractor, be bound to Contractor by the terms of this Agreement, and assume towards Contractor all of the obligations and responsibilities, including the responsibilities for safety of the Subcontractor’s Work, which Contractor, by this Agreement, assumes towards Owner. Each subcontract agreement between Contractor and a Subcontractor shall preserve and protect the rights of Owner under this Agreement with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights.

2.4 Owner Not Liable. This Agreement shall not be construed to create a contractual relationship of any kind between any persons or entities other than Owner and Contractor; provided, however, each of the agreements with Subcontractors for the performance of any portion of the Work shall state that Owner and its successors and assigns are intended third-party beneficiaries of such agreements and shall state that Subcontractor makes to Owner with respect to the Subcontractor's portion of the Work the same warranties as are required to be made by Contractor to Owner in this Agreement. Upon request by Owner, Contractor shall deliver to Owner a complete copy of Contractor's subcontract with each Subcontractor. Notwithstanding anything to the contrary, Owner shall not have any liabilities, obligations, and/or responsibilities of any kind to any Subcontractors and/or Sub-Subcontractors.

Article 3

Contract Time

3.1 Date of Commencement. The Work shall commence on _____, unless the parties mutually agree otherwise in writing.

3.2 Substantial Completion and Final Completion.

3.2.1 Contractor agrees to achieve "Substantial Completion" of the Work not later than _____. For purposes of this Agreement, the term "Substantial Completion" means the date upon which the Work is sufficiently complete so that Owner can occupy and/or use the Work for its intended purposes. If Owner's legal use or occupancy of such Work requires use permits and/or occupancy permits issued by governmental authorities with jurisdiction over such Work, the issuance of required use permits and certificates of occupancy shall be a condition precedent to Substantial Completion of such Work.

3.2.2 When Contractor believes that Contractor has achieved Substantial Completion of the Work, Contractor shall deliver written notice to Owner of Contractor's belief that the Work is substantially complete and of Contractor's request for a Substantial Completion inspection of the Work. Upon Owner's receipt of such request for a Substantial Completion inspection of the Work, Owner shall inspect the Work to determine whether Contractor has achieved Substantial Completion of the Work.

3.2.3 If Owner determines that Contractor has achieved Substantial Completion of the Work, Owner shall prepare a list identifying all Work found by Owner to be incomplete in accordance with the requirements of this Agreement, or requiring correction to comply with this Agreement, and the performance of which is required in order for the Work to be finally complete (the "Punch List") and Owner shall provide Contractor with a document (i) stating the date of Substantial Completion of the Work, and (ii) acknowledging that warranties with respect to the Work commence to run on such date of Substantial Completion (the "Certificate Of Substantial Completion"). Owner shall deliver a copy of the Punch List to Contractor, at the time of delivery of the Certificate Of Substantial Completion to Contractor.

3.2.4 If during the Substantial Completion inspection, Owner determines that Contractor has not achieved Substantial Completion of the Work, Owner shall inform Contractor of such determination and Contractor shall expeditiously and without delay complete and correct all Work and take all actions necessary to achieve Substantial

Completion of the Work and to obtain a Certificate Of Substantial Completion and Punch List from Owner.

3.2.5 Notwithstanding anything to the contrary, Contractor shall achieve Substantial Completion of the Work before the deadline for Substantial Completion of the Work set forth in Section 3.2.1.

3.2.6 Contractor agrees to achieve "Final Completion" of the Work no later than (i) thirty (30) days after the date of Substantial Completion of the Work, or (ii) thirty (30) days after the deadline for Substantial Completion of the Work set forth in Section 3.2.1, whichever is earlier. For purposes of this Agreement, the term "Final Completion" means the date upon which the Work is finally complete in conformance with this Agreement and this Agreement is fully performed with respect to the Work, including the completion of all of the Work and/or requirements set forth in the Punch List. If Owner's legal use or occupancy of such Work requires use permits and/or occupancy permits issued by governmental authorities with jurisdiction over such Work, the issuance of required use permits and certificates of occupancy shall be a condition precedent to Final Completion of such Work.

3.2.7 When Contractor believes that Contractor has achieved Final Completion of the Work, Contractor shall deliver written notice to Owner of Contractor's belief that the Work is finally complete and of Contractor's request for a Final Completion inspection of the Work. Upon Owner's receipt of such request for a Final Completion inspection of the Work, Owner shall inspect the Work to determine whether Contractor has achieved Final Completion of the Work.

3.2.8 If Owner determines that Contractor has achieved Final Completion of the Work, Owner shall provide Contractor with a document stating the date of Final Completion of the Work (the "Certificate Of Final Completion").

3.2.9 If during the Final Completion inspection, Owner determines that Contractor has not achieved Final Completion of the Work, Owner shall inform Contractor of such determination and Contractor shall expeditiously and without delay complete and correct all Work and take all actions necessary to achieve Final Completion of the Work and to obtain a Certificate Of Final Completion from Owner.

3.2.10 Notwithstanding anything to the contrary, Contractor shall achieve Final Completion of the Work before the deadline for Final Completion of the Work set forth in Section 3.2.6.

3.3 Time is of the Essence. Owner and Contractor mutually agree that time is of the essence with respect to the dates and times set forth in this Agreement.

Article 4

Contract Price

4.1 Contract Price.

4.1.1 Owner shall pay Contractor in accordance with the terms and conditions of this Agreement the sum of _____ (\$ _____) ("Contract Price"), subject to adjustments, if any, made in accordance with Section 4.1.2. The Contract

Price includes (i) all sales, use, consumer and other taxes relating to the Work payable in accordance with all applicable Legal Requirements and Contractor shall pay when due all such amounts, and (ii) all permits, licenses and governmental approvals necessary for the lawful and proper performance of the Work in accordance with all applicable Legal Requirements and Contractor shall obtain all such permits, licenses and governmental approvals and shall pay when due all fees and costs for the issuance of such permits, licenses and governmental approvals.

4.1.2 Contractor agrees that Owner may order a change in the scope of the Work at any time and from time to time by issuing a written order to Contractor signed by Owner directing a change in the scope of the Work and describing such change in the scope of the Work (which change may be either an increase or decrease in the scope of the Work), such written order signed by Owner to be in a form determined by Owner (“Work Change Directive”). If such change in the scope of the Work in an applicable Work Change Directive does not reasonably require any adjustment in the deadline for Substantial Completion of the Work set forth in Section 3.2.1 and does not reasonably require any adjustment in the Contract Price, then the deadline for Substantial Completion of the Work set forth in Section 3.2.1 and the Contract Price shall remain unchanged. If however, such change in the scope of the Work in an applicable Work Change Directive does reasonably require an adjustment in the deadline for Substantial Completion of the Work set forth in Section 3.2.1 or does reasonably require an adjustment in the Contract Price, then such adjustments, as applicable, shall be determined as follows:

(i) If the change in the scope of the Work in an applicable Work Change Directive does reasonably require an adjustment in the deadline for Substantial Completion of the Work set forth in Section 3.2.1, then such deadline shall be adjusted to either (i) an earlier or later date mutually agreed upon by Owner and Contractor in a signed written memorandum, or (ii) if Owner and Contractor are unable to reach such mutual agreement, such earlier or later date as is equitable based on the extent of the increase or decrease in the scope of the Work in an applicable Work Change Directive.

