



Orange County  
Financial Services Department  
**ADDENDUM #2**  
**October 26, 2015**

RFQ 5214
CMAR - Orange County Detention Center

To all Vendors:

Modifications to bid documents for the above-named Request for Proposal are made as follows and shall be included in the proposed amount.

See attached "Draft" contract as referenced in the RFQ

All other terms and conditions shall remain the same

By: David E. Cannell, Purchasing Agent; [dcannell@co.orange.nc.us](mailto:dcannell@co.orange.nc.us) / (919) 245-2651

**Acknowledgement of receipt of this addendum shall be included with your submittal**

Company Name: \_\_\_\_\_

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

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

P.O. Box 8181 200 South Cameron Street Hillsborough, North Carolina 27278  
Telephones: Area Code 919-245-2651 Fax: 919-636-4913

**ORANGE COUNTY  
NORTH CAROLINA**

**CONSTRUCTION MANAGER AT RISK CONTRACT  
FOR CONSTRUCTION SERVICES**

This Construction Manager at Risk Contract for Construction Services (hereinafter the "Contract") is entered into this the \_\_\_\_\_ of \_\_\_\_\_ 20\_\_\_\_, between: \_\_\_\_\_ (hereinafter the "CM" or "CMAR") and Orange County, North Carolina, a political subdivision of the State of North Carolina (hereinafter the "Owner").

For the Project:

**WITNESSETH:**

Whereas the Owner published a Request for Qualifications ("RFQ"), the \_\_\_\_ day of \_\_\_\_\_ seeking the submission of Statements of Qualifications to act as a Construction Manager at Risk to furnish professional construction management services during the design and construction of the Project identified and described in that Request for Qualifications; and

Whereas the undersigned CMAR submitted a responsive Statement of Qualifications dated \_\_\_\_\_, \_\_\_\_\_ and subsequently submitted a fee proposal; and

Whereas the Owner has evaluated the Statement of Qualifications and approved, on \_\_\_\_\_, the selection of the undersigned CMAR to furnish professional construction management services during the design and construction of the Project; and

Whereas the CMAR and the Owner now wish to form and memorialize their agreement for Construction Services pursuant to the terms of the RFQ;

Now therefore, for the consideration hereinafter set forth, the CMAR and the Owner agree as follows:

**1. GENERAL SCOPE AND INTENT**

- 1.1. For the fee, allowances and other sums set forth herein, the CMAR undertakes to act as the Owner's fiduciary (GS 143-128.1(c)) and to furnish professional construction management services during the Project. In broad terms, under this Contract, the CMAR will perform construction services, as generally defined in the RFQ, with General Conditions services being provided on a not-to-exceed allowance basis, and all construction being accomplished through the CMAR's Subcontractors, selected as provided herein. The CMAR shall furnish efficient engineering reviews, business administration and field supervision, and shall use its best efforts to see to it that the Work of the Project is done in the best and most expeditious, economical manner consistent with the interests of the Owner, and in strict conformity with the Contract Documents, including all reasonable implications therein. The Work of the Project will be divided into construction phases. The CMAR shall provide a Guaranteed Maximum Price for each construction phase, as more fully defined herein.
- 1.2. During the construction of the Work, the CMAR will provide all services to coordinate, manage and effect the construction of the Work (including the provision of General Conditions services and the award and management of all Subcontracts) including without limitation: change order review; quality control inspections; schedule maintenance; cost control measures; all meetings; shop drawing review; processing, tracking and monitoring of Requests For Information and substitution requests; resolution of claims by all Subcontractors; all inspections, including inspections by regulatory agencies, the Project Designer, the Owner's Representative, and the Owner's other technical inspectors; and close out documents with the Owner and Project Designer.
- 1.3. The CMAR shall familiarize itself with all available Project funding and Work with the Owner and Project Designer to maximize the scope and quality of the Project based upon the available funds.

- 1.4. The performance of the CMAR's services shall be in strict compliance with this Contract, the Fee Proposal, the RFQ (including all its requirements, general conditions, appendices, and attachments), the CMAR's Proposal, the Orange County Minority and Women Owned Business Enterprise ("MWBE") policy approved by the Owner on \_\_\_\_\_ (attached as Appendix A), bonds, and all amendments hereto (hereinafter, together: the "Contract Documents"). To the extent any term, requirement, or specification in the CMAR's proposal shall be in conflict with any term, requirement, or specification of any other document or item contained in the Contract Documents, the terms, requirements, and specifications of the other document or item contained in the Contract Documents shall control and the conflicting contents of the CMAR's proposal and supporting documents shall be deemed surplusage.
- 1.5. The drawings and specifications for the Project shall be considered complementary, one to the other. That which is shown on the drawings or called for in the specifications shall be as binding as if it were both called for and shown. The intent of the drawings and specifications is to establish the scope of all labor, materials, transportation, equipment, and any and all other things necessary to provide a complete job. In case of discrepancy or disagreement in the Contract Documents, the order of precedence shall be: Contract Documents, Project Designer's specifications, large-scale detail drawings, and small-scale drawings.
- 1.6. The wording of the specifications shall be interpreted in accordance with common usage of the language except that words having a commonly used technical or trade meaning shall be so interpreted in preference to other meanings.

## 2. DEFINITIONS

- 2.1. The "Project Team," "Project Design Team," or "Design Team" consists of the Owner, the Project Designer, the CMAR and others as identified in the RFQ.
- 2.2. The "Owner" is Orange County. The Owner in its sole discretion shall designate an Owner's Representative who shall be the CMAR's Owner contact point during both the Pre-Construction and Construction Phases. This representative is \_\_\_\_\_ unless designated otherwise in writing. \_\_\_\_\_ shall be the primary channel of communication to the Owner and shall act as the Owner's liaison with the CMAR. The Owner's Representative may designate multiple representatives responsible for defined aspects of the Project, and may replace or re-designate any or all multiple representatives. In the event of any disagreement or dispute between any members of the Project Team regarding the Project, the Owner's Representative shall be the final decision making authority, subject to written appeal by either party to the Owner and dispute resolution procedures incorporated herein
- 2.3. The "Designer" or "Project Designer" means the firm or firms of architects or engineers or both (and their consultants) which have undertaken to design the Project pursuant to a contract with the Owner, (hereinafter, the "design contract" or "design agreement"). The Owner has retained \_\_\_\_\_ of \_\_\_\_\_, NC as the Project Designer \_\_\_\_\_ with \_\_\_\_\_ of \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_ as consultants (Refer to the RFQ Data Sheet). The Project Designer will provide all design services throughout the duration of the Project. The CMAR acknowledges that he has received a copy of the Design Contract between the Owner and Project Designer.

- 2.4. The “Construction Manager at Risk” (CMAR) is the Owner’s fiduciary responsible for undertaking all necessary action contemplated under the Contract Documents to (a) establish during the design phase a Guaranteed Maximum Price (GMP) to construct the Project and (b) ensure timely and quality completion of the Project at a cost within the GMP. CM or CMAR as used in the Contract Documents means Construction Manager at Risk (CMAR).
- 2.5. A “Subcontractor”, as the term is used herein, shall include a general, mechanical, electrical, or plumbing Subcontractor or other specialty Subcontractor, trade Subcontractor, supplier, or vendor who has entered into a direct contract with the CMAR, and includes one who furnishes labor, materials, equipment or other services to complete Work in accordance with the drawings, specifications and other plans for the Project. The term Subcontractor shall include, where appropriate, sub-subcontractors and suppliers to subcontractors of any tier.
- 2.6. The “Total Construction Budget” is first described in the RFQ Data Sheet, and consists of the Cost of the Work, as more fully defined in section 4 below, the CMAR-GMP Contingency, as more fully defined in section 5 below, the Early Completion Bonus Fund, if offered and made part of this Agreement, as more fully defined in section 24 below, the CMAR General Conditions, as more fully defined in section 3 below, and the CMAR Fee, as more fully defined in section 3 below. Upon approval by the Owner of the Total Construction Budget as presented on \_\_\_\_\_, the Total Construction Budget will not be allowed to exceed \$ \_\_\_\_\_. The Owner reserves the right to adjust the Total Construction Budget at any time prior to agreement on the final GMP.
- 2.7. The “Construction Documents” are the drawings, specifications and other plans for the Project prepared by the Project Designer and approved in writing by the Owner’s Representative, which define the scope of the work. The Contract Documents define terms and conditions. Bid packages or other materials prepared by the CMAR to contract with Subcontractors, while they might incorporate all or part of the Contract Documents and the Construction Documents, shall not be deemed part of nor shall they modify the Contract Documents or the Construction Documents for purposes of this Contract.
- 2.8. Any “notice” as referenced or required herein shall be in writing, signed by an authorized agent of the party providing notice, and shall be delivered as provided in Section 53.1.
- 2.9. “Work”, as used herein as a noun, is intended to include materials, labor, and workmanship provided by the CMAR and its Subcontractors to carry out the intent of the Construction Documents.
- 2.10. The “Project” is the total construction Work to be performed under the Contract Documents, whether performed by the CMAR and its Subcontractors, by the Owner, or by the Owner’s separate contractors.
- 2.11. “Change Order”, as used herein, shall mean a written order to the CMAR subsequent to the signing of the Contract authorizing a change in the Contract. The Change Order shall be signed by the CMAR, Project Designer, and the Owner.
- 2.12. “Field Order”, as used herein, shall mean a written approval for the CMAR to proceed with the Work requested by Owner prior to issuance of a formal Change Order. The field order shall be signed by the CMAR, Project Designer, and Owner’s Representative.

- 2.13. "Liquidated Damages", as stated in the Contract Documents, is an amount reasonably estimated in advance to cover the losses incurred by the Owner by reason of failure of the CMAR to complete the Work within the time specified.
- 2.14. "Surety", as used herein, shall mean the bonding company or corporate body which is bound with and for the CMAR, and which engages to be responsible for the CMAR and its acceptable performance of the Work.
- 2.15. "Request for Information" (RFI) is a request from the CMAR seeking an interpretation or clarification by the Project Designer relative to the Contract Documents. The RFI, which shall be labeled (RFI), shall clearly and concisely set forth the issue or item requiring clarification or interpretation and why the response is needed. The RFI must set forth the CMAR's interpretation or understanding of the Contract Documents requirements in question, along with reasons for such an understanding.
- 2.16. "Inspection" shall mean examination or observation of Work completed or in progress to determine its compliance with the Contract Documents.
- 2.17. "Equal to" or "approved equal" shall mean materials, products, equipment, assemblies, or installation methods considered equal by the bidder in all characteristics (physical, functional, and aesthetic) to those specified in the Contract Documents.
- 2.18. "Substitution" or "substitute" shall mean materials, products, equipment, assemblies, or installation methods deviating in at least one characteristic (physical, functional, or aesthetic) from those specified, but which in the opinion of the bidder would improve competition and/or enhance the finished installation.
- 2.19. "Provide" or "provides" shall mean furnished or furnished and installed by the CMAR or its Subcontractors as more fully described in the Contract Documents.

### **3. CMAR CONSTRUCTION FEE AND GENERAL CONDITIONS COSTS**

- 3.1. The CMAR shall be entitled to payment of a fee (the CMAR Fee) for its services on the Project, and shall be entitled to reimbursement of costs as set forth herein, all within the Total Construction Budget as adjusted by the Orange County Board of Commissioners (the "Board") in accordance with 2.76 above.
- 3.2. Provided that the Total Construction Budget remains \$\_\_\_\_\_, the CMAR Fee shall not exceed \$\_\_\_\_\_, subject to modification and limitation as set forth herein. If the Owner changes the Total Construction Budget, the CMAR Fee shall not exceed three percent (3%) of the sum of (i) the Cost of the Work, (ii) the CMAR-GMP Contingency, and (iii) the CMAR General Conditions, (but not including the Early Completion Bonus Fund) all as more fully defined in this Contract, as of the date when the final GMP is established and approved by the Owner, subject to modification and limitation as set forth herein. The CMAR Fee will include all CMAR home office personnel costs, including officers as well as home office and local office support staff not included in General Conditions below, together with all other CMAR overhead costs and profit. This Fee shall also include all home office quality control and safety reviews, as well as all required services of a home office Project executive, by whatever name called. CMAR costs which are not to be included in the CMAR Fee are the costs of all Subcontracts, on-site field staff, General Conditions costs (as provided below), and the CMAR-GMP Contingency described below.
- 3.3. When a GMP is established and approved for a defined phase of the Work, the CMAR Fee for that GMP shall be converted to a lump sum and be included in the GMP. When the final GMP is established and approved, the CMAR agrees that the cumulative CMAR Fee shall not exceed the maximum amount set forth above in paragraph 3.2, and shall not cause the final GMP to exceed the

Total Construction Budget approved by the Owner. Thereafter, the CMAR Fee shall not be adjusted unless cumulative Owner requested Change Orders to the Work of the Project adjust **the total Cost** of the Work in the total cumulative GMP in excess of FIVE (5.0%) percent. The entire CMAR Fee at the time the final GMP is fixed, including all lump sum CMAR fees for each GMP for a defined phase of Work, shall not exceed the amount in 3.2 above. In the event an adjustment to the Fee is warranted under this paragraph, a lump sum adjustment to the Fee shall be equitably determined based on the nature of the changes to the Work, proven changes in the scope of services provided by the CMAR, and any other factor that would affect the effort and cost expended by the CMAR due to changes to the Work.