(ii) If the change in the scope of the Work in an applicable Work Change Directive does reasonably require an adjustment in the Contract Price, then the Contract Price shall be adjusted to either (i) such increased or decreased Contract Price mutually agreed upon by Owner and Contractor in a signed written memorandum, or (ii) if Owner and Contractor are unable to reach such mutual agreement, such increased or decreased Contract Price as determined by the reasonable increased expenses (including a reasonable overhead and profit on such reasonable increased expenses [which overhead and profit shall not exceed ten percent (10%) of the reasonable increased expenses]) or savings, as applicable, in the performance of the Work resulting from the applicable Work Change Directive, such reasonable increased expenses or savings, as applicable, to be determined by Owner based upon an accurate and documented itemized accounting by Contractor evidencing the reasonable increased expenses or savings, as applicable, resulting from an applicable Work Change Directive to be prepared by Contractor as the Work impacted by an applicable Work Change Directive is performed. With respect to such reasonable increased expenses or savings, as applicable, resulting from each of the Work Change Directives, Contractor shall keep full and detailed accounts relating to the reasonable increased expenses or savings, as applicable, resulting from each of the Work Change Directives and shall exercise such controls as may be necessary to minimize any increased expenses in the performance of the Work resulting from each of the Work Change Directives. During the performance

of the Work and for a period of three (3) years after the final payment for the Work, Owner and Owner's accountants shall be afforded access from time to time, upon reasonable notice, to Contractor's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to changes in the Work pursuant to each of the Work Change Directives, all of which Contractor shall preserve for a period of three (3) years after the final payment for the Work.

4.1.3 Upon receipt of a Work Change Directive, Contractor shall proceed promptly with the change in the Work ordered. All changes in the Work ordered by a Work Change Directive shall be performed under the terms and conditions of this Agreement.

Article 5

Procedure for Payment

5.1 Progress Payments.

5.1.1 Contractor shall submit to Owner on or before the last day of each month, beginning with the first month after the Date of Commencement, Contractor's Application for Payment in accordance paragraph Section 5.1.2 below. The period covered by each Application for Payment shall be a one month period commencing on the twenty-fifth (25th) day of the prior month and ending on the twenty-fifth (25th) day of the month in which the Application for Payment is submitted.

5.1.2 On or before the date established in Section 5.1.1, Contractor shall submit for Owner's review and approval Contractor's Applications for Payment requesting progress payment for all Work performed as of the ending date of the Application for Payment in such form and format as may be required by Owner. Contractor's Applications for Payment, including the Final Application for Payment, shall be submitted and certified by Contractor using forms and procedures acceptable to Owner. Contractor shall not be entitled to receive progress payments or final payment of the Contract Price on the basis of an Application for Payment until Contractor has provided to Owner:

- (i) A list of Contractor's Subcontractors and Sub-Subcontractors. This list shall be updated by Contractor throughout the course of the Work, and promptly delivered to Owner following each update.
- (ii) All supporting documentation for the Application for Payment required by the Owner or this Agreement. If a progress payment is requested for a Work Change Directive, a copy of the fully executed Work Change Directive (exclusive of attachments thereto) shall be submitted with Contractor's Application for Payment.
- (iii) A Progress Payment – Conditional Lien Waiver and Release on forms acceptable to Owner executed by Contractor and each of the Subcontractors and Sub-Subcontractors covering all monies payable pursuant to the pending Application for Payment.
- (iv) Beginning with the third Application for Payment, a Progress Payment – Unconditional Lien Waiver and Release on forms acceptable to Owner executed by Contractor and each Subcontractor and Sub-Subcontractor covering all monies paid by

Owner on previous Applications for Payment submitted by Contractor pertaining to periods more than thirty (30) days prior to the current Application for Payment.

(v) An Affidavit of Contractor on a form acceptable to Owner identifying each Subcontractor and Sub-Subcontractor owed monies by Contractor for services, labor, materials, equipment or other value furnished in the performance of the Work and the amount owed by Contractor to each identified Subcontractor.

5.1.3 Applications for Payment shall show the percentage completion of the Work as of the end of the period covered by the Application for Payment. Applications for Payment shall not include requests for payment for portions of the Work for which Contractor does not intend to pay a Subcontractor or Sub-Subcontractor, unless such Work has been performed by others whom Contractor intends to pay.

5.1.4 The amount of each progress payment shall be computed as follows:

(i) Take that portion of the Contract Price properly allocable to the percentage of the completed Work (but not including the portion of the Contract Price properly allocable to materials and equipment claimed under Section 5.1.4(ii) below), less the retention allowed by Section 5.2. Pending final determination of the cost to Owner of changes in the Work, amounts not in dispute may be included in the Application for Payment, even though the Contract Price has not yet been adjusted by a Work Change Directive.

(ii) Add the portion of the Contract Price properly allocable to materials and equipment delivered and suitably stored at the Site for subsequent incorporation in the construction at the Site less the retention allowed by Section 5.2, provided, however, the Application for Payment may include payment for equipment and materials not yet incorporated into the construction at the Site only if (i) Owner is satisfied that the equipment and materials are suitably stored at either the Site or another acceptable location, (ii) the equipment and materials are protected by suitable insurance acceptable to Owner, (iii) Contractor delivers bills of sale or other documentation satisfactory to Owner to identify the materials and equipment and Owner's title to such materials and equipment upon payment, and (iv) upon payment, Owner will receive title to the equipment and materials free and clear of all liens and encumbrances.

(iii) Subtract the aggregate of previous payments made by Owner.

5.1.5 Contractor warrants to Owner that title to the Work, including all materials and equipment, covered by an Application for Payment will pass to Owner upon incorporation of the Work into the construction or upon receipt of payment by Contractor for the Work, whichever occurs first. Contractor further warrants upon submittal of an Application for Payment, including the Final Application for Payment, that: (i) the Work has progressed to the point indicated in Contractor's Application for Payment; (ii) the Work for which payment is sought strictly conforms to the requirements of this Agreement; (iii) Contractor is entitled to payment in the amount requested in the Application for Payment; (iv) all Work, including all materials and equipment, covered by previous Applications for Payment for which payments have been received by Contractor are free and clear of liens, claims, security interest or encumbrances; and (v) no Work, including any materials or equipment, covered by the Application for Payment has been acquired by Contractor, or its Subcontractors or Sub-Subcontractors or any other persons performing Work or furnishing materials or equipment for the Work, subject to an agreement under which an interest therein or an

encumbrance thereon is retained by the seller or otherwise imposed by the seller or by Contractor or its Subcontractors or Sub-Subcontractors.

5.1.6 Upon receipt of payment from Owner, Contractor shall promptly make payment to Subcontractors for their portions of the Work for which Owner has made payment. Contractor, by its submission of an Application for Payment, warrants to Owner that Contractor has paid each Subcontractor and Sub-Subcontractor, upon receipt of payment from Owner, the amount paid to Contractor by Owner on all prior Applications for Payment submitted by Contractor to Owner on account of such Subcontractor's or Sub-Subcontractor's portion of the Work (reflecting the same retainage actually retained by Owner from payments to Contractor on account of such Subcontractor's portion of the Work).

5.1.7 Owner shall make payment within thirty (30) days after Owner's receipt of each properly submitted and accurate Application for Payment,

5.2 Retainage on Progress Payments.

5.2.1 Owner shall retain ten percent (10%) of each Application for Payment made during the course of the Work; provided that in no event shall Owner retain amounts in excess of that allowed by the governing law of the state in which the Project Site is located. The retained amounts shall be paid to Contractor as provided in this Section 5.2.2 without interest. Owner, at its option and in its sole discretion, may reduce retainage to less than ten percent (10%) of each Application for Payment and/or may release retainage with respect to the Work of one or more Subcontractors or Sub-Subcontractors before Owner is obligated to release retained amounts under this Section 5.2 of this Agreement. Owner's exercise of such option shall not waive any of the Owner's rights under this Section 5.2, or entitle Contractor to any reduction in retainage or any early releases of retainage.