- 3.4. In addition to the foregoing Fee, an allowance for the General Conditions on a “not-to-exceed” basis will be submitted by the CMAR with each GMP for the Owner’s approval. No costs associated with the CMAR’s main office or its main office or other off-site personnel, including the costs associated with the use of items or equipment of the main office, are covered under the General Conditions allowance. All such costs are deemed to have been included in the CMAR Fee. Subject to approval by the Owner’s Representative, each GMP may include special designated allowances for defined expenses. Each GMP shall contain an allowance for General Conditions fixed as an estimated lump sum for each GMP. The entire General Conditions allowance shall be fixed based on the Total Construction Budget at the time of the final GMP, after which the General Conditions shall not be adjusted unless an amount is negotiated with Owner-requested Change Orders to the Work of the Project. The sum of the entire General Conditions at the time the final GMP is fixed, including all allowances for General Conditions for each GMP for a defined phase of Work, shall not exceed \$ \_\_\_\_\_, subject to approval by the Owner and modification and limitation as further set forth herein.

**3.5.** General Conditions shall be broken down into a reasonable number of categories as approved by the Owner’s Representative. The General Conditions items to be handled by the CMAR on a not-to-exceed allowance basis are to include, but not necessarily be limited to the following items:

- 3.5.1. Mobilization: Move on site and establish appropriate field offices.
- 3.5.2. Travel Expenses: All travel, by any conveyance, relating to the Project; except that, with the prior approval of the Owner’s Representative, travel required for product reviews, selection, inspection, approvals and expediting at the place of production of such products, shall be chargeable at cost to the cost of the Work under the GMP.
- 3.5.3. Temporary Facilities: Owner will assist CMAR in providing field office(s). Owner will assist CMAR with providing other appropriate office necessities such as temporary electric, heating, water, and sanitation, after consultation with the Owner’s Representative. These costs should be incurred judiciously. Owner will also assist CMAR in establishing and maintaining an appropriate shipping and receiving system.
- 3.5.4. Plans/Surveys/Permits/Testing: Reproduction of Construction Documents as needed by the CMAR over and above the allowance for Construction Documents provided by the Owner. Provide surveyor’s services (site layout, etc.), as required. Acquire all required permits (fee for permits to be paid directly by Owner unless otherwise directed by the Owner’s Representative). Perform inspections of the existing buildings and Project conditions and perform destructive testing to assist the Project Designer prepare a complete and accurate set of Construction Documents and for the CMAR to estimate the cost of the Work in order to minimize change orders due to unforeseen conditions within allowances in the GMP.
- 3.5.5. Safety/Cleanup: Establish and maintain an on-site safety program throughout the construction phases. (Note: The cost of home office safety personnel is included in the CMAR Fee. The cost of materials and onsite personnel may be included in General Conditions.) Install and maintain temporary facilities, as required: safety barricades, partitions, ladders, stairs, site fencing, signage, first aid, traffic control devices, etc. Provide daily site cleanup, trash collection, and removal. Provide and maintain site

- security throughout Project construction phases. Provide site snow removal, as may be required throughout Project construction phases.
- 3.5.6. General: Provide temporary weather and dust protection (that which must practically remain outside of construction) as may be required during construction phases. Provide field personnel pagers, and two-way radio throughout the construction phases, as applicable. Include travel expenses for field personnel related to off-site equipment/materials survey and inspections. Field staffing needs shall be provided by the CMAR as part of General Conditions per the RFQ documents, and shall be limited to the specific staff positions noted. Provide Project supervisory personnel, as may be required, throughout the construction phases; i.e., the Project superintendent and Project engineers (mechanical, electrical, civil, and structural). Provide field office support staff, as may be required, throughout the construction phases, i.e., secretarial, laborers, etc.
- 3.5.7. Insurance/Bond: Provide 100% Performance and Payment Bonds. Provide liability insurance and provide builder's risk insurance policy in the amount of the GMP unless directed otherwise by Owner's Representative in accordance with any Owner Controlled Insurance Program ("OCIP").
- 3.5.8. Close-Out/De-Mobilization: Provide final site/facility clean up. Provide final release of liens for all contracts. Provide sets of all Subcontractor as-built drawings to the Owner and Designer; one set will be used by the Project Designer to prepare as-built drawings.
- 3.6. Expenditures in excess of General Conditions category totals may be made if and only if the CMAR can first certify to the Owner that identified funds in other General Conditions categories within the specific GMP are in excess of actual needs. The CMAR will be reimbursed for actual General Conditions costs only as they are incurred, with no mark-up by the CMAR. Other expenditures in excess of the total General Conditions allowance that are not covered in the Cost of Work may be paid out of the CMAR Contingency as allowed hereunder, or are deemed included in the CMAR's Construction Fee.
- 3.7. The Owner reserves the right to adjust the Total Construction Budget at any time prior to agreement on the final GMP. Subject to the Owner's right to adjust the Total Construction Budget, any unused balance from each General Conditions allowance may be carried forward by the CMAR to each subsequent GMP, and to the end of the Project. Any unused portion of the total General Conditions allowance remaining after the Project is finally complete shall be returned to the Owner.
- 3.8. Costs for on-site field staff will be included in the General Conditions allowance. Field personnel costs shall be billed at Direct Personnel Expenses/ Employee costs (direct salary) plus all customary payroll benefits including but not limited to FICA, SUTA, FUTA, 401K, vacation leave, sick leave, holidays, jury duty leave and bereavement leave] with no employee overhead mark up. The on-site field staff is limited to full time staff which includes the Project Engineer(s), Superintendent(s) actually furnishing services to the Project, Field Secretaries/Clerks, and occasional laborers (on as needed basis), as amended from time to time by agreement of the parties. Other CMAR positions will be deemed included in the CMAR Construction Fee.
- 3.9. Additional General Conditions costs alleged to arise from any Owner-requested change orders to the Work of the Project will be reviewed on an individual change order basis. After consultation with the Project Designer, the Owner shall determine whether the requested increases are caused by an Owner-requested change order. Absent extraordinary circumstances, the CMAR should not expect that any change order other than those requested by the Owner will allow for an increase in its General Conditions.
- 3.10. The CMAR shall not, on account of differing site conditions, be entitled to any increase in the CMAR Fee or General Conditions unless the differing site condition is such that the CMAR is entitled to an extension of the time for completion of the Project of more than 30 calendar days.

#### 4. CONSTRUCTION GUARANTEED MAXIMUM PRICE (“GMP”)

- 4.1. Upon final review submission by the Project Designer of Construction Documents for an agreed phase of the Work, the CMAR will develop and provide to the Owner a GMP for that phase which will include all costs of construction, (hereinafter sometimes referred to as “Cost of the Work”), and all other projected costs including without limitation the CMAR Fee, the CMAR-GMP Contingency and General Conditions allowance, but not including the Owner’s Construction Contingency. The Early Completion Bonus Fund will not be included in any GMP until the final GMP, at which time the Early Completion Bonus will be included in the GMP. The GMP shall set out each anticipated Subcontract amount, the CMAR fixed Fee, the General Conditions Allowance costs including on-site field staff, and all Project related costs, i.e., bonds, personnel payroll benefits, etc. The allocation, basis and distribution of the cost of construction, CMAR Fee, General Conditions and CMAR-GMP Contingency for each GMP shall be set out in detail in each GMP amendment.
- 4.2. The GMP shall reflect all cash discounts obtained on payments made by the CMAR or any Subcontractor, which shall be for the benefit of the Owner. Trade discounts, rebates, refunds, and amounts received from sales of surplus or salvaged materials and equipment shall accrue to the Owner and the CMAR shall make provisions so they can be secured and shall reduce the GMP accordingly. Amounts which accrue to the Owner in accordance with this section shall be accounted for and credited to the Owner as a deduction from the Cost of the Work or the General Conditions as appropriate.
- 4.3. Not later than \_\_\_\_\_, provided the Designer submits by \_\_\_\_\_ and the Owner approves final submission by the Project Designer of the last of the complete Construction Documents for the entire Project by \_\_\_\_\_, the CMAR will develop and submit its final GMP for the Project. At that time, the Total Construction Budget will be fixed, subject to changes only as set forth herein by change order. Until that time, the CMAR agrees to use its best efforts to work with the Project Team to keep the cost of the Project within the Total Construction Budget.
- 4.4. At no time shall the CMAR Fee, General Conditions, CMAR-GMP Contingency, or the Early Completion Bonus Fund exceed the amounts for these respective items within the Total Construction Budget. The sum of all GMP must not exceed the Total Construction Budget, including CMAR Fees, overhead, and escalation until \_\_\_\_\_, as set forth on the RFQ Data Sheet, unless and to the extent that the Total Construction Budget is increased or decreased by the Board.
- 4.5. Each GMP for a phase of the Work shall identify the Construction Drawings that define the scope of work covered by the GMP, shall describe any assumptions or clarifications concerning the scope of the Work, shall describe any special allowances and the basis on which each allowance was calculated, and shall contain the progress schedule related to that phase of the Work.
- 4.6. The Owner reserves the right to direct the CMAR to (and the CMAR shall) work in conjunction with the Project Designer to redesign the Project as necessary to maintain the Project program and meet the Total Construction Budget as follows:
  - 4.6.1. After consultation with the Owner, the CMAR shall coordinate and cooperate with the Project Team to alter and redraft Construction Documents as necessary to accomplish the required reduction in cost.
  - 4.6.2. The CMAR shall develop and provide to the Owner a GMP in connection with the redrafted and altered Construction Documents to accomplish the necessary reductions in cost.
  - 4.6.3. The CMAR shall analyze the Project Designer’s originally submitted and as altered and redrafted Construction Documents, and make recommendations to the Owner as to ways and methods to reduce the costs of constructing the Project to a sum which does not exceed the Total Construction Budget. Notwithstanding anything in the RFQ to the contrary, the CMAR shall perform the Work set forth in this section without additional

compensation. The Owner has the right to reject any GMP as originally submitted, or as adjusted. In that event, the Contract may be terminated according to its terms. In addition, the Owner has the right to withhold, in its sole discretion, approval of the amendment of the Contract to reflect any GMP, in which event the Contract may be terminated according to its terms.

- 4.6.4. The CMAR's detailed construction cost estimates and GMP will be reviewed by the Project Designer and the Owner for reasonableness and compatibility with the Total Construction Budget. Meetings and negotiations between the Owner, Project Designer and the CMAR will be held to resolve questions and differences that may occur between the Project Construction Budget and the CMAR's construction cost estimate and corresponding GMP. If indicated by the Total Construction Budget limitations or other circumstances, the CMAR shall work with the Owner and Project Designer to reach a mutually acceptable GMP.
- 4.7. Upon acceptance by the Owner of a GMP, the Owner shall prepare and the CMAR shall execute an amendment to this Contract to reflect the GMP. Within 10 days after the execution of the amendment provided herein, the CMAR shall provide the Owner with a Performance Bond and a Labor and Material Payment Bond each for 100% of the GMP in conformity with the terms of N.C. Gen. Stat. Chapter 44A and this Contract.
- 4.8. Upon acceptance of the GMP, the CMAR shall continue to advise and assist the Owner and Project Designer during any continuing design activities as described in the RFQ.
- 4.9. Upon completion of the Work, any and all non-expended funds remaining in any GMP will be retained by the Owner, except as specifically set forth above in Section 3 and below in Section 5.

## 5. CONTINGENCY ALLOWANCES

- 5.1. Owner's Contingency: An Owner's Construction Contingency will be established. Expenditures against this contingency will be available to cover all costs not covered by the GMP resulting from changes in scope and initiated by the Owner via a change order amendment issued by the Owner.
- 5.2. CMAR-GMP Contingency: Each GMP shall contain a CMAR-GMP Contingency fixed as an estimated lump sum for each GMP in an amount approved by the Owner, to help reduce the risks assumed by the CMAR in providing the GMP for the Project. The entire CMAR Contingency shall be fixed, based on the Total Construction Budget at the time of the final GMP, after which the CMAR-GMP Contingency shall not be adjusted unless an amount is negotiated with Owner requested Change Orders to the Work of the Project. In the event an adjustment to the CMAR Contingency is negotiated under this paragraph, a lump sum adjustment to the CMAR Contingency shall be equitably determined based on the nature of the changes to the Work, proven changes in the scope of services provided by the CMAR, and any other factor that would affect the CMAR risks due to changes to the Work
- 5.3. The Owner and the CMAR acknowledge that the contingency is included to compensate for eventualities which have not been taken into precise account in the establishment of the GMP, specifically unanticipated costs which do not result in, or cause a change order to the GMP, including (1) legal fees not to exceed in the aggregate \$\_\_\_\_\_ associated with defending bid protests or subcontract awards may be authorized by the Owner as expenditures within the GMP Contingency provided the CMAR is not negligent or at fault, (2) scope gaps between trade Subcontractors, (3) contract default by trade Subcontractors, (4) threat of or damage due to Acts of God to the extent not otherwise covered by insurance; (5) costs of corrective Work not provided for elsewhere and (6) unforeseen field conditions and design omissions which a prudent CMAR should reasonably have detected during the discharge of the CMAR's pre-construction duties. Costs incurred for such design omissions shall come from the CMAR-GMP Contingency. Design errors which the CMAR could not have reasonably detected will be resolved on a case-by-case basis. These may be paid from the Owner contingency, but shall not be chargeable to the CMAR-GMP Contingency.

- 5.4. The CMAR-GMP Contingency is not allocated to any particular item of the Cost of the Work, and is established for the CMAR's use as may be required for increases in costs as noted above. It is understood that the amount of the CMAR-GMP Contingency is the maximum sum available to the CMAR to cover costs incurred as a result of such unanticipated causes or details, and that cost overruns in excess of the amount of the CMAR-GMP Contingency will be borne by the CMAR.
- 5.5. The CMAR-GMP Contingency may be applied to any items within the Cost of the Work without the necessity of a change order, without constituting a change in the Work, and without resulting in any change in the GMP. The CMAR will notify the Owner and Project Designer in writing of the CMAR's intent to apply any part of the CMAR-GMP Contingency to any item within the Cost of the Work prior to any such application. The CMAR shall fully document the change on its copy of the Construction Documents for inclusion in the as-built record documents required by this Contract.
- 5.6. Unless otherwise agreed by the Owner, and provided that the Total Construction Budget remains \$\_\_\_\_\_, the total CMAR-GMP Contingency for the Project shall not exceed \$\_\_\_\_\_. If the Owner changes the Total Construction Budget, the CMAR-GMP Contingency shall not exceed two percent (\_\_\_\_%) of the sum of the Cost of the Work and the CMAR General Conditions, all as more fully defined in this Contract, as of the date when the final GMP is established and approved by the Owner, subject to modification and limitation as set forth herein. When each GMP is fixed, the CMAR-GMP Contingency for that GMP shall be converted to a lump sum. The entire CMAR Contingency shall be fixed in the final GMP, based on the Total Construction Budget at the time of the final GMP, after which the CMAR Contingency shall not be adjusted unless an amount is negotiated with Owner requested Change Orders to the Work of the Project.
- 5.7. The amount of the CMAR-GMP Contingency is to be reviewed by the Owner as part of its review of each GMP. The Owner retains the right to specifically request revisions to the amount of the CMAR-GMP Contingency prior to the Owner's acceptance and approval of each GMP. If, after a contingency is fixed as part of a GMP proposal, the contract prices are lower than anticipated, the CMAR and Owner agree that the CMAR-GMP Contingency shall not be reduced prior to completion of that GMP phase. In the event that the CMAR is not required to use any or all of the CMAR-GMP Contingency for a particular GMP it shall be carried forward to each subsequent GMP. After final completion of the Project, the Owner shall pay the CMAR \_\_\_\_ percent (\_\_\_\_%) of the unused CMAR-GMP Contingency. In the event that there are any funds remaining in any special or dedicated Owner's allowance, those funds shall be retained solely by the Owner.

## **6. PROJECT DESIGNER'S STATUS**

- 6.1. The Project Designer shall provide liaison and necessary inspection of the Work to ensure compliance with the Construction Documents. The Project Designer is the agent of the Owner only for the purposes and to the extent stipulated in the various Contract Documents. The Project Designer has authority to stop Work or to order Work removed, or to order corrections of faulty Work where such action may be necessary to assure successful completion of the Work.
- 6.2. The Project Designer is the impartial interpreter of the Contract Documents, and, as such, shall exercise its powers under the Contract to enforce faithful performance by both the Owner and the CMAR, taking sides with neither.
- 6.3. Should the Project Designer cease to be employed on the Project for any reason whatsoever, then the Owner shall employ a competent replacement who shall assume the status of the former Project Designer.
- 6.4. The Project Designer will make periodic inspections of the Project at intervals appropriate to the stage of construction. The Project Designer will inspect the progress, the quality and the quantity of the Work.

- 6.5. The Project Designer and the Owner shall have access to the Work whenever it is in preparation and progress during normal working hours. The CMAR shall provide facilities for such access so the Project Designer may perform its functions under the Contract Documents.
- 6.6. Based on the Project Designer's inspections and evaluations of the Project, the Project Designer shall issue interpretations, directives, and decisions as may be necessary to assist the CMAR in the administration of the Project. The Project Designer's decisions relating to artistic effect and technical matters shall be final, provided such decisions are within the limitations of the Contract. The CMAR's decisions, however, relating to means and methods, and administration of the contracts the CMAR holds are final.

## 7. DRAWINGS, SPECIFICATIONS AND RECORD DOCUMENTS

- 7.1. All data, information, material and matter of any nature and all copies thereof in any and all forms whatsoever developed by the CMAR or in the CMAR's possession or control relating to the Project are the property of the Owner and shall be turned over to the Owner within ten (10) days after the Owner's request.
- 7.2. All design drawings and specifications are instruments of service and remain the property of the Owner. The use of these instruments on Work other than this contract without permission of the Owner is prohibited. All copies of drawings and specifications other than contract copies shall be returned to the Owner upon request after completion of the Work.
- 7.3. Owner will bear the reasonable cost of reproduction and distribution of drawings, sketches, specifications and other Construction Documents for use on the project development and by the CMAR and its Subcontractors for bidding and administrative purposes, up to an allowance of \$\_\_\_\_\_. The CMAR shall receive clean sets of black line prints on white paper of all appropriate drawings provided by the Owner, the CMAR shall clearly and legibly record in redline all work-in-place that is at variance with the Contract Documents.
- 7.4. In such cases where the nature of the Work requires clarification by the Project Designer, such clarification shall be furnished by the Project Designer with reasonable promptness by means of written instructions or detail drawings, or both. Clarifications and drawings shall be consistent with the intent of Construction Documents, and shall become a part thereof unless objected to by the Owner's representative.
- 7.5. The CMAR shall maintain, in readable condition at its **job office**, one complete set of working drawings and specifications for its Work, including all shop drawings. Such drawings and specifications shall be available for use by the Project Designer or its authorized representative.
- 7.6. The CMAR shall require all Subcontractors to provide and shall maintain in a fire proof safe at the job office a day-to-day record of "as built" work-in-place that is at variance with the Contract Documents. Such variations shall be compiled by and fully noted on Project drawings by the CMAR and submitted to the Project Designer upon Project completion and no later than 30 days after acceptance of the Project. A condition of final payment to the CMAR shall be delivery to the Project Designer, in paper, digital image or electronic form, each Subcontractor's submittal drawings and as-built records, and certification by the Project Designer that it has the information needed to prepare a comprehensive as-built record of the Project for delivery to the Owner in accordance with the Project Designer's contract.
- 7.7. The CMAR shall devise, implement and maintain at the Project site, on a current basis, a structured document control system which includes and tracks records of all necessary contracts, RFI's, shop drawings, samples, purchases, materials, equipment, maintenance and operating manuals and instructions, and any other documents and revisions thereto which arise out of the Contract or the

Work. These documents and copies thereof in paper or electronic form or both as requested shall be readily available to the Owner any time during the performance of this Contract.

- 7.8. The CMAR shall arrange for and submit monthly to the Owner and Project Designer, as a General Conditions expense, progress photographs, organized by date into a sequentially labeled, three ring binders or approved electronic equivalent, in sufficient detail to properly record the Work.

## **8. CODES AND STANDARDS**

- 8.1. Wherever reference is given to codes, standard specifications or other data published by regulating agencies including, but not limited to, national electrical codes, North Carolina state building codes, federal specifications, ASTM specifications, various institute specifications, etc., it shall be understood that such reference is to the latest edition including addenda published prior to the date of the Contract Documents.

## **9. LABOR, MATERIALS AND EQUIPMENT**

- 9.1. The CMAR shall, unless otherwise specified, contract for and pay for all labor, transportation, materials, tools, construction apparatus, lights, power distribution, generators, heating apparatus, sanitary facilities, water distribution, scaffolding and incidentals necessary for the completion of the Work, shall arrange for the installation, maintenance and removal all construction equipment, utensils or things, and be responsible for the safe, proper and lawful construction, maintenance and use of same, and the CMAR shall construct in the best and most workmanlike manner, a complete Project and everything incidental thereto, as shown on the drawings, stated in the specifications, or reasonably implied there from, all in accordance with the Contract Documents.
- 9.2. All materials shall be new and of quality specified, except where reclaimed material is authorized herein and approved for use. Workmanship shall at all times be of a grade accepted as the best practice of the particular trade involved, and as stipulated in written standards of recognized organizations or institutes of the respective trades except as exceeded or qualified by the specifications.
- 9.3. As set forth in the Construction Documents or upon reasonable notice from the Owner's Representative, the CMAR shall require the Subcontractors to furnish warranties and evidence as to quality of materials.
- 9.4. Products are generally specified by the American Society for Testing and Materials ("ASTM") or other reference standard and/or by manufacturer's name and model number or trade name. When specified only by reference standard, the CMAR may select any product meeting this standard, by any manufacturer. When several products or manufacturers are specified as being equally acceptable, the CMAR has the option of using any product and manufacturer combination listed. However, the CMAR shall be aware that the cited examples are used only to denote the quality standard of the product desired and that they do not restrict bidders to a specific brand, make, manufacturer or specific name; that they are used only to set forth and convey to bidders the general style, type, character and quality of product desired; and that equivalent products will be acceptable. Request for substitution of materials, items, or equipment shall be submitted to the Project Designer for approval or disapproval; such approval or disapproval shall be made by the Project Designer prior to the opening of bids.
- 9.5. The CMAR shall obtain written approval from the Project Designer for the use of products, materials, equipment, assemblies or installation methods claimed as equal to those specified. Such approvals must be obtained as soon after contract awards as possible and before any materials are ordered.
- 9.6. The Project Designer shall adjudge the equality of proposed substitution of products, materials or equipment, and its opinion shall be final, unless overridden by the Owner's Representative in writing, subject to written appeal to the Owner.

- 9.7. If at any time during the construction and completion of the Work covered by these Contract Documents, the conduct of any worker of the various crafts be adjudged by the Owner's Representative a nuisance to the Owner or Project Designer, or if any worker be considered detrimental to the Work, the CMAR and the Subcontractor shall order such parties removed immediately from the site and its environs.