5.2.2 Upon issuance of the Certificate of Substantial Completion in accordance with Section 3.2.3 of the entire Work, Owner shall release to Contractor all retained amounts relating to the entire Work, less an amount equal to the greater of (i) five thousand (\$5,000) dollars or (ii) one hundred fifty percent (150%) of the reasonable value of all remaining or incomplete items of such Work and such Work not strictly conforming to the requirements of this Agreement as noted in the Certificate of Substantial Completion for such Work, and less an amount sufficient to remedy any breach of the Contract by Contractor including, without limitation, the amount of any damages for the delayed Substantial Completion beyond the date required therefor; provided that in no event shall Owner retain amounts in excess of that allowed by the governing law of the state in which the Project Site is located.

5.3 Payment Following Substantial Completion.

5.3.1 Following issuance of the Certificate Of Substantial Completion by Owner to Contractor pursuant to Article 3, Contractor shall submit to Owner the following:

- (i) A sworn statement in form and content acceptable to Owner listing each of the Subcontractors and Sub-Subcontractors that performed any portion of the Work, describing the portion of the Work performed by the applicable Subcontractors and Sub-Subcontractors and stating the amount payable to the applicable Subcontractors and Sub-Subcontractors for the portion of the Work performed by the applicable Subcontractors and Sub-Subcontractors.

(ii) A Progress Payment – Conditional Lien Waiver and Release in form and content acceptable to Owner executed by Contractor and each of the Subcontractors covering all monies payable pursuant to Section 5.3.2 below and covering all Work completed through the date of the issuance of the Certificate Of Substantial Completion by Owner to Contractor.

(iii) If requested by Owner, in Owner's sole discretion, a Progress Payment – Conditional Lien Waiver and Release in form and content acceptable to Owner executed by one, more or all of the Sub-Subcontractors (as requested by Owner) covering all monies payable pursuant to Section 5.3.2 below and covering all Work completed through the date of the issuance of the Certificate Of Substantial Completion by Owner to Contractor.

(iv) Contractor's Application For Substantial Completion Payment in form and content acceptable to Owner requesting payment pursuant to Section 5.3.2 below. Contractor's Application For Substantial Completion Payment shall be submitted and certified by Contractor using forms and procedures (including electronic billing and payment procedures, if elected and implemented by Owner) acceptable to Owner.

5.3.2 Within thirty (30) days of receipt by Owner (in form and content acceptable to Owner) of all of the documentation required by Section 5.3.1 above, Owner shall pay to Contractor the Contract Price, including retained retainage as set forth in Section 5.2.1, less one hundred fifty percent (150%) of the reasonable value of all Work identified in the Punch List.

5.4 Payment Following Final Completion.

5.4.1 Following issuance of the Certificate Of Final Completion by Owner to Contractor pursuant to Article 3, Contractor shall submit to Owner the following:

(i) A Final Payment – Unconditional Lien Waiver and Release in form and content acceptable to Owner executed by Contractor and each of the Subcontractors covering all monies payable for the entire Contract Price and covering the entire Work.

(ii) If requested by Owner, in Owner's sole discretion, a Final Payment – Unconditional Lien Waiver and Release in form and content acceptable to Owner executed by one, more or all of the Sub-Subcontractors (as requested by Owner) covering all monies payable for the entire Contract Price and covering the entire Work.

(iii) Contractor's Application For Final Payment in form and content acceptable to Owner requesting payment pursuant to Section 5.4.2 below. Contractor's Application For Final Payment shall be submitted and certified by Contractor using forms and procedures (including electronic billing and payment procedures, if elected and implemented by Owner) acceptable to Owner.

5.4.2 Within thirty (30) days of receipt by Owner (in form and content acceptable to Owner) of all of the documentation required by Section 5.4.1 above, Owner shall pay to Contractor the portion of the Contract Price retained by Owner pursuant to Section 5.3.2 above.

5.5 Place of Payments. Owner's payments to Contractor of the Contract Price shall be made to Contractor at the address of Contractor shown on the first page of this Agreement. If Contractor requests in writing that any payment of the Contract Price be made to Contractor at an address different than the address of Contractor shown on the first page of this Agreement, Contractor shall comply with all requirements of Owner to make payment to Contractor at a different address, and Contractor acknowledges and agrees that such requests by Contractor for payment of any portion of the Contract Price to an address different than the address shown for Contractor on the first page of this Agreement may delay payment to Contractor by Owner beyond the times set forth in this Agreement. Contractor agrees that such delays in payment to Contractor caused by Contractor's written request that payment be made to Contractor at an address different than the address for Contractor shown on the first page of this Agreement shall not be a breach of this Contract.

5.6 Contractor's Warranties Regarding Title, Applications For Payment And Payments.

5.6.1 Contractor covenants with and represents and warrants to Owner that title to the Work, including all materials and equipment, will pass to Owner upon incorporation of the Work into the construction or upon receipt of payment by Contractor for the Work, whichever occurs first. Contractor further covenants with and represents and warrants to Owner that by submittal of an Application Payment, Application for Substantial Completion Payment and/or Application for Final Payment, as applicable, that: (i) all Work, including all materials and equipment, conforms to the requirements of this Agreement; and (ii) all Work, including all materials and equipment, is free and clear of liens, claims, security interests and/or encumbrances of any kind whatsoever.

5.6.2 Contractor covenants with and represents and warrants to Owner that (i) Contractor shall pay when due (but in no event later than promptly following receipt of payment from Owner and in no event later than allowed by Legal Requirements) all amounts due to Subcontractors relating to the Work, (ii) Contractor shall cause to be paid when due (but in no event later than promptly following receipt of payment from Owner and in no event later than allowed by Legal Requirements) all amounts due to Sub-Subcontractors relating to the Work, and (iii) Contractor shall not allow any liens, claims, security interests and/or encumbrances of any kind whatsoever to be placed, recorded, filed and/or asserted against the Work and/or Project site by any Subcontractors and/or Sub-Subcontractors.

5.7 Owner's Rights Regarding Payments.

5.7.1 Notwithstanding anything to the contrary, Owner may withhold payment (in whole or in part) of the amount requested in an Application for Payment, Application for Substantial Completion Payment and/or Application for Final Payment, as applicable, and/or deduct from the Contract Price any amounts reasonably necessary to protect Owner from and/or compensate Owner for loss and/or damage for which Contractor is responsible, including loss and/or damage resulting from (i) Work which is not in compliance with the requirements of this Agreement, (ii) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Price, (iii) any failure to carry out any portion of the Work in compliance with the requirements of this Agreement, and/or (iv) any liens, claims, security interests and/or encumbrances of any kind whatsoever placed, recorded, filed and/or asserted against the Work and/or Project site by any Subcontractors and/or Sub-Subcontractors.

5.7.2 Notwithstanding anything to the contrary, (i) Owner may make any payments due under this Agreement (in whole or in part) jointly to Contractor and/or any Subcontractors and/or Sub-Subcontractors, and (ii) no Certificate of Substantial Completion and/or Certificate of Final Completion by Owner, no payment of any portion of the Contract Price, including any final payment, by Owner and/or no partial or entire use or occupancy of the Work by Owner, shall constitute an acceptance of Work not in compliance with the requirements of this Agreement.

5.7.3 Acceptance of final payment by Contractor shall constitute a waiver of all claims and/or causes of actions by Contractor arising out of and/or related to the Work and/or this Agreement, including but not limited to any request and/or demand for adjustment of the Contract Price and/or for any other relief, damages and/or compensation arising out of and/or related to the Work and/or this Agreement, including but not limited to claims for damages caused by personal injury or death, for damages caused by injuries and/or losses to tangible or intangible property, and/or for economic loss and/or damage arising out of and/or related to the Work and/or this Agreement.