## 10. SUBCONTRACTS AND SUBCONTRACTORS

- 10.1. The CMAR shall determine the appropriate bid packages based on the available resources. One or more bid packages shall be prepared for each of the general construction, electrical, mechanical, fire protection, and plumbing divisions of the Work of the Project. The CMAR shall prepare any other contract packages for other divisions or subdivisions of the Work. Each Subcontractor may be required by the CMAR to provide bonds and insurance, consistent with the terms of the RFQ.
- 10.2. First-tier Subcontractors shall be pre-qualified by the CMAR. Only pre-qualified Subcontractors are allowed to bid and contract with the CMAR on a Project. The CMAR and the Owner's Representative shall confer on the prequalification of lower tier subcontractors, and the CMAR shall decide whether to pre-qualify lower tier subcontractors after giving due regard to the Owner's MWBE goals. The prequalification criteria shall be determined jointly by the Owner, Project Designer and the CMAR to address quality, performance, time specified in the bids for performance of the Contract, the cost of construction oversight, time for completion, capacity to perform, and other factors deemed appropriate by the Owner. The CMAR shall publicly advertise as prescribed in G.S. 143-129; and shall accept bids from first-tier Subcontractors for all construction Work and all General Conditions that are not being self-performed by the CMAR. All bids shall be opened publicly and once they are opened, shall be public record under Chapter 132 of the General Statutes. The CMAR shall award each contract to the lowest responsible, responsive bidder, taking into consideration the Owner's requirements, quality, performance, time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, compliance with G.S. 143-128.2 and other factors deemed appropriate by the Owner's Representative and advertised as part of the bid solicitation. If the low bid Subcontractor fails to account for all costs associated with the scope of the Work on which it is bidding, then the bid may be disqualified at the discretion of the CMAR or modified to show additional Project costs not accounted for. If after modification, the apparent low bid is no longer low, then the CMAR shall disqualify that bid and consider the next low bid submitted. The CMAR shall have the right as outlined above to verify the scope of each low bid in the same manner until it determines the lowest verified bid.
- 10.3. The CMAR shall conduct pre-bid meetings and award meetings for all contracts. The CMAR shall notify the Owner and Project Designer of each such meeting and shall not hold any such meeting outside the presence of the Owner and Project Designer.
- 10.4. The CMAR may reject all bids and repeat the bidding for a given division of Work or re-package the Work activity.
- 10.5. The CMAR shall not award or issue notice of award for the Work until certified tabulation of the bids, copies of the bids received, the CMAR's recommendations for award, a report of the documentation of MWBE participation and documentation of the good faith efforts of the bidders are provided to and reviewed with the Owner.
- 10.6. The CMAR may not bid on any trade package, nor may the CMAR perform the Work of any trade package except in the case of an emergency or extraordinary circumstance without the written approval of the Owner and Project Designer. The Owner's Representative may approve the CMAR performing a portion of the Work only if that bidding produces no responsible, responsive bidder for that portion of the Work, the lowest, responsive, responsible bidder will not execute a contract for the bid portion of the Work, or a Subcontractor defaults and a pre-qualified replacement cannot be obtained in a timely manner, and the amount of the Work does not exceed \$100,000. Any self-

performance of the Work by the CMAR exceeding \$100,000 requires the approval of the Orange County Commissioners.

- 10.7. Once Subcontractors are in place, the CMAR shall provide copies of contracts to the Owner and Project Designer, including those for equipment and material suppliers. The CMAR will require the Subcontractors to provide the applicable Contract Documents including insurance certificates, MWBE participation schedules, and verification of MWBE participation (by submission of letters of intent, copies of purchase orders, etc.).
- 10.8. If the Project Designer disapproves of any Subcontractor, then it shall submit its reasons for disapproval in writing to the Owner and CMAR. If the Owner's Representative concurs with the Project Designer's recommendation, the CMAR shall submit a substitute for approval. The Project Designer shall act promptly in the approval of material and equipment suppliers and when approval is given, no changes will be permitted except for cause or reason considered justifiable to the Project Designer and Owner's Representative.
- 10.9. The Project Designer will furnish to any Subcontractor, upon request, evidence regarding amounts of money approved for payment to the CMAR on account of the Subcontractor's Work.

**10.10.** The CMAR is and remains fully responsible for its own acts or omissions as well as those of any Subcontractor or of any employee of either. The CMAR agrees that no contractual relationship exists between the Subcontractor and the Owner in regard to the contract, and that the Subcontractor acts on its Work as an agent or employee of the CMAR. The CMAR shall prepare bid documents and construction contract conditions for the Subcontracts for the Work, with the participation of the Design Professional as set forth in the Design Agreement. Bid documents containing (but not limited to) the terms described below shall be prepared by the CMAR and the Design Professional as indicated:

10.10.1. Designer and CMAR: Any procedure or condition requested by the Owner's Representative in writing that is consistent with this Contract.

10.10.2. CMAR: Time of completion and liquidated damages.

10.10.3. Designer and CMAR: Alternate bids – as previously established with Owner's representative and CMAR's approval.

10.10.4. Designer and CMAR: Allowances - as previously established with Owner's representative and CMAR's approval.

10.10.5. Designer and CMAR: Any condition peculiar to the Project and the requirements of the particular contract.

10.10.6. CMAR: Tax reporting and payment procedures.

10.10.7. CMAR: Bid, Payment and Performance Bond forms and procedures in accordance with NC General Statutes.

10.10.8. CMAR: Insurance coverages and certificates.

10.10.9. CMAR: A statement emphasizing execution of the contract(s) and delivery to the CMAR and Owner in accordance with General Statutes (within 10 days of award).

10.10.10. Designer and CMAR: Determine special definitions, such as "unclassified excavation, mucking or rock", etc.

10.10.11. CMAR: Develop procedures for the Subcontractor(s) to request and the Owner's Representative to authorize field and laboratory testing by qualified independent testing agent, which typically include soils, concrete, masonry, asphalt, steel, welding, etc. in accordance with ASTM standards. The CMAR and Project Designer shall participate in reviewing qualification statements from local testing companies, evaluating with the Project Designer and Owner, and providing a final recommendation to the Owner. Subsequent to the Owner's Representatives approval, the CMAR shall participate in seeking proposals for separate contracts as required for

testing and special testing necessary for the Project and recommending selection to the Designer and Owner, and the execution of contracts. The cost of independent testing agent(s) is not included in CMAR's GMP.

10.10.12. CMAR: Provisions which establish appropriate incentives and remedial measures for enforcing the contract requirements during construction.

10.10.13. CMAR: Retention of five percent (5%) during construction, reduced to one percent (1%) of the contract sum during the warranty period for contracts up to \$ \_\_\_\_\_, or one half percent (1/2%) with a \$ \_\_\_\_\_ minimum, for the warranty period for contracts over \$ \_\_\_\_\_. Deductions shall be allowed by the Owner from the amount of final payment to reimburse any funds expended for repair of warranty items due to failure of the CMAR to achieve such repairs in a timely manner (48 hours for life/safety and 15 working days for all other items).

10.10.14. Designer: provide a Listing of all Construction Documents.

10.10.15. CMAR: The Subcontractors shall be required to perform corrections to their Work and fulfill all Project closeout requirements in a timely manner.

10.10.16. CMAR: The CMAR shall require Subcontractors to organize their Work, and incorporate scheduling by the CMAR in accordance with the Owner's requirements.

10.10.17. CMAR: No retention shall be withheld on the CMAR's General Conditions Allowance expenditures.

## 11. BUSINESS PARTICIPATION GOALS AND STANDARDS

- 11.1. The CMAR shall identify subcontract packages that will be selected from the local contracting community.
- 11.2. Orange County requires documentation of good faith efforts for meeting established MWBE goals.
- 11.3. The Subcontractor and CMAR shall comply in all respects with the Owner's MWBE policies, rules and regulations. The stated goals for this contract are \_\_\_\_% MBE and \_\_\_\_% WBE. Percentages include all tiers of subcontractors in accordance with local and state laws and regulations.
- 11.4. The CMAR shall report all information required by local and state law and regulations to the Owner within ten (10 days) after the end of the quarter (**March 31, June 30, September 30 and December 31**) the GMP package is completed, which in turn will submit to the North Carolina Department of Administration, office of Historically Underutilized Businesses.
- 11.5. To increase participation, if necessary, the CMAR may, with the written approval of the Owner's Representative, waive performance or payment bonds by Subcontractors, or may offer the participation of the CMAR as a guarantor or surety in the financing of materials purchases by Subcontractors, provided that the CMAR may condition such financing participation upon the issuance of joint checks or other similar arrangements to allow the CMAR to verify that timely payments are made to suppliers furnishing credit.
- 11.6. The CMAR shall discriminate against any employee, applicant for employment, contractor, or subcontractor with regard to race, ethnicity, biometric information, gender, gender identity, color, religion, sex, national origin, or veteran status. The CMAR agrees not to discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant is qualified. The CMAR agrees to take affirmative action to employ, advance in employment and otherwise treat qualified disabled individuals without discrimination based upon their physical or mental disability in all employment practices.

## 12. CONSTRUCTION MANAGER AND SUBCONTRACTOR RELATIONSHIPS

- 12.1. The CMAR agrees that the requirements of these Contract Documents shall apply equally to each Subcontractor as to the CMAR, and the CMAR agrees to take such action as may be necessary to bind each Subcontractor to these requirements. The CMAR further agrees to conform to the Code of Ethical Conduct as adopted by the Associated General Contractors of America, Inc., with respect to CMAR-Subcontractor relationships, and that payments to Subcontractors shall be made in accordance with the provisions of G.S. 143-134.1 providing for interest on final payments due to prime Subcontractors and sub-subcontractors.
- 12.2. Within seven (7) days after the CMAR receives each periodic or final payment and its bank makes the funds available after deposit, the CMAR shall pay each Subcontractor based on Work completed or service provided under the Contract. Should any periodic or final payment to a Subcontractor be delayed by more than seven days after receipt of periodic or final payment by the CMAR, the CMAR shall pay the Subcontractor interest, beginning on the eighth day, at the rate of one percent (1%) per month or fraction thereof on such unpaid balance as may be due, provided the Subcontractor has conformed to the specified billing procedures and insurance requirements.
- 12.3. The retainage withheld from payments made by the CMAR to the Subcontractor shall not exceed the retainage reflected in the CMAR payment applications and payments made by the Owner to the CMAR. Any retainage on payments made by the CMAR to the Subcontractor that exceeds the corresponding retainage on payments made by the Owner to the CMAR shall be subject to interest to be paid by the CMAR to the Subcontractor at the rate of one percent (1%) per month or fraction thereof.
- 12.4. Nothing in this section shall prevent the CMAR at the time of application and certification to the Owner from withholding application and certification to the Owner for payment to a Subcontractor for unsatisfactory job progress; defective construction not remedied; disputed Work; third-party claims filed or reasonable evidence that claim will be filed; failure of Subcontractor to make timely payments for labor, equipment and materials; damage to CMAR or another Subcontractor; reasonable evidence that the contract cannot be completed for the unpaid balance of the contract sum; or a reasonable amount for retainage not to exceed the initial percentage retained by Owner.

### **13. SEPARATE CONTRACTS**

- 13.1. Without invalidating the relationships with the CMAR, the Owner reserves the right to let other contracts in connection with the Project, the Work under which shall proceed simultaneously with the execution of the CMAR's Work. Separate contracts may include materials or equipment that the Owner elects to provide itself. The Owner may also enter into separate contracts with testing firms or other technical support firms to assist the Owner in connection with the Project. The CMAR shall afford other separate Subcontractors reasonable opportunity for the execution of their Work and for the introduction and storage of their materials, and the CMAR shall take all reasonable action to coordinate its Work with theirs. If the Work performed by the separate Subcontractor is defective or so performed as to prevent the CMAR from carrying out its Work according to the plans and specifications, the CMAR shall immediately notify the Project Designer and the Owner upon discovering such conditions.

### **14. WARRANTY AND GUARANTEE**

- 14.1. The CMAR unconditionally warrants and guarantees all materials and workmanship against patent defects arising from faulty materials, faulty workmanship or negligence for a period of twenty-four (24) months following the date of substantial completion of the Work and beneficial occupancy and shall replace such defective materials or workmanship without cost to the Owner.
- 14.2. In addition to the foregoing general warranty, the Owner may require extended warranties for specified building components, including without limitation mechanical and electrical equipment, elevators and escalators, security equipment, roof, curtain wall, doors and waterproofing. Extended

warranties shall be specified in the Construction Documents or specific written instructions from the Owner. All such extended warranties shall either be provided by the CMAR or by a Subcontractor or manufacturer. If the warranty is provided by a Subcontractor or manufacturer, the warranty shall explicitly state that it is for the benefit of and may be enforced by the Owner. Such warranties shall provide, at a minimum, for the repair or replacement of defective or non-conforming components within the warranty period. Beyond its general twenty-four month warranty, the CMAR shall not be responsible for extended warranties given by a Subcontractor or manufacturer, so long as the Owner has the benefit of and right to enforce the warranty.

- 14.3. Additionally, the Owner may bring an action against the CMAR for latent defects which are hidden or not readily apparent to the Owner at the time of beneficial occupancy or final acceptance, whichever occurred first, in accordance with applicable law.
- 14.4. The CMAR services shall extend through the completion of the warranty phase; once **Project Closeout** is achieved, however, the CMAR's obligations and services are limited to Warranty obligations.