5.8 Interest On Payments To Contractor. If any undisputed amounts payable by Owner to Contractor under this Agreement are not paid when due, all such undisputed amounts due to Contractor by Owner under this Agreement shall bear interest from the date due until the date paid at the annual rate of six percent (6%), or the highest rate allowed by law, whichever is lower. Interest is waived as to any disputed amounts during the duration of such dispute.

5.9 Notice of Violations of Applicable Law. Owner contracts for construction services in numerous states, some of which have laws applicable to retention withheld to secure performance of construction contracts and the timing of payments made for services, labor or materials furnished in the performance of construction contracts. If any portion of this Agreement is believed by Contractor to violate Contractor's rights under the governing law of the state in which the Project is located to payment of retention, to payment of interest on retention, or to payment of any progress payment or final payment, or if Contractor believes that Owner's interpretation of this Agreement or Owner's acts or practices under this Agreement violate Contractor's rights under such governing laws to payment of retention, to payment of interest on retention, or payment of any progress payment or final payment, Contractor shall give Owner prompt written notice of such believed violation of Contractor's rights under the governing law. Contractor covenants not to sue Owner and/or Owner's Affiliates, as Owner's Affiliates are defined herein, and agrees to waive all claims against Owner and/or Owner's Affiliates (i) for any violations of Contractor's rights under the governing law resulting from Owner's retention in accordance with the terms of this Agreement of amounts due to Contractor, or (ii) resulting from any payments in accordance with the terms of this Agreement to Contractor that do not comply with the governing law, provided, however, Contractor's covenant not to sue and waiver of claims shall not extend to such violations of Contractor's rights or such violations of governing law occurring more than thirty (30) days after the receipt by Owner of written notice given by Contractor of such violations in accordance with this Section 5.6 of this Agreement. The terms of this Section 5.6 shall survive the completion of the Work, termination of this Agreement and/or final payment.

Article 6

Other Duties And Responsibilities Of Contractor

6.1 Construction Means. Contractor shall supervise and direct the Work such that all Work shall be performed efficiently and with the requisite expertise, skill and competence to satisfy the requirements of this Agreement. Contractor shall be solely responsible for and shall at all times exercise complete and exclusive control over the means, methods, sequences, procedures and techniques of construction.

6.2 Construction Safety. Contractor shall take necessary precautions for the safety of, and shall provide necessary protection to prevent damage, injury or loss to (i) all individuals at the Project site, whether working or visiting, (ii) the Work, including materials and equipment incorporated into the Work, and (iii) all other property at the Project site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities. Contractor assumes responsibility for implementing and monitoring all necessary safety precautions and programs related to the performance of the Work, so that all Work is completed in a safe manner and Contractor shall cause all Work to be completed in a safe manner and in compliance with all Legal Requirements relating to safety. During the performance of the Work, Contractor shall erect and maintain, as required by existing conditions and performance of the Work, reasonable safeguards for safety and protection of all individuals at the Project site, whether working or visiting. Contractor shall be solely responsible for the preparation, implementation and enforcement of a jobsite safety program, and Owner accepts no responsibility or liability for same.

6.3 Minimize Interference With Owner's Business. Contractor will cause all operations and activities for performance of the Work to be confined to areas on the Project site reasonably necessary to perform the Work in a good and workmanlike manner and in all cases to areas permitted by Legal Requirements. Contractor shall at all times avoid creating dust, fumes, vibration or noise in excess of that reasonably necessary to perform the Work in a good and workmanlike manner. If Owner is operating a store, warehouse, distribution center or other business facility at and/or adjacent to the Project site, Contractor agrees to cooperate with Owner to reasonably coordinate the Work with the operations of Owner's existing business facilities at and/or adjacent to the Project site to minimize any disruptions to and/or interference with Owner's business operations at and/or adjacent to the Project site and Contractor shall cause all Work to be completed in a manner so as to minimize any disruptions to and/or interference with Owner's business operations at and/or adjacent to the Project site.

6.4 Cutting And Patching. Contractor shall be responsible for cutting, fitting and patching required to complete the Work in a good and workmanlike manner and to make its parts fit together properly in accordance with the requirements of this Agreement.

6.5 Testing And Inspections. Contractor shall cause to be completed at Contractor's sole cost and expense all tests, inspections and/or approvals of the Work required by Legal Requirements. Contractor shall engage an independent testing laboratory or entity acceptable to Owner to perform such tests, inspections and/or approvals required by Legal Requirements, unless Legal Requirements preclude Contractor from engaging such independent testing laboratory or entity, in which case Owner shall engage such independent testing laboratory or entity at Contractor's sole cost and expense. Owner may, but shall not be obligated to, require additional tests, inspections and/or approvals of the Work beyond those required by Legal Requirements. If Owner requires such additional tests, inspections and/or approvals of the Work beyond those required by Legal Requirements and such additional tests, inspections and/or

approvals of the Work determine that the applicable Work is not in conformance with the requirements of this Agreement, then Owner may deduct all costs for such additional tests, inspections and/or approvals from the Contract Price and/or upon demand by Owner, Contractor shall reimburse Owner on demand for all costs for such additional tests, inspections and/or approvals. If Owner requires such additional tests, inspections and/or approvals of the Work beyond those required by Legal Requirements and such additional tests, inspections and/or approvals of the Work determine that the applicable Work is in conformance with the requirements of this Agreement, then Owner shall be responsible for the costs of such additional tests, inspections and/or approvals.

6.6 Site Clean Up. Contractor shall at all times keep the Project site, any sales floor in any operating store on the Project site and the roadways and properties adjacent to the Project site clean and reasonably free from dirt, dust, debris, trash, construction wastes and other hazards and at all times as required by Legal Requirements. Without limiting the generality of the foregoing, Contractor shall cause the Work to be completed in a manner that will allow customers to at all times access the sales floor in any operating store on the Project site and that will allow such sales floor to be in customer ready condition at all times and suitable for Owner's business operations at all times. Upon Substantial Completion of the Work, Contractor shall remove all dirt, dust, debris, trash, construction wastes, materials, equipment, machinery and tools relating to and/or arising out of the Work to permit Owner to use or occupy the Work for its intended purposes.

6.7 Interest On Contractor's Payments. If any amounts payable by Contractor to Owner under this Agreement are not paid when due, all such amounts due to Owner by Contractor under this Agreement shall bear interest from the date due until the date paid at the annual rate of six percent (6%), or the highest rate allowed by law, whichever is lower.

Article 7

Contractor's Warranties And Indemnification

7.1 Work, Materials and Equipment. Contractor covenants with and represents and warrants to Owner that all materials and equipment furnished under this Agreement and/or as part of the Work shall be new and of good quality and shall be in strict conformance with this Agreement. Contractor further covenants with and represents and warrants to Owner that the Work will be performed in a skillful and workmanlike manner, that the Work will be free of faults and defects, that the Work will be of high quality and at least equal to industry standards and that the Work will strictly conform to the requirements of this Agreement. Nothing in this Section 7.1 is intended to and/or shall limit in any way any covenants, representations and/or warranties of Contractor set forth elsewhere in this Agreement and/or any warranties of any manufacturers, suppliers and/or vendors of any materials and/or equipment furnished under this Agreement and/or as part of the Work. Contractor shall assign to Owner, from time to time as Owner may request, by assignments in form and content acceptable to Owner all warranties of any manufacturers, suppliers and/or vendors of any materials and/or equipment furnished under this Agreement and/or as part of the Work.

7.2 Licenses. Contractor covenants with and represents and warrants to Owner that Contractor, all Subcontractors and all Sub-Subcontractors shall hold all appropriate construction and business licenses required in the location in which the Project is located to perform the Work.

7.3 Skill, Expertise And Resources. Contractor covenants with and represents and warrants to Owner that Contractor, all Subcontractors and all Sub-Subcontractors shall have the

requisite skill, experience, expertise, financial resources, and capabilities to perform the Work in strict compliance with this Agreement.

7.4 Employment Compliance. Contractor covenants with and represents and warrants to Owner that (i) the employees of Contractor, Subcontractors and/or Sub-Subcontractors engaged in the Work shall be eligible and authorized to perform such Work under applicable Legal Requirements, and (ii) the Contractor, Subcontractors and/or Sub-Subcontractors engaged in the Work shall comply at all times with all Legal Requirements with respect to their respective employees who perform the Work of this Agreement, including but not limited to immigration (including using only employees that are eligible and authorized to work in the United States under applicable Legal Requirements), wage and hour, worker's compensation, OSHA, and all other matters related to their respective employees.

7.5 Survival Of Contractor's Covenants, Indemnifications, Representations And Warranties. All covenants, indemnifications, representations and/or warranties of Contractor in this Agreement shall remain in effect notwithstanding the completion of the Work, the expiration of the one year period set forth in Section 7.6 for Contractor's obligation to correct defective Work, the termination of this Agreement and/or final payment.

7.6 Correction of Defective Work. Without limiting any other covenants, representations and warranties of Contractor in this Agreement and in addition to and without limiting any other remedies available under this Agreement and/or by law, if any of the Work is found to not be in conformance with this Agreement within a period of one year from the date of Substantial Completion of the Work, Contractor shall promptly after receipt of written notice from Owner correct the Work so that the Work complies with the requirements of this Agreement, including the correction, removal and/or replacement of other parts of the Work affected by the nonconforming Work. With respect to any Work first performed after the Substantial Completion of the Work, the one year period shall commence upon the completion of such Work. With respect to any Work replaced and/or repaired by Contractor and/or Subcontractors and/or Sub-Subcontractors after the Substantial Completion of the Work, the one year period shall commence with respect to such replaced and/or repaired Work upon the completion of the repair and/or replacement of such Work. If Contractor fails to promptly correct the Work so that the Work complies with the requirements of this Agreement, including the correction, removal and/or replacement of other parts of the Work affected by the nonconforming Work, Owner, in addition to any other remedies provided under this Agreement and/or by law, may correct the Work so that the Work complies with the requirements of this Agreement, including the correction, removal and/or replacement of other parts of the Work affected by the nonconforming Work. If Owner does perform such corrective work, Owner may deduct all costs incurred by Owner in performing such corrective work, including the correction, removal and/or replacement of other parts of the Work affected by the nonconforming Work, from the Contract Price and/or upon demand by Owner, Contractor shall reimburse Owner on demand for all costs incurred by Owner in performing such corrective work, including the correction, removal and/or replacement of other parts of the Work affected by the nonconforming Work. If the nonconforming Work creates an emergency requiring immediate response, Owner may perform such corrective work at Contractor's sole cost and expense without giving notice to Contractor and/or giving Contractor an opportunity to perform the corrective work and in such case Owner may deduct all costs incurred by Owner in performing such corrective work, including the correction, removal and/or replacement of other parts of the Work affected by the nonconforming Work, from the Contract Price and/or upon demand by Owner, Contractor shall reimburse Owner on demand for all costs incurred by Owner in performing such corrective work, including the correction, removal and/or replacement of other parts of the Work affected by the nonconforming Work.

7.7 Contractor's Indemnification. To the fullest extent permitted by law, Contractor shall indemnify, defend and hold harmless Owner and Owner's direct and/or indirect parents, subsidiaries and/or affiliates (Owner's direct and/or indirect parents, subsidiaries and/or affiliates are collectively "Owner's Affiliates") and their successors, assigns, officers, directors, shareholders, members, general partners, limited partners, employees, agents and representatives (Owner and Owner's Affiliates and their successors, assigns, officers, directors, shareholders, members, general partners, limited partners, employees, agents and representatives are individually and collectively referred to as the "Indemnified Parties") from and against any and all claims, demands, losses, liabilities, judgments, costs and expenses (including, without limitation, attorneys' fees and costs and expenses of dispute resolution) and damages and injuries (including, without limitation, injuries to persons, loss of life, damage to tangible or intangible property or rights wherever occurring, or economic loss) arising out of, related to and/or in any way connected with (i) the performance of the Work, but only to the extent that such claims, losses, demands, liabilities, judgments, costs, expenses, damages or injuries are not caused by the negligence or other fault of Owner, Owner's Affiliates, the Indemnified Parties, or anyone for whose acts any of them may be liable, (ii) any breach by Contractor of and/or default by Contractor under any of the covenants, indemnifications, representations and/or warranties of Contractor in this Agreement, and/or (iii) any liens, claims, security interests and/or encumbrances of any kind whatsoever placed, recorded, filed and/or asserted against the Work and/or Project site by any Subcontractors and/or Sub-Subcontractors.

Article 8

Bonds and Insurance

8.1 General Requirements of Article 8.

8.1.1 Owner shall have the right to obtain copies of Contractor's insurance policies required by this Agreement, and copies of the insurance policies of the Subcontractors and Sub-Subcontractors required by this Agreement, if requested by Owner in writing from Contractor. Should Owner request such copies in writing from Contractor, Contractor shall cause the copies of each requested policy to be delivered to Owner within thirty (30) days of Owner's written request.

8.1.2 Contractor, Subcontractors and Sub-Subcontractors shall be solely responsible for the timely payment in full of premiums for all insurance required of Contractor, Subcontractors and/or Sub-Subcontractors by this Agreement. Should Contractor, Subcontractors and/or Sub-Subcontractors fail to provide or maintain any insurance required of any one of them by this Agreement, Owner shall have the right, but not the obligation, to provide or maintain any such insurance at the cost of Contractor. If Owner does elect to provide or maintain any such insurance, Owner may deduct all costs incurred by Owner in providing or maintaining any such insurance from the Contract Price and/or upon demand by Owner, Contractor shall reimburse Owner on demand for all costs incurred by Owner in providing or maintaining any such insurance.

8.1.3 The obligations of this Article 8 shall survive the completion of the Work, the termination of this Agreement and/or final payment.

8.2 Insurance of Contractor, Subcontractors and Sub-Subcontractors. Contractor shall procure the insurance coverages and insurance terms and limits required to be procured by

Contractor by this Agreement, and Contractor shall ensure that the Subcontractors and/or Sub-Subcontractors procure the insurance coverages and insurance terms and limits required to be procured by Subcontractors and/or Sub-Subcontractors by this Agreement.