## **15. ROYALTIES, LICENSES AND PATENTS**

- 15.1. It is the intention of the Contract Documents that the Work covered herein will not constitute in any way infringement of any patent whatsoever unless the fact of such patent is clearly evidenced herein. The CMAR shall protect and save harmless the Owner against suit on account of alleged or actual infringement. The CMAR shall pay all royalties and/or license fees required on account of patented articles or processes, whether the patent rights are evidenced hereinafter.

## **16. PERMITS, INSPECTIONS, FEES, REGULATIONS**

- 16.1. The CMAR shall give all notices and comply with all laws, ordinances, codes, rules and regulations bearing on the conduct of the Work under the Contract. If the CMAR observes that the drawings and specifications are at variance therewith, it shall promptly notify the Project Designer and Owner in writing. Any necessary changes required after contract award shall be made by change order. If the CMAR performs any Work knowing it to be contrary to such laws, ordinances, codes, rules and regulations, and without such notice to the Project Designer and Owner, it shall bear all cost arising there from. Additional legal requirements implemented after bidding will be subject to equitable adjustments to the GMP.
- 16.2. All Work under the CMAR Contract shall conform to the North Carolina State Building Code and other State, local, and national codes as are applicable. The cost of all required regulatory agency inspections under State, local and national codes shall be the responsibility of the CMAR and its Subcontractors. Costs for re-inspections by Orange County or other regulatory agencies, to the extent attributable to the CMAR and its Subcontractors, shall be the responsibility of the CMAR and its Subcontractors.
- 16.3. The CMAR shall cooperate with the state, county or municipal authorities by obtaining building and other required permits. Permits shall be obtained by the CMAR, but paid for by the Owner.

## **17. CONDUCT AND USE OF PREMISES**

- 17.1. The CMAR shall confine its apparatus, the storage of materials and the operations of its workers to limits as indicated by law, ordinances, permits or directions of the Project Designer and Owner's Representative and shall not exceed those established limits in its operations.
- 17.2. The CMAR shall not load or permit any part of the structure to be loaded with a weight that will endanger its integrity or safety.

- 17.3. The CMAR shall enforce the Project Designer's and Owner's Representative's instructions regarding signs and advertisements.
- 17.4. The CMAR, its Subcontractors and employees shall not possess or carry, whether openly or concealed, any gun, rifle, pistol, or explosive on any property owned by the Owner. This includes firearms locked in containers, vehicles or firearm racks within vehicles.
- 17.5. The CMAR, its Subcontractors and employees, are prohibited from profane, lewd, obscene or offensive conduct or language, including engaging in sexual harassment.
- 17.6. The CMAR and its Subcontractors shall not manufacture, transmit, conspire to transmit, possess, use or be under the influence of any alcoholic or other intoxicating beverage, narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana or anabolic steroids, or possess, use, transmit or conspire to transmit drug paraphernalia on any property owned by the Owner, except pursuant to a drug prescription by a physician.
- 17.7. Smoking or use of any tobacco product is prohibited in any enclosed or occupied facility at all times. The use of tobacco products is prohibited at all times on all sites routinely occupied by staff, and in enclosed areas of unoccupied sites. An enclosed area for construction projects shall be defined as any dried-in area as designated by the Project Designer.
- 17.8. The CMAR, its employees, its Subcontractors and their employees shall not solicit from or sell anything within the Owner's facilities.
- 17.9. Operators of all commercial vehicles on any property owned by the Owner shall be subject to post-accident, random, reasonable suspicion and follow-up testing for drugs and alcohol.
- 17.10. The CMAR shall at all times enforce strict discipline and good order among its employees and shall not employ any unfit person or anyone not skilled in the task assigned to it. The Owner may require the CMAR to remove any employee or Subcontractor the Owner deems incompetent, careless or otherwise objectionable.
- 17.11. All agents and workers of the CMAR and its Subcontractors shall wear identification badges approved by the Owner's Representative and provided by the CMAR at all times they are on the Owner's property. The identification badges shall at a minimum display the company name, telephone number, employee name and a picture of the employee. The CMAR and its Subcontractors shall comply with the Owner's access procedures when working on any existing facility.

## **18. CUTTING, PATCHING AND DIGGING**

- 18.1. The CMAR shall ensure satisfactory performance of all cutting, fitting, or patching that may be required to make the Work come together properly and fit to receive or be received by Work of other Subcontractors shown upon or reasonably implied by the drawings and specifications for the completed structure, as the Project Designer may direct.
- 18.2. Any cost brought about by defective or ill-timed Work shall be borne by the party responsible therefore.
- 18.3. No Subcontractor shall endanger any Work of another such Subcontractor by cutting, digging, or other means, nor shall any Subcontractor cut or alter the Work of any other such Subcontractor without the consent of the Project Designer and the affected Subcontractor(s).

## **19. UTILITIES, STRUCTURES, SIGNS**

- 19.1. Prior to the operation of permanent systems, the CMAR will cooperate with the Owner to arrange for temporary power, lighting, water, and heat to maintain space temperature above freezing, as required for construction operations. Utility charges for temporary power, lighting, water, and heat will be paid directly by the Owner, unless the Owner directs the CMAR to pay such charges as a General Conditions expense.
- 19.2. The CMAR shall provide or arrange for as appropriate necessary and adequate apparatus and facilities for water, electricity, gas, oil, sewer, and other utility services, which may be required for completion of the Project. It is anticipated that the Owner will pay directly to the each utility company all public utility charges for metered utilities such as water, sewer and power. Nevertheless, if requested by the Owner, any permanent meters installed shall be listed in the CMAR's name until its Work is deemed substantially complete and occupied by the Owner, and the Owner may hold the CMAR responsible for extended utility charges in the event completion of the Project is delayed. The Owner or CMAR, as applicable, shall cooperate with one another to recover actual costs of metered utilities from the responsible party should delays occur in Project completion. Extended metered utility costs are in addition to the liquidated damages provided for elsewhere in this Contract.
- 19.3. Any meters listed in the name of the CMAR shall be re-listed in the Owner's name on the day following completion and acceptance of the CMAR's Work, and the Owner shall pay for services used after that date.
- 19.4. The Owner shall be reimbursed for all metered utility charges after the meter is re-listed in the Owner's name and prior to completion and acceptance of the Work of all Subcontractors. Reimbursement shall be made by the Subcontractor that's Work has not been completed and accepted.
- 19.5. The CMAR shall have the permanent building systems in sufficient readiness for furnishing temporary climatic control at the time a building is enclosed and secured. The HVAC systems shall maintain climatic control throughout the enclosed portion of the building sufficient to allow completion of the interior finishes of the building. A building shall be considered enclosed and secured when windows, doorways (exterior, mechanical, and electrical equipment rooms), and hardware are installed; and other openings have protection, which will provide reasonable climatic control. The appropriate time to start the mechanical systems and climatic condition shall be jointly determined by the CMAR and the Project Designer. Use of the equipment in this manner shall in no way affect the warranty requirements of the CMAR.
- 19.6. The CMAR shall coordinate the Work so that the building's permanent power wiring distribution system shall be in sufficient readiness to provide power as required by the HVAC Subcontractor for temporary climatic control.
- 19.7. The CMAR shall coordinate the Work so that the building's permanent lighting system shall be ready at the time the Subcontractors begin final interior painting and other final interior finishes and shall provide adequate lighting in those areas where other interior painting and finishing is being performed.
- 19.8. The CMAR shall be responsible for its permanently fixed service facilities and systems in use during progress of the Work. The following procedures shall be strictly adhered to:
- 19.8.1. Prior to acceptance of Work by the Owner, the CMAR shall coordinate the removal and replacement of any parts of the permanent building systems damaged through use during construction.

- 19.8.2. Temporary closures or filters shall be installed in each of the heating and air conditioning units and at each return grille during construction. New filters shall be installed in each unit prior to the Owner's acceptance of the Work.
- 19.8.3. Extra effort shall be maintained to keep the building and the site adjacent to the building clean. Under no circumstances shall air systems be operated if finishing and site Work operations are creating dust in excess of what would be considered normal if the building were occupied.
- 19.8.4. It shall be understood that any warranty on equipment presented to the Owner shall extend from substantial completion and occupancy by the Owner. The cost of maintaining the equipment during operation in the finishing stages of construction shall be borne by the Subcontractor whose system is utilized.
- 19.8.5. The CMAR shall ensure that all lamps are in proper working condition at the time of final Project acceptance.
- 19.9. The CMAR shall provide, if required and where directed, a shed for toilet facilities and shall furnish and install in its shed all water closets required for a complete and adequate sanitary arrangement. These facilities will be available to other Subcontractors on the job and shall be kept in a neat and sanitary condition at all times. Chemical toilets are acceptable.
- 19.10. The CMAR shall, if needed and where directed by the Owner's Representative, erect a temporary field office, complete with lights, telephone, heat and air conditioning. A portion of this office shall be partitioned off, of sufficient size, for the use of the Project Designer, should the Owner's Representative so direct.
- 19.11. The CMAR is responsible for making temporary elevators, lifts, or other special equipment available for the general use of all Subcontractors. The cost for such elevators, lifts or other special equipment and the operation thereof may be included in the CMAR's General Conditions.
- 19.12. The CMAR will erect one sign on the Project, and may erect others if approved by the Owner's Representative. The sign(s) shall be of sound construction, and shall be neatly lettered. The sign(s) shall bear the name or logos approved by the Owner's Representative of participants on the Project, and the CMAR's name, and the name of the Project Designer and consultants. Directional signs may be erected on the Owner's property subject to approval of the Owner with respect to size, style and location of such directional signs. Such signs may bear the name of the CMAR and a directional symbol. All signs must comply with all local sign, appearance, and traffic ordinances. No other signs will be permitted except by permission of the Owner's Representative.

## **20. CLEANING UP**

- 20.1. The CMAR shall ensure that the building and surrounding area is reasonably free from rubbish at all times, and shall remove debris from the site on a timely basis or when directed to do so by the Owner's Representative. The CMAR shall provide an on-site refuse container(s) for the use of all Subcontractors. The CMAR shall ensure that each Subcontractor removes their rubbish and debris from the building on a daily basis. The CMAR shall ensure that the building is broom cleaned as required to minimize dust and dirt accumulation.
- 20.2. The CMAR shall provide and maintain suitable all-weather access to the building.

- 20.3. Before final inspection and acceptance of the building, the CMAR shall ensure that all portions of the Work are clean, including glass, hardware, fixtures, masonry, tile and marble (using no acid). The CMAR shall clean and wax all floors as specified, and completely prepare the building for use by the Owner, with no cleaning required by the Owner.

## 21. PROTECTION OF WORK, PROPERTY AND THE PUBLIC

- 21.1. The CMAR shall be responsible for the entire site and the building or construction of the same and provide all the necessary protections, as required by the Owner's Representative or Project Designer, and by laws or ordinances governing such conditions. Consistent with the indemnification provisions elsewhere in this Contract, and subject to the benefits of any Owner-controlled or Owner-provided insurance that covers the interests of the CMAR and its Subcontractors, the CMAR shall be responsible for protecting the public and those on the site against all bodily injury or harm, and protecting against any damage to the Work, to adjacent property, and to property of others. The CMAR shall have access to the Project at all times. Subject to its ultimate contractual responsibility for protection of work, property and the public under this Contract, and subject to any non-delegable duties imposed by law, the CMAR may delegate to Subcontractors these obligations of the CMAR under this Contract, and may obtain indemnification and insurance from Subcontractors as the CMAR deems reasonable and prudent.
- 21.2. The CMAR shall provide cover and protect all portions of the structure when the Work is not in progress, provide and set all temporary roofs, covers for doorways, sash and windows, and all other materials necessary to protect all the Work on the building, whether set by it, or any of the Subcontractors.
- 21.3. Any Work damaged through the lack of proper protection or from any other cause, shall be repaired or replaced without extra cost to the Owner.
- 21.4. No fires of any kind will be allowed inside or around the operations during the course of construction without special permission from the Owner's Representative.
- 21.5. The CMAR shall protect all trees and shrubs designated to remain in the vicinity of the operations by building substantial boxes around same. The CMAR shall barricade all walks, roads, etc., as directed by the Project Designer to keep the public away from the construction. All trenches, excavations or other hazards in the vicinity of the Work shall be well barricaded and properly lighted at night.
- 21.6. The CMAR shall develop and implement a Project safety program in accordance with the RFQ and applicable regulations. The Owner will have final approval of the CMAR's Safety Program. The Owner's Representative may require additional safety measures before granting approval. Subcontractors must also comply with any such additional safety requirements of the OCIP program. The CMAR shall report, to the Owner, as part of each monthly report, any safety violations and actions taken to protect the safety of persons and property engaged in the Project. The CMAR may require that all Subcontractors meet the CMAR's safety program requirements including where those requirements meet or exceed State or Federal requirements.
- 21.7. The CMAR shall be responsible for all necessary safety measures for the protection of all persons on the job, including the requirements of the **Associated General Contractors of America Accident Prevention Manual in Construction**, as amended, and shall fully comply with all state, federal, and local laws or regulations and North Carolina State Building Code requirements to prevent accident or injury to persons on or about the location of the Work. The CMAR shall clearly mark or post signs warning of hazards existing, and shall barricade excavations, elevator shafts, stairwells and similar hazards. The CMAR shall protect against damage or injury resulting from falling materials and shall maintain all protective devices and signs throughout the progress of the Work.