8.3 Contractor's Insurance.

8.3.1 General Requirements of Contractor's Insurance.

- (i) All insurance required by this Agreement shall be provided by insurance companies licensed and authorized to conduct their insurance business in the state in which the Project is located and rated not less than A- / VII by A.M. Best.
- (ii) The existence of any self-insured retentions (SIRS) or deductibles over which the required policies apply must be disclosed to Owner and shall not exceed the maximum SIRS or deductibles allowed by this Agreement.
- (iii) Contractor shall comply with the conditions stipulated in each of the insurance policies required by this Agreement. None of the insurance coverages required by this Agreement shall be on "claims-made" forms, rather all such insurance coverages shall provide coverage on an "occurrence basis".
- (iv) All policies of insurance required by this Agreement shall be endorsed or shall otherwise provide that Contractor's insurance shall be primary with respect to Contractor's acts or omissions and not be in excess of, or contributing with, any insurance maintained by Owner. Owner and Owner's Affiliates shall be named as additional insureds for liability arising from Contractor's operations under this Agreement, using ISO additional insured Forms (CG 20 10 07 04) and (CG 20 37 07 04) or equivalent, under all policies of liability insurance to be maintained by Contractor (except Worker's Compensation Insurance). A copy of the required endorsements shall be attached to the certificates of insurance.
- (v) The insurance policies required by this Agreement shall each contain a provision that the insurance company shall endeavor to provide at least thirty (30) days prior written notice via certified United States mail to Contractor, Owner, the additional insureds, and to any other persons or entities as herein or hereinafter required, at the addresses provided to the insurance company for the giving of such notice, or in the absence thereof, at their last known addresses of any cancellation, non-renewal or material change of insurance coverages of the applicable insurance policy. Alternatively, the Certificates of Insurance issued with respect to an insurance policy required by this Agreement shall contain a provision binding the insurance agency or brokerage issuing the Certificate of Insurance to endeavor to provide not less than thirty (30) days prior written notice via certified United States mail to Contractor, Owner, the additional insureds, and to any other persons or entities as herein or hereinafter required, of any cancellation, non-renewal or material change of insurance coverages of such insurance policy.
- (vi) Certificates of Insurance shall be delivered to Owner on industry acceptable forms showing such coverage in full force and effect prior to the commencement of the Work and upon request by Owner thereafter.

(vii) All policies shall include waivers of any right of subrogation of the insurers thereunder against Owner and/or Owner's Affiliates.

(viii) Any certificates of renewal with respect to any insurance policy required to be maintained by Contractor under this Agreement shall be delivered to Owner promptly after renewal.

8.3.2 Workers' Compensation.

Contractor shall maintain at all times until issuance by Owner of a Certificate Of Final Completion statutory Workers Compensation insurance in conformance with the laws of the state in which the Project is located, and any Federal laws where applicable, to cover all employees during the performance of the Work. Contractor shall maintain at all times until issuance by Owner of a Certificate Of Final Completion Employers Liability insurance with limits of not less than \$2,000,000 for each accident or disease; Contractor agrees to indemnify and hold Owner and Owner's Affiliates harmless from and against any and all claims, liabilities, losses, costs or expenses due to accident, disease or other liabilities that may be subject to applicable workers' or workmans' compensation acts or disability benefit acts.

8.3.3 Commercial General Liability.

Contractor shall maintain at all times until issuance by Owner of a Certificate Of Final Completion Commercial General Liability Insurance on ISO occurrence Form (CG 0001 12 07) or equivalent and, in addition to the additional insured requirements noted in this Agreement, such Commercial General Liability Insurance must include the following:

- (i) Combined single limit coverage for bodily injury and property damage of not less than \$2,000,000 combined single limit;
- (ii) General Aggregate limit of not less than \$4,000,000;
- (iii) Personal Injury Liability limit of not less than \$2,000,000;
- (iv) Coverage for all premises and operations – the policy shall be endorsed to provide the Designated Construction Project(s) General Aggregate Limit Endorsement (ISO CG 25 03 03 97);
- (v) Products Liability/Completed Operations coverage for the period of the statute of repose in the state in which the Project is located applicable to claims for construction services, and in the absence of an applicable statute of repose, for a period of three (3) years after the date of Final Completion of the Work;
- (vi) Any contractual exclusions relating to Personal/Advertising injury shall be deleted;
- (vii) In the event the Work requires any contract with a municipality, the policy will be endorsed so that the contract with the municipality is an "insured contract";
- (viii) Coverage for Injury to Leased Workers (CG 04 24);

- (ix) Hazardous Materials Contractors coverage (CG 22 78), if applicable to the Work;
- (x) A deductible or SIRS of not greater than One Hundred Thousand Dollars (\$100,000.00) per occurrence; and
- (xi) Coverage for demolition and removal of any building or structure, collapse, explosion, blasting, excavation and damage to property below the surface of the ground (XCU coverage).

8.3.4 Business Automobile.

Contractor shall maintain at all times until issuance by Owner of a Certificate Of Final Completion Business Automobile Insurance on ISO Form (CA 0001 03 06) or equivalent covering all owned, non-owned and hired automobiles used in connection with the Work, with combined single limits coverage for bodily injury and property damage of not less than \$2,000,000 combined single limit. The policy shall cover loss due to bodily injury or death of any person, or property damage arising out of the ownership, maintenance, operation or use of any motor vehicle whether owned, non-owned, hired or leased.

8.3.5 Umbrella/Excess Liability. If Contractor does not normally procure and maintain insurance limits as required by Sections 8.3.2, 8.3.3 or 8.3.4, Contractor shall maintain umbrella/excess liability insurance on an occurrence basis in excess of the underlying insurance described in Sections 8.3.2, 8.3.3. and 8.3.4 which is at least as broad as each and every one of the underlying policies, with minimum limits such that when combined with the primary coverage, the total coverage maintained by Contractor is not less than that required by Section 8.3 for any category of insurance described in Sections 8.3.2, 8.3.3 and 8.3.4.

8.3.6 Contractor's Pollution Liability. If this Agreement requires remediation or other construction services with regard to any known Hazardous Materials (The term "Hazardous Materials" means any wastes, substances, chemicals or other materials which in the quantities and form found or suspected (i) are deemed to be hazardous under applicable Legal Requirements, or (ii) the handling, storage, remediation, transportation or disposal of which are regulated by applicable Legal Requirements), Contractor shall maintain Contractor's Pollution Liability coverage with dedicated limits of \$2,000,000 per occurrence and aggregate, and ten year completed operations coverage. Such coverage shall have a deductible or SIRS of not greater than Seventy Five Thousand Dollars (\$75,000.00) per occurrence. Covered damages shall include bodily injury, property damage, environmental damage, loss of use of property, governmental ordered cleanup costs, completed operations and defense (including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for damages). If Contractor is required by this Agreement to dispose of Hazardous Materials or other wastes or if Contractor does during the course of the Work dispose of Hazardous Materials or other wastes, the Contractor's Pollution Liability coverage procured by Contractor shall extend to liabilities arising from the transportation and/or disposal of Hazardous Materials and other wastes including, without limitation, coverage for transport of Hazardous Materials or other wastes to disposal sites.

8.4 Subcontractors'/Sub-Subcontractors' Insurance. Contractor shall ensure that each of the Subcontractors and Sub-Subcontractors with an agreement to furnish more than \$100,000 in labor and/or materials shall carry the same insurance coverages as required to be

carried by Contractor by Section 8.3 of this Agreement, name Owner and Owner's Affiliates as additional insureds, and comply with all other provisions of this Article 8 as though they have the same responsibilities under this Article 8 as Contractor, provided, however (i) the Commercial General Liability Insurance of the Subcontractors and Sub-Subcontractors may have limits of not less than \$1,000,000 per occurrence/\$1,000,000 annual aggregate, and (ii) the Business Automobile Insurance of such Subcontractors and Sub-Subcontractors may be procured with combined single limits for bodily injury and property damage of not less than \$1,000,000 per occurrence.

8.5 Other Additional Insurance (Contractor, Subcontractors and Sub-Subcontractors).

Without limiting any of the foregoing provisions of this Article 8, Contractor shall, as and to the extent required by Legal Requirements, procure and maintain and shall cause Subcontractors and Sub-Subcontractors as and to the extent required by Legal Requirements to procure and maintain additional insurance coverage in the type and amounts so required, and name persons or entities as additional insureds as so required, without cost or expense to Owner. Nothing in this Agreement is intended to and/or shall limit Contractor's liability and/or the liability of Subcontractors and/or Sub-Subcontractors to Owner and/or to Owner's Affiliates for any of the Work of the Project to the insurance coverages and/or insurance limits required by this Agreement.

8.6 Property Insurance.. To the extent damages to the Work are covered by property insurance applicable to the Work during the course of construction: (i) Owner and Contractor waive all rights against each other and against Subcontractors, Sub-Subcontractors, agents and employees of the other for such damages covered by such property insurance, but only to the extent of the injured party's actual recovery of any insurance proceeds, after giving effect to any applicable deductible or self-insured retention; and (ii) any deductible or self-insured retention applicable to the damages to the Work covered by such property insurance shall be paid by the Contractor unless the damages to the Work were caused by the fault of the Owner, the Owner's Affiliates, the Indemnified Parties or anyone for whose acts any of them may be liable.

8.7 Payment and Performance Bonds. Contractor shall (**shall not**) furnish bonds covering faithful performance of this Agreement and payment of obligations of Contractor arising under this Agreement. If Contractor is required by the first sentence of this Section 8.7 to procure a performance and payment bond, the amount of each bond shall be equal to one hundred percent (100%) of the Contract Price, as the Contract Price may be modified by Work Change Directives. Contractor shall deliver the required bonds to Owner at least three (3) days before commencement of any Work. Contractor shall furnish a Performance and Payment Bond naming Contractor as Principal and Owner and Owner's Affiliates as Obligees written on Owner's approved Performance Bond and Labor Material Payment Bond forms (the "Bonds"). The Bonds shall be procured from a surety authorized to do business in the state in which the Project is located and shall be rated "A-/VII" or better by the A.M. Best Company at the time of issuance of the Bonds and holding Certificates of Authority as an acceptable surety on federal bonds as listed by the United States Department of Treasury (Circular 570, as amended) in its most recent list at the time of issuance of the Bonds. The penal sum of the Bonds shall be written within the maximum specified for such surety in Circular 570, as amended. The attorney-in-fact who executes the Bonds on behalf of the surety shall affix to the Bonds a certified and current copy of his or her power of attorney. If the surety on any of the Bonds furnished by Contractor is declared a bankrupt or becomes insolvent or its rights to do business are terminated in the state in which the Project is located or it ceases to meet the requirements of this Section 8.7, Contractor shall within ten (10) calendar days thereafter substitute another bond and surety, both of which must be acceptable to Owner. The obligations of this Section

8.7 shall survive the completion of the Work, the termination of this Agreement and/or final payment.

Article 9

Termination

9.1 Owner's Right to Terminate for Convenience.

9.1.1 Owner may, at any time, for its convenience and without cause, elect to terminate this Agreement. Termination by Owner of this Agreement for convenience shall be by written notice delivered to Contractor specifying the effective date of the termination of this Agreement.

9.1.2 In the event of Owner's termination of this Agreement for convenience, Owner shall pay Contractor the following amounts:

- (i) For all Work satisfactorily completed prior to the effective date of the termination, Owner shall pay Contractor the portion of the unpaid Contract Price equitably allocated to such completed portion of the Work for which payment has not already been made;
- (ii) Contractor's actual direct costs reasonably incurred within fourteen (14) days of the effective date of termination of this Agreement with respect to Contractor's demobilization from the Project site;
- (iii) Notwithstanding anything to the contrary, in no event shall Owner be liable to Contractor for any indirect and/or consequential damages (including, without limitation, loss of financing, loss of bonding capacity, loss of business, loss of reputation and/or loss of profits) arising out of Owner's termination of this Agreement for convenience; and
- (iv) Notwithstanding anything to the contrary, in no event shall Owner be liable to Contractor pursuant to this Section 9.1 for any payments to Contractor in excess of the Contract Price.

9.2 Owner's Right to Perform and Terminate for Cause.

9.2.1 If Contractor: (i) fails to provide a sufficient number of skilled workers, or to supply proper materials, to permit the Work to be completed in accordance with the requirements of this Agreement; (ii) fails to comply with applicable Legal Requirements; (iii) fails to timely pay Subcontractors for labor, materials and services; (iv) fails to prosecute the Work with promptness and diligence to ensure that the Work is completed in accordance with the requirements of this Agreement; (v) fails to timely correct defective Work rejected by Owner; and/or (vi) breaches and/or defaults under any of the covenants, indemnifications, representations and/or warranties of Contractor in this Agreement, then Owner, in addition to any other rights and/or remedies provided in this Agreement and/or by law, shall have the rights and remedies set forth in Sections 9.2.2 and 9.2.3 below.

9.2.2 Upon the occurrence of any of the events set forth in Section 9.2.1 above, Owner may give written notice to Contractor and Contractor's surety, if any, that Owner intends to terminate this Agreement unless the events described in the notice are cured within seven (7) days of the receipt by Contractor of such written notice given by Owner. If Contractor

fails to cure such events within such seven (7) day period, then Owner may give a second written notice to Contractor and Contractor's surety, if any, declaring the termination of this Agreement.

9.2.3 Upon declaring this Agreement terminated pursuant to Section 9.2.2 above, subject to any prior rights of Contractor's surety, if any, Owner may (i) take possession of the Work and take possession, for the purpose of completing the Work, of all materials (whether delivered to the Project site, stored off-the Project site or on order), and of all equipment, scaffolds, tools, construction equipment and machinery on the Project site, which have been purchased or provided for the performance of the Work, all of which Contractor hereby transfers, assigns and sets over to Owner for such purpose, and (ii) employ any person or persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. In the event of such termination, Contractor shall not be entitled to receive any further payments under this Agreement until the entire Work shall be finally completed in accordance with the requirements of this Agreement. At such time, if the unpaid balance of the Contract Price exceeds the costs and expenses incurred by Owner in completing the entire Work, plus all other liabilities, damages, losses, costs, and/or expenses incurred by Owner as a consequence of Contractor's default and/or Owner's termination of this Agreement, such excess shall be paid by Owner to Contractor. If the costs and expenses incurred by Owner in completing the entire Work, plus all other liabilities, damages, losses, costs, and/or expenses incurred by Owner as a consequence of Contractor's default and/or Owner's termination of this Agreement, exceeds the unpaid balance of the Contract Price, then Contractor shall pay and/or reimburse Owner for such excess upon demand. The costs and expenses incurred by Owner as a consequence of Contractor's default and/or Owner's termination of this Agreement shall include reasonable attorneys' fees and/or expenses incurred by Owner in connection with the prosecution and defense of claims arising from Contractor's default and/or any exercise by Owner of any of its rights and/or remedies.

9.2.4 If Owner improperly terminates this Agreement for cause, the termination of this Agreement for cause shall be converted to a termination of this Agreement for Owner's convenience in accordance with the provisions of Section 9.1 hereof, and Contractor shall be entitled to recover from Owner only those amounts afforded Contractor under Section 9.1 hereof in the event of an Owner termination of this Agreement for convenience.

9.3 Contractor's Right to Terminate for Cause.

9.3.1 If Owner fails to make payment within the time stated in this Agreement of undisputed amounts properly due under this Agreement, then Contractor, in addition to any other rights and/or remedies provided in this Agreement and/or by law, shall have the rights and remedies set forth in Sections 9.3.2 and 9.3.3 below.

9.3.2 Upon the occurrence of such failure to pay undisputed amounts set forth in Section 9.3.1 above, Contractor may give written notice to Owner that Contractor intends to terminate this Agreement unless such failure to pay described in the notice is cured within seven (7) days of the receipt by Owner of such written notice given by Contractor. If Owner fails to cure such default within such seven (7) day period, then Contractor may give a second written notice to Owner declaring the termination of this Agreement.