- 21.8. The CMAR shall, at a minimum, adhere to the rules, regulations and interpretations of the North Carolina Department of Labor relating to Occupational Safety and Health Standards for the Construction Industry.
- 21.9. The CMAR shall designate a responsible member of its organization as safety inspector, whose duties shall include accident prevention on the Project. The name of the full-time onsite safety inspector shall be made known to the Project Designer and Owner at the time the Work is started. The CMAR will provide the Owner's Representative with the name of each Subcontractor's onsite safety officer.
- 21.10. In the event of emergency affecting the safety of life, the protection of Work, or the safety of adjoining properties, the CMAR is hereby authorized to act at its own discretion, without further authorization from anyone, to prevent such threatened injury or damage. Any compensation claimed by the CMAR on account of such action shall be determined as provided for under Sections 3 and 33 herein.
- 21.11. If reasonable precautions are inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance encountered but not created on the site by the CMAR or its Subcontractors, the CMAR shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Project Designer in writing. The Owner shall take responsibility for remediation of the material or substance from the site. If the CMAR claim's its progress in completing the Project is delayed because of the Owner's remediation of the site, the CMAR shall file notice and a claim in accordance with this Contract.

## **22. SEDIMENTATION POLLUTION CONTROL**

- 22.1. Any land-disturbing activity performed by the CMAR in connection with the Project shall comply with all erosion control measures set forth in the Construction Documents and any additional measures which may be required in order to ensure that the Project is in full compliance with all state, federal, and local stormwater, erosion control, and sedimentation control laws, regulations, ordinances, rules, and regulations.
- 22.2. Upon receipt of notice that a land-disturbing activity is in violation of said act, the CMAR shall be responsible for ensuring that all steps or actions necessary to bring the Project in compliance with said act are promptly taken.
- 22.3. The CMAR shall be solely responsible for defending any legal actions instituted pursuant to N.C.G.S. 113A-64.
- 22.4. To the fullest extent permitted by law, the CMAR shall indemnify and hold harmless the Owner, the Project Designer and the agents, consultants and employees of the Owner and Project Designer, from and against all claims, damages, civil penalties, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from the performance of Work or failure of performance of Work, provided that and only to the extent that any such claim, damage, civil penalty, loss or expense is attributable to the CMAR or its subcontractors and is a violation of the Sedimentation Pollution Control Act. Such obligation shall not be construed to negate, abridge or otherwise reduced any other right or obligation of indemnity which would otherwise exist as to any party or persons described in this Contract, including specifically paragraph 48.

## **23. INSPECTION OF THE WORK**

- 23.1. It is a condition of this contract that the Work shall be subject to inspection during normal working hours by the Project Designer, designated official representatives of the Owner, and those persons required by state law to test special Work for official approval. The CMAR shall therefore provide safe access to the Work at all times for such inspections.

- 23.2. All instructions to the CMAR regarding the interpretation of the plans and specifications will be made only by or through the Project Designer or its designated Project representative. Observations made by official representatives of the Owner shall be conveyed to the Project Designer for review and coordination prior to issuance to the CMAR.
- 23.3. Where special inspection or testing is required by virtue of any state laws, instructions of the Project Designer, specifications or codes, the CMAR shall give adequate notice to the Project Designer and Owner of the time set for such inspection or test, if the inspection or test will be conducted by a party other than the Project Designer. Such special tests or inspections will be made in the presence of the Project Designer and Owner's representative or the Owner's designated agent, and it shall be the CMAR's responsibility to serve ample notice of such tests.
- 23.4. All laboratory tests shall be paid by the Owner unless provided otherwise in the Contract Documents except the CMAR shall pay for laboratory tests to establish design mix for concrete, and for additional tests to prove compliance with Contract Documents where materials have tested deficient except when the Owner's testing laboratory did not follow the appropriate ASTM testing procedures.
- 23.5. The CMAR shall perform quality control inspections on the Work of the Subcontractors to guard the Owner against defects and deficiencies in the Work and shall coordinate its activity with the on-site duties of the Project Designer. The CMAR shall advise the Project Designer of any apparent variation and deviation from the intent of the Construction Documents and shall take the necessary action to correct such variations and deviations from the intent of the Construction Documents. The CMAR shall provide two sets of all inspection reports (in binder form) as part of the job progress meetings to the Project Designer and the Owner.
- 23.6. The Owner reserves the right to independently contract for compliance inspection and testing. The CMAR shall incorporate and coordinate its services with inspections agents provided by the Owner in general accordance with the State of North Carolina, Department of Administration, State Construction Office's "Special Inspections Guidelines"
- 23.7. The CMAR shall record and effectuate the correction of deficiencies submitted by the Owner and the Project Designer.
- 23.8. The Project Designer shall in all cases make final interpretation of the Contract Documents and rule on compliance of the Work.
- 23.9. Should any Work be covered up or concealed prior to required inspection and approval by the Project Designer, such Work shall be uncovered or exposed for inspection, if so requested by the Project Designer in writing. Inspection of the Work will be made promptly upon notice from the Subcontractor. All cost involved in uncovering, repairing, replacing, recovering and restoring to design condition, the Work that has been covered or concealed will be paid by the CMAR.
- 23.10. If any other portion of the Work has been covered which the Project Designer has not specifically requested to observe prior to being covered, the Project Designer or Owner's Representative may request to see such Work and it shall be uncovered by the CMAR. If such Work be found in accordance with the Construction Documents, the cost of uncovering and replacement shall, by appropriate change order, be charged to the Owner. If such Work be found not in accordance with the Contract Documents, the CMAR shall pay such costs.

#### **24. TIME OF COMPLETION, DELAYS, EXTENSION OF TIME**

- 24.1.** The CMAR shall commence provision of services under this Contract not later than five days after the date of this Contract, and shall fully complete all services hereunder and accomplish the substantial and final completion of the Project in accordance with the following target schedule, which shall be adhered to unless otherwise agreed by the Owner:

- 24.1.1. GMP#1 – Design Package Completion \_\_\_\_\_
- 24.1.2. CMAR submits GMP#1 to Owner \_\_\_\_\_
- 24.1.3. Board Approval of GMP#1 \_\_\_\_\_
- 24.1.4. GMP#2 – Design Package Completion \_\_\_\_\_
- 24.1.5. Presentation of Schematic Design \_\_\_\_\_
- 24.1.6. Completion of Schematic Design \_\_\_\_\_
- 24.1.7. CMAR submits GMP#2 to Owner \_\_\_\_\_
- 24.1.8. Board approval of GMP #2 \_\_\_\_\_
- 24.1.9. Completion of Design Development \_\_\_\_\_
- 24.1.10. GMP #3 – Design Package Completion \_\_\_\_\_
- 24.1.11. CMAR submits GMP # 3 to Owner \_\_\_\_\_
- 24.1.12. Presentation of Design Development \_\_\_\_\_
- 24.1.13. Board approval of GMP #3 \_\_\_\_\_
- 24.1.14. GMP #4 Design Package Completion \_\_\_\_\_
- 24.1.15. CMAR submits GMP # 4 to Owner \_\_\_\_\_
- 24.1.16. Board approval of GMP #4 \_\_\_\_\_
- 24.1.17. GMP #5 Design Package Completion \_\_\_\_\_
- 24.1.18. CMAR submits GMP # 5 to Owner \_\_\_\_\_
- 24.1.19. Presentation of Construction Documents \_\_\_\_\_
- 24.1.20. Board approval of GMP #5 \_\_\_\_\_
- 24.1.21. Substantial Completion – Move In \_\_\_\_\_
- 24.1.22. Punch List Completion \_\_\_\_\_
- 24.1.23. Project Final Completion \_\_\_\_\_
- 24.1.24. Completion of Closeout and Warranty \_\_\_\_\_.

24.2. The Project shall be brought to Substantial and Final Completion within the time prescribed by the Project schedule that is updated and established at the time the final GMP is accepted, which shall be in accord with the foregoing target schedule as extended by the Owner by change order in accordance with the Contract.

24.3. If the CMAR is delayed at any time in the progress of its Work by any act or negligence of the Owner or the Project Designer, or by any employee of either; by changes ordered in the Work; by labor disputes at the Project site; by abnormal weather conditions not reasonably anticipated for the locality where the Work is performed; by unavoidable casualties; by any causes beyond the CMAR’s control; or by any other causes which the Project Designer and Owner determine may justify the delay, then the contract time may be extended by change order for the time which the Project Designer and Owner may determine is reasonable. Contract defaults or other breaches of any legal duty by a Subcontractor shall not be grounds for a time extension under this Contract. Time extensions will not be granted for rain, wind, snow or other natural phenomena of normal intensity for the locality where Work is performed. For purpose of determining the extent of delay attributable to unusual weather phenomena, a determination shall be made by comparing the weather for the contract period involved with the average of the preceding twenty (20) year climatic range during the same time interval based on the National Oceanic and Atmospheric Administration National Weather Service statistics for the locality where Work is performed and on daily weather logs kept on the job site by the CMAR reflecting the effect of the weather on progress of the Work and initialed by the Project Designer. Time extensions for weather delays shall not entitle the CMAR to an increase in the GMP.

24.4. It is the CMAR’s responsibility to meet the required construction completion dates, as extended by the Owner in accordance with the Contract. As an inducement to the CMAR to meet the required substantial completion date for the Project, the Owner will include in the Total Construction Budget an **Early Completion Bonus Fund** in the sum of \$\_\_\_\_\_, which shall be payable to the CMAR as an Early Completion Bonus if the Project is completed prior to the substantial completion date, as extended in accordance with this Contract. This Early Completion Bonus, if earned, will be included in the final payment to the CMAR. If the CMAR decides that

any action must be taken in order to meet its contractual responsibility to complete the Project on time or to mitigate liquidated damages payable to the Owner, including for example and without limitation forcing Subcontractors to work overtime, increase labor forces or staffing, or work out of sequence, then the CMAR may, upon written notice to the Owner, waive its right to the Early Completion Bonus. Upon notice that the CMAR waives its right to the Early Completion Bonus, the Owner shall make the funds budgeted for the Early Completion Bonus available to the CMAR to pay the actual costs of such action as a Cost of the Work. The CMAR will enforce all rights and remedies that it has against any and all Subcontractors that are responsible for the failure to complete the Project within the schedule, and reimburse the Owner for the sums contributed under this paragraph to the extent the CMAR is able to recover those costs from those Subcontractors. If the Project is not substantially complete by the substantial completion date as extended, the Early Completion Bonus shall be deemed automatically waived without further notice, and the funds shall be made available to take action to maintain the Project on schedule. Once the funds budgeted for the Early Completion Bonus are exhausted, all costs associated with any action taken to stay within the completion schedule are the CMAR's responsibility within the GMP. If the CMAR finds that the schedule is likely to be impacted by an action or inaction on the part of the Owner, the CMAR must review the situation with the Owner in a timely manner, and if necessary, to obtain a change order amendment for such Work prior to taking any action which has a time and/or cost impact. All change orders will be settled in full. No caveats for later settlement of time extensions or delays will be accepted.

- 24.5. Request for extension of time shall be made in writing within ten (10) days following the event that is the cause of delay. In case of continuing cause for delay, the CMAR shall notify the Project Designer of the delay within 20 days of the beginning of the delay and only one claim is necessary.
- 24.6. The CMAR shall notify its surety in writing of each extension of time granted.
- 24.7. The schedule for all responses by the Project Designer to submittals by the CMAR shall be part of the Project schedule, as amended from time to time in accordance with the Contract. No request for a time extension shall be allowed on account of failure of the Project Designer to process any type of submittals, furnish drawings, or provide instructions unless and until the CMAR provides written notice of the request and processes it in accordance with paragraphs 24.4 and 24.5.
- 24.8. Should the CMAR fail to bring the Project to substantial completion within the time prescribed by the schedule that is established at the time the final GMP is accepted (or such later date as may result from extension of time granted by the Owner), the CMAR shall be liable to the Owner for delay damages as set forth herein. The CMAR acknowledges that delays will damage the Owner, but also acknowledges that proof of such damages would be difficult and costly for both parties, and that the injury to the Owner which could result from a failure of the CMAR to complete on schedule is uncertain and cannot be computed with exact precision. In order to liquidate in advance the delay damages that the Owner will be entitled to recover from the CMAR in the event of unexcused delays in the completion of the Project, the CMAR agrees that it will pay, and that the Owner may retain from the funds otherwise to be paid to the CMAR, the following liquidated damages, which sums are agreed upon as a reasonable and proper measure of damages which the Owner will sustain by failure of the CMAR to complete Work within the time stipulated:
- 24.8.1. The sum of \$\_\_\_\_\_ per day for each consecutive calendar day that the CMAR fails to achieve substantial completion of the entire Project; provided that the daily liquidated damages to be assessed against and paid by the CMAR through the date of substantial completion shall not exceed \_\_\_\_\_ and No/100 dollars (\$ \_\_\_\_\_).
- 24.8.2. In addition to the foregoing daily liquidated damages, the CMAR shall pay as Event Liquidated Damages an additional one-time charge of \$\_\_\_\_\_ for failure to compete substantial completion and beneficial occupancy for load in and setup for a scheduled event by \_\_\_\_\_ pm on \_\_\_\_\_.

- 24.8.3. If the Project is not finally complete within ninety days after the time prescribed for final completion by the schedule that is established at the time the final GMP is accepted (or such later date as may result from extension of time granted by Owner) then on the ninety-first day after the final completion date and on each calendar day thereafter, the CMAR shall pay as liquidated damages the sum of \$ \_\_\_\_\_ per day.
- 24.9. In addition to the foregoing liquidated damages, the Owner may recover extended utility charges as expressly set forth elsewhere in this Contract.
- 24.10. The CMAR shall not use its unexpended GMP Contingency to pay liquidated damages. The CMAR may in its discretion provide in its construction contracts that its Subcontractors will be liable for liquidated delay damages, in the amount of the Owner's liquidated damages or in different amounts. Notwithstanding anything in this Contract that might be construed to the contrary, in the event the CMAR deducts liquidated damages from a particular construction contract, thereby reducing the sum payable under that contract, the GMP will not be reduced by the amount withheld from that Subcontractor.
- 24.11. This provision for liquidated damages does not bar Owner's right to enforce its other contractual rights and remedies under this Contract, including without limitation the right to order the CMAR to accelerate the Work or the right to terminate the Contract. Liquidated damages represent the Owner's best effort at the commencement of the Contract to estimate its reasonable anticipated damages for delay, and should not be construed as a penalty.

## **25. CONSTRUCTION SUPERVISION AND SCHEDULE**

- 25.1. The CMAR shall maintain a competent and adequate full-time staff approved by the Owner at the Project site to coordinate and provide adequate direction of the Work, and to monitor progress of the Subcontractors on the Project at all times. The CMAR's on-site representatives shall manage the Work of the Subcontractors and coordinate the Work with the activities and responsibilities of the Owner, Project Designer and CMAR to complete the Project in accordance with the Owner's objectives of cost, time and quality.
- 25.2. It is understood that the designated and approved on-site resident CMAR representatives will remain on the job and in responsible charge as long as those persons remain employed by the CMAR, unless the Owner's Representative agrees otherwise in writing during the course of the Project. A contract amendment may be required by the Owner's Representative issued accordingly by the Owner. The Owner may request in writing that the CMAR promptly remove any individual staff member for any reason.
- 25.3. The CMAR shall establish an on-site organization and lines of authority in order to carry out the overall plans of the Project Team. The CMAR will provide for all coordination with the on-site Subcontractors the necessary on-site services for the construction activities and on-site requirements of the CMAR, Owner and Project Designer.
- 25.4. The CMAR shall accept delivery and arrange for storage, protection and security for any Owner purchased materials, systems and equipment that are a part of the Work until such items are turned over to the respective Subcontractors.
- 25.5. The CMAR shall provide a cost and resource loaded critical path method ("CPM") schedule utilizing accepted standard computer based software. The scheduling software shall allow for integration of all aspects of the Project and provide for coordination of all Work to be performed. The scheduling software used by the CMAR shall be capable of producing and coordinating logic developed network diagrams, and tabular format reports.
- 25.6. After acceptance of each GMP and issuance of a construction contract amendment to the CMAR for a Construction Phase of the Project and within fifteen (15) days of written notice to proceed

(NTP), the CMAR shall submit a preliminary CPM schedule for inclusion in the contract bid packages consistent with the time frames submitted in each GMP.

- 25.7. After contract award but prior to thirty (30) days from the date of the notice to proceed, the CMAR shall obtain from the Subcontractors their respective Work activities and integrate them into a Project construction schedule. The CMAR shall develop the complete and final CPM schedule in the form of a CPM network arrow diagram using the CMAR's logic and time estimates for each segment of the Work and shall be cost loaded, the sum of which totals the GMP exclusive of a CMAR-GMP contingency, and manpower loaded to complete the Work within the scheduled time frames. The scheduling obligation shall include tracking the progress of the Owner's and Project Designer's tasks and activities in relation to the milestone schedule and promptly notifying Owner of any delay that might impact construction. The CMAR shall make recommendations to the Owner, with a copy to the Project Designer, regarding strategies for overcoming any delay in the design of the Project that will affect the construction schedule. The CMAR and the Project Designer shall prepare, if deemed necessary, a schedule fixing dates upon which foreseeable clarifications will be required. The schedule will be subject to addition or change in accordance with progress of the Work. The Project Designer shall furnish drawings or clarifications in accordance with that schedule. The CMAR shall not proceed with the Work without such detail drawings and/or written clarifications.
- 25.8. The arrow network diagram will be drawn in a level of detail suitable for display of salient features of the Work, including but not limited to the placing of orders for materials, submission of shop drawings for approval, approval of shop drawings by the Project Designer and the Owner, delivery of material, and all Work activities inclusive of punch list agreed to by the Owner. Each Work activity shall be assigned a time estimate by the CMAR. One-day shall be the smallest time unit used. Data shall also be provided in Gantt form. This cost loaded schedule will not be the basis for invoicing, but may be considered by the Design Professional and the Owner when evaluating the percentage of Work represented to be complete in each schedule of values.
- 25.9. Upon completion of the network diagrams, the CMAR shall have computer input data prepared, and a computer run made to generate a printout for the Project based on the information supplied. In the event the completion date indicated by the schedule exceeds the contractual date, the logic and time estimates used to develop the plan will be reviewed, changes made in the logic and time estimates, and another computer run made to generate a new schedule. This procedure shall be repeated, if necessary, to provide a plan and schedule to meet Owner requirements. All submissions shall be both in hard copy and in electronic format.
- 25.10. Within fifteen (15) days of each GMP notice to proceed, the updated CPM schedule shall be submitted to the Owner for review and approval. No application for payment will be processed until the Project CPM schedule is approved by the Owner. This working plan shall show job identification, job duration, manpower loading, cost loading, calendar dates for start and finish of each job, and jobs critical to the completion of the Project on schedule. When approved by the Owner, they shall become the working plan and schedule for the Project and such information shall be provided to the Contractor for distribution to the Project Team. The CMAR shall distribute to the Subcontractors the approved Project CPM schedule and shall display same at the job site.
- 25.11. The CMAR shall review the plan and schedule each week. An updated cost-loaded Project schedule shall be furnished showing actual completed Work at the end of each month in respect to the entire Project. The form used shall be approved by the Owner and shall be submitted with the monthly invoice. The CMAR shall also develop and submit a Work plan for a two week, thirty day and sixty day look ahead.
- 25.12. The CMAR shall provide regular monitoring of the schedule as construction progresses, identify potential variances between scheduled and desired completion dates, review the schedule for Work not started or incomplete, review the status of submittals and delivery of long-lead time deliveries,

review the Owner's occupancy priorities, and take the action necessary to meet the required completion date. The CMAR shall furnish to the Owner various schedules and updates setting forth planned and completed progress of the Project broken down by the various divisions or parts of the Work and by calendar days. The CMAR shall ensure that all schedules are prepared and updated in strict conformance with the Owner's requirements for formatting of reports for the Owner. The CMAR shall keep the Owner, the Project Designer and all Subcontractors fully informed as to all changes and updates to the schedule. The CMAR shall ensure that all schedules are prepared and updated in strict conformance with the Owner's requirements and for provision of one inclusive schedule incorporating necessary lead times for actions required, by the Owner and regulatory agencies (including Orange County), by the Consultant, by the CMAR, and by utility companies providing services or relocating service lines and facilities, by all Subcontractors, and for significant General Condition's activities, including but not limited to agenda submittals, permit and approvals applications and review of interim and final plans, specifications and bid packages.

- 25.13. The CMAR shall schedule and preside over regular site coordination meetings with Subcontractors as conditions on the Project require, but at least weekly. In addition, the CMAR shall conduct weekly progress meetings and other meetings as may be directed by the Owner, at which Subcontractors, the Owner, the Project Designer, other designated representatives, and the CMAR can discuss jointly such matters as progress, scheduling, and construction-related problems. All Subcontractors shall be represented at these job progress conferences by both home office and Project personnel, unless specifically excused by both the CMAR and the Owner. The CMAR shall require attendance from other subcontractors and material suppliers who can contribute toward maintaining required job progress. It shall be the principal purpose of these meetings, or conferences, to effect coordination, cooperation and assistance in every practical way toward the end of maintaining progress of the Project on schedule and to complete the Project within the specified contract time. The CMAR shall be prepared to assess progress of the Work and to recommend remedial measures for correction of progress as may be appropriate. The CMAR with assistance from the Project Designer shall be the coordinator of the conferences and shall preside as chairman. The CMAR shall take and distribute complete minutes of meetings to all attendees and others as directed by the Owner within three (3) days of such meetings. Representatives of the Owner may attend any or all meetings and shall in any case receive all notices and minutes of meetings.
- 25.14. The CMAR shall keep accurate and detailed written records of Project progress during all stages of construction. The CMAR shall maintain a detailed daily diary of all events, which occur at the jobsite or elsewhere, and which affect, or may be expected to affect, Project progress. The diary shall record weather data, including minimum and maximum temperatures, precipitation type and amount, sky conditions, and wind velocities. The diary shall also record all visitors, and include a detailed list of all material deliveries to the site. The diary shall be available to the Owner at all times and shall be turned over to the Owner upon completion of the Contract.
- 25.15. The CMAR shall compile and submit to the Owner daily a summary report consisting of the CMAR's Daily Diary and each Subcontractor's daily report describing the construction activities of the day along with manpower and equipment usage, including that of the Subcontractors.
- 25.16. The CMAR shall submit to the Owner and the Project Designer a weekly report of the status of all Work activities. The CMAR is to submit and conform the report format to the Owner's requirements for these reports and prior to implementation the CMAR must obtain the Owner's approval of the format. The Owner shall have no duty to respond to any information in the periodic reports, unless the CMAR specifically requests a response or action by the Owner in writing in a separate document.
- 25.17. The weekly status report shall show the actual Work completed to date in comparison with the original amount of Work scheduled, inclusive of information on the Subcontractors' Work and the percentage of completion for the Project. The report shall describe major milestones achieved and slipped, including a discussion of each slippage. In addition to schedule information, the report shall contain an overall summary of the financial status of the Project with a cost control report

with proposed solutions for resolution of any cost concerns or issues. The report shall contain a summary statement on the status of change orders for the Project inclusive of potential change orders, approved change order and rejected/voided change orders as well as change orders which require the Owner's immediate attention. The report shall contain a summary statement as to the status of shop drawings, submittals and RFI's for the Project inclusive of items requiring the Owner and/or the Project Designer's immediate attention. The report shall contain a summary statement as to the status of quality control/inspections for the Project including, but not limited to, number and type of inspections made, overall Project quality to date, and recommendations. Finally, subject to the requirements of any OCIP, the report shall include an accident report.

- 25.18. If the Work is behind schedule, the CMAR must immediately provide written report of such condition to the Owner and Project Designer and indicate in writing what measures are being taken to bring the Work back on schedule and ensure that the contract completion date is not exceeded. If the Work is greater than thirty (30) days behind schedule and no legitimate requests for time extensions are in process, then the CMAR shall prepare and submit to the Project Designer a recovery schedule for review and approval. Failure of the CMAR to abide by the directives in this paragraph will give the Owner cause to terminate the Contract and pursue any other legal remedies allowed it by law.