9.3.3 Upon properly declaring this Agreement terminated pursuant to Section 9.3.2, Contractor shall be entitled to recover from Owner the following amounts:

- (i) For all Work satisfactorily completed prior to the effective date of the termination, Owner shall pay Contractor the portion of the unpaid Contract Price equitably allocated to such completed portion of the Work for which payment has not already been made;
- (ii) Contractor's actual direct costs reasonably incurred within fourteen (14) days of the effective date of termination of this Agreement with respect to Contractor's demobilization from the Project site;
- (iii) Contractor's actual direct costs reasonably incurred in settlement of terminated contracts with Subcontractors;
- (iv) Contractor's other proven losses directly caused by Owner's breach of this Agreement, including loss of anticipated profits arising directly from performance of this Agreement;
- (v) Notwithstanding anything to the contrary, in no event shall Owner be liable to Contractor for any indirect and/or consequential damages (including, without limitation, loss of financing, loss of bonding capacity, loss of business, loss of reputation and/or loss of profits) arising out of Owner's breach of this Agreement and/or Contractor's termination of this Agreement for cause, except loss of anticipated profits arising directly from performance of this Agreement; and
- (vi) Notwithstanding anything to the contrary, in no event shall Owner be liable to Contractor pursuant to this Section 9.3 for any payments to Contractor in excess of the Contract Price.

Article 10

Notices

All notices given under this Agreement shall be in writing and shall be sent postage prepaid by either (a) United States certified mail, return receipt requested, or (b) for delivery on the next business day with a nationally-recognized express courier. All such notices shall be sent to the following addresses, until such addresses are changed by 30 days' notice:

To Contractor: **NAME AND ADDRESS**

To Owner: Albertsons LLC
 250 Parkcenter Blvd.
 Boise, ID 83706
 Attn:

With a copy to: Albertsons LLC
 250 Parkcenter Blvd.
 Boise, ID 83706
 Attn: Legal Department

Notices shall be deemed given as of the date such notice is postmarked, if sent by certified mail, or is placed with an express courier, if sent by express courier. If the last day for giving any notice or taking any action required or permitted under this Agreement would otherwise fall on a Saturday, Sunday, or legal holiday, that last day shall be postponed until the next legal business day.

Article 11

Miscellaneous Terms and Conditions

11.1 Assignment. Contractor shall not, without the written consent of Owner in Owner's sole discretion, assign, transfer and/or convey (by operation of law or otherwise) any rights and/or interests in this Agreement, including any rights to payments under this Agreement. Owner may assign, transfer and/or convey any and/or all of its rights and/or interests in this Agreement. Contractor shall assign to Owner, from time to time as Owner may request, by assignments in form and content acceptable to Owner all guarantees, warranties and/or indemnities by any Subcontractor, Sub-Subcontractor and/or any manufacturers, suppliers and/or vendors providing materials, equipment or services in connection with the Work.

11.2 Successorship. Contractor and Owner intend that the provisions of this Agreement are binding upon and inure to the benefit of the parties, their heirs, successors and permitted assigns.

11.3 Governing Law. This Agreement shall be governed by the laws of the place of the Project, without giving effect to its conflict of laws principles.

11.4 Severability. If any provision or any part of a provision of this Agreement shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to any applicable Legal Requirements, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provisions or parts of the provision of this Agreement, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

11.5 Cumulative Remedies. Rights and/or remedies available under this Agreement shall be in addition to and not a limitation of rights and/or remedies otherwise available by law and/or equity including, without limitation, all rights and/or remedies at common law for breach of this Agreement (including failure to complete the Work for the Contract Price and/or to complete the Work within the times required by this Agreement).

11.6 Attorney's Fees. If Owner or Contractor commence litigation and/or other legal proceedings respecting any dispute between Owner and Contractor arising out of and/or relating to this Agreement and/or the Work, the prevailing party in such litigation and/or other legal proceedings shall be entitled to the recovery of reasonable attorneys' fees and other reasonably incurred costs and expenses of the successful prosecution or defense of such litigation and/or other legal proceedings.

11.7 Contractor's Waiver. Notwithstanding anything to the contrary, Contractor waives all claims and/or causes of actions against Owner and/or Owner's Affiliates for indirect and/or consequential losses and/or damages arising out of and/or related to this Agreement and/or the breach of this Agreement and/or the Work performed pursuant to this Agreement, including, without limitation, damages incurred by Contractor for principal office expenses,

including compensation of personnel stationed there, for loss of financing, loss of bonding capacity, loss of business, loss of reputation and/or for loss of profits, except anticipated profit arising directly from performance of this Agreement. This waiver is applicable, without limitation, to all indirect and/or consequential losses and/or damages arising out of, related to and/or in any way connected with this Agreement and/or the Work, including any indirect and/or consequential losses and/or damages due to termination of this Agreement under any circumstances.

11.8 No Waiver. A party shall not be deemed to have made a waiver under this Agreement unless it does so in writing, and the mere failure of a party to act to enforce any provision of this Agreement shall not be considered a waiver and shall not prevent that party from enforcing any provision of this Agreement in the future. Any written waiver under this Agreement shall apply only to the matter expressly waived and shall not be deemed to be a waiver of any subsequent breach or of any other provision of this Agreement. Wherever this Agreement requires obtaining the waiver, consent or approval of any person or entity, such waiver, consent or approval may be granted or withheld in such person or entity's sole discretion unless this Agreement expressly provides otherwise.

11.9 Entire Agreement. This Agreement, including any attached Exhibits, all of which are made a part of this Agreement, contains the entire agreement of the parties concerning this subject matter. This Agreement should be read carefully because only those terms in writing in this Agreement concerning this subject matter are enforceable. No other terms or oral promises concerning this subject matter which are not in this Agreement may be legally enforced, and no promises, projections, inducements or representations concerning this subject matter made before the date of this Agreement will change the terms of this Agreement or be binding on any party. No promises or other terms concerning this subject matter shall be implied in this Agreement.

11.10 Headings. The headings used in this Agreement are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

11.11 Survival Of Terms And Conditions. Without limiting other specific provisions of this Agreement, all terms and conditions of this Agreement which by their express terms or which by their nature are intended by the parties to extend beyond the completion of the Work, termination of this Agreement and/or final payment, shall survive the completion of the Work, termination of this Agreement and/or final payment and shall remain binding on the parties.

11.12 Joint Authors. The Owner and Contractor have negotiated, or have had the opportunity to negotiate this Agreement, and shall jointly be deemed the authors of it. In interpreting this Agreement, there shall be no presumption or standard of construction in favor of or against either the Owner or Contractor.

11.13 Confidentiality. Contractor shall not, without Owner's prior written consent, release or disclose any information relating to the Work or the Project to any person or entity except as necessary to perform the Work hereunder or as otherwise required by law.

11.14 Independent Contractor. The relationship of Contractor to Owner hereunder is that of an independent contractor. As such, Contractor shall have no authorization, express or implied, to bind Owner, and Owner shall have no authorization, express or implied, to bind Contractor to any agreement, settlement, liability or understanding whatsoever, except as specifically set forth

in this Agreement, nor is either party authorized to perform any acts for the other, except as specifically set forth in this Agreement.

11.15 Relationship Of Trust. Contractor accepts the relationship of trust and confidence established with Owner by this Agreement, and covenants with Owner to furnish Contractor's best skill and judgment to further the interests of Owner.

In executing this Agreement, Owner and Contractor each individually represents to the other that it has the necessary financial resources to fulfill its obligations under this Agreement, and that it has the necessary approvals required by its governing instruments to execute this Agreement and perform its obligations under this Agreement.

OWNER	CONTRACTOR
_____	_____
By: _____ Its: _____	By: _____ Its: _____
Date: _____	Date: _____

EXHIBIT "A"

Drawings, plans and/or specifications for the Work