#### SHOP DRAWINGS, SUBMITTALS, SAMPLES, DATA

- 25.19. The CMAR shall develop and implement a system for review, acceptance or rejection, and processing of all shop drawings and submittals, including the projected lead-time on the CPM schedule. The CMAR shall review this system with the Owner and the Project Designer, and obtain the Owner's approval prior to implementation.
- 25.20. Within 30 consecutive calendar days of the notice to proceed with each GMP, a schedule for anticipated submission of all shop drawings, product data, samples, and similar submittals shall be prepared by the CMAR and provided to the Project Designer. This schedule shall indicate the items, relevant specification sections, other related submittal data, and the date when these items will be furnished to the Project Designer.
- 25.21. The CMAR will be responsible for logging all shop drawings/submittals and stamping them reviewed and approved prior to submission to the Project Designer. The CMAR shall provide additional copies of any submittals or shop drawings requested by the Owner. The CMAR is to insure that shop drawing/submittal packages are submitted in an appropriate manner and, if not, return them to the Subcontractor for proper submission.
- 25.22. The CMAR shall be responsible for tracking and monitoring all shop drawings/submittals throughout construction until all shop drawings/submittals have been approved by the Project Designer and completion reported to the Owner.
- 25.23. The CMAR shall include shop drawings as an agenda item on all Owner meetings and advise the Owner immediately of any delays in the shop drawing and submittal process.
- 25.24. The CMAR shall develop a shop drawing and submittal aging report which is to be submitted to the Owner at each weekly progress meeting.
- 25.25. Approval of shop drawings by the Project Designer shall not be construed as relieving the CMAR from responsibility for compliance with the design or terms of the Contract Documents nor from responsibility of errors of any sort in the shop drawings, unless such error has been called to the attention of the Project Designer in separate writing by the CMAR.

#### **26. SUBSTITUTION REQUESTS**

- 26.1. The CMAR will be responsible for logging all substitution requests. The CMAR will be responsible for reviewing all substitution requests to insure that they are complete; and, if not, return them to the Subcontractor for proper submission. The CMAR will be responsible to review

all substitution requests prior to submission to the Project Designer and the Owner. It is to be noted that the Owner discourages substitutions and the Owner's approval will be granted only upon the most persuasive arguments as to quality, function and financial merit regarding a substitution. The CMAR shall be responsible for tracking and monitoring all substitution requests throughout construction until all substitution requests are processed by the Project Designer and the Owner. The CMAR shall be responsible to see that all substitution requests are submitted in a timely manner per the specifications. The CMAR shall include substitution requests, if any, on the agenda topic at the Owner's meetings and advise the Owner immediately of any delays in the substitution request process.

## **27. REQUESTS FOR INFORMATION**

- 27.1. The CMAR will be responsible for developing and implementing a RFI form for use on the Project. The CMAR will be responsible for logging and reviewing all RFI's prior to submission to the Owner and the Project Designer. The CMAR is to insure that the RFI's submitted are appropriate and not frivolous. The CMAR shall be responsible for tracking and monitoring all RFI's throughout construction in a timely manner until they are processed by the Project Designer and the Owner. The CMAR shall include RFI's as an agenda topic at all Owner meetings and advise the Owner immediately of any delays in their process. All responses to the RFI's that have an added cost impact must also be discussed with the Owner immediately upon such determination. The CMAR shall develop an RFI aging report that is to be submitted to the Owner at each progress meeting.

## **28. SUBSTANTIAL COMPLETION**

- 28.1. The date of substantial completion of the Work or designated portion thereof is the date certified by the Project Designer when the Work or a designated portion thereof is sufficiently complete, in accordance with the Construction Documents, so the Owner can fully occupy and utilize the Work or designated portion thereof for the use for which it is intended, with all of the Project's parts and systems operable as required by the Contract Documents. Only incidental corrective Work and any final cleaning beyond that needed for the Owner's full use may remain for final completion. The issuance of a temporary or final certificate of occupancy shall not, in itself, constitute substantial completion.
- 28.2. When the CMAR considers that the Work, or a designated portion thereof which is acceptable to the Owner, is substantially complete as defined above, the CMAR shall prepare for and submit to the Project Designer and Owner a list of all items which in the CMAR'S opinion are to be completed or corrected and shall attach it to a request in writing that the Project Designer perform a substantial completion inspection. The Owner's occupancy of incomplete Work shall not alter the CMAR's responsibilities. The Project Designer shall review the CMAR'S list and shall compile a punch list of items to be corrected and completed. The failure to include any items on such list does not alter the responsibility of the CMAR to complete all Work in accordance with the Contract Documents.
- 28.3. When the Owner, Project Designer and CMAR, on the basis of an inspection, jointly determine that the Work or designated portion thereof is substantially complete, the Project Designer will then prepare a certificate of substantial completion which shall establish the date of substantial completion, shall state the responsibilities of the Owner and the CMAR for security, maintenance, heat, utilities, damage to the Work, and insurance, and shall signify the beginning of the time within which the CMAR shall complete the items listed therein. Warranties required by the Contract Documents shall commence on the date of substantial completion of the Work or designated portion thereof, unless otherwise provided in the certificate of substantial completion.
- 28.4. The certificate of substantial completion shall be submitted to the Owner and the CMAR for their written acceptance of the responsibilities assigned to them in such certificate. Upon substantial completion of the Work or designated portion thereof and upon application by the CMAR and

certification by the Project Designer, the Owner shall make payment, except retainage held pursuant to the Contract Documents, for such Work or portion thereof as provided in the Contract Documents.

- 28.5. The acceptance of substantial completion payment shall constitute a waiver of all claims by the CMAR and its Subcontractors, except those previously made in writing and identified by the CMAR as unsettled at the time the CMAR submits the application for payment for substantial completion, and except for the retained sums due at final acceptance.
- 28.6. In addition to any and all other indemnification required by this Contract the CMAR shall indemnify and hold the Owner harmless against any claims by its Subcontractors that are waived because they were not made in writing and identified by the CMAR as unsettled when the CMAR submitted the application for payment for substantial completion.
- 28.7. The Owner shall have the option to correct or complete any and all punch list items not completed by the CMAR to the satisfaction of the Project Designer and the Owner within forty five (45) days for any GMP package of less than 1 year's duration and not more than ninety (90) days from the actual date of substantial completion for any GMP package of more than 1 year's duration by utilizing its own forces or by hiring others. The cost of such correction of remaining punch list items by the Owner or others shall be deducted from the final payment to the CMAR.
- 28.8. If CMAR does not complete certain punch list items within the required time period, all warranties and guarantees for such incomplete punch list items shall become effective upon CMAR submitting to the Owner and Project Designer certification of the date such items were completed and approval by the Owner's Representative and Project Designer.. The issuance of the certificate of substantial completion does not indicate final acceptance of the Project by the Owner, and the CMAR is not relieved of any responsibility for the Project except as specifically stated in the certificate of substantial completion.
- 28.9. Should the Project Designer and the Owner determine that the Work or a designated portion thereof is not substantially complete, they shall provide the CMAR with written notice stating why the Work or designated portion is not substantially complete. The CMAR shall expeditiously complete the Work and shall re-request in writing that the Project Designer perform another substantial completion inspection. Costs, if any, associated with such re-inspection shall be assessed to the CMAR at the rates specified in the Project Designer's contract.

## **29. PARTIAL UTILIZATION/BENEFICIAL OCCUPANCY**

- 29.1. The Owner may desire to occupy or utilize all or a portion of the Project when the Work for that portion is substantially complete.
- 29.2. Prior to the final payment, the Owner may request the CMAR in writing, through the Project Designer if applicable, to permit the Owner to use a specified part of the Project which the Owner believes it may use without significant interference with construction of the other parts of the Project. If the CMAR agrees, the Project Designer will schedule a beneficial occupancy inspection after which the Project Designer may issue a certificate of substantial completion. The certificate shall include the following documentation:
  - 29.2.1. Date of substantial completion.
  - 29.2.2. A tentative list of items to be completed or corrected before final payment.
  - 29.2.3. Establishing responsibility between the CMAR and Owner for maintenance, heat, utilities and insurance.
  - 29.2.4. Establishing the date for guarantees and warranties under the terms of the Contract.

29.2.5. Consent of surety.

29.2.6. Endorsement from the CMAR'S insurance company permitting occupancy shall not be a condition precedent to the Owner's occupancy of a part or parts of the Project, but may be requested by the Owner in its discretion.

29.3. The Owner shall have the right to exclude the CMAR from any part of the Project which the Project Designer has so certified to be substantially complete, but the Owner will allow the CMAR reasonable access to complete or correct Work to bring it into compliance with the Contract. Contractors allowed to Work in substantially complete and occupied areas shall clean up after their operations daily or be subject to back charges therefor. Occupancy by the Owner under this article will in no way relieve the CMAR from its contractual requirement to complete the Project within the specified time.

### **30. FINAL INSPECTION, ACCEPTANCE, AND PROJECT CLOSEOUT**

30.1. The CMAR is responsible for the close out requirements under the Contract. The CMAR is to Work closely with the Owner as to the procedures and schedule for contract close-out and the related contractual obligations.

30.2. The CMAR is to Work closely with the Owner's building commissioning agent or agents throughout the design, construction, and close-out phases of the Project.

30.3. Upon notification from the CMAR that the Project is complete and ready for inspection, the Project Designer shall make a preliminary final inspection to verify that the Project is complete and ready for final inspection. Prior to final inspection, the CMAR shall complete all items requiring corrective measures noted at the preliminary inspection. The Project Designer shall schedule a final inspection at a time and date acceptable to the Owner and the CMAR.

30.4. At the final inspection, the Project Designer shall, if job conditions warrant, record a list of items that are found to be incomplete or not in accordance with the Construction Documents. At the conclusion of the final inspection, the Project Designer shall make the following determinations:

30.4.1. That the Project is completed and accepted.

30.4.2. That the Project is accepted subject to the list of discrepancies (punch list). Subject to unavoidable delays in the delivery of materials needed to correct or complete discrepancies, all punch list items must be completed within thirty (30) days of acceptance or the Owner may invoke Owner's Right to Do Work.

30.4.3. That the Project is not complete and another date for a final inspection will be established.

30.5. Within fourteen (14) days of acceptance or within fourteen (14) days after completion of punch list, the Project Designer shall certify the Work and issue applicable certificate(s) of compliance.

30.6. Any discrepancies listed or discovered after the date of final inspection and acceptance shall be resolved as a warranty item.

30.7. The CMAR shall obtain as-built and product data from Subcontractors and maintain a current set of record drawings, specifications and operating manuals. For mechanical and electrical equipment, the CMAR is to obtain the operating and maintenance (O&M) manuals at least three (3) months prior to the demonstration for such equipment. These O&M manuals are to be sent to the Owner's representative who is to forward one (1) set to the Owner's department responsible for maintaining the facility for review prior to the equipment demonstration.

- 30.8. At the completion of the Project and before final payment, the CMAR shall deliver a complete set of as-built drawings for use by the Project Designer in preparing Record Drawings.

### **31. COST CONTROL**

- 31.1. The CMAR shall develop and maintain an effective system of Project cost control. Elements of the system of Project cost control will include Project budgets, GMP proposals, the cost and resource loaded critical path schedule, and cash flow forecasts and reports, all in formats to be approved by the Owner.
- 31.2. The CMAR shall incorporate into each element of the system of Project cost control all Owner approved changes as they occur, update and refine the GMP, and develop reports and forecasts as needed, or as directed by the Owner. The CMAR shall identify variances between actual and estimated costs and advise the Owner whenever projected cost exceeds allowances or estimates.
- 31.3. The CMAR shall check and supervise all material deliveries, equipment and labor entering the Work site. The CMAR shall maintain cost accounting records on authorized Work performed under unit costs, actual costs for labor and material, or other bases requiring accounting records, and afford the Owner access to these records and preserve them for a period of three (3) years after final payment. The Owner reserves the right to audit these records during that period.

### **32. CHANGES IN THE WORK**

- 32.1. The CMAR shall develop and implement a system for review, negotiation, and processing of proposed Change Orders. The CMAR shall, with complete supporting data, recommend necessary desirable changes to the Owner and the Project Designer for approval.
- 32.2. The Owner unilaterally at any time may have changes made in the Work covered by the Contract, including but not limited to changes: (1) in the specifications or drawings; (2) in the sequence, method or manner of performance of the Work; (3) in the Owner-furnished facilities, equipment, materials, services or site; or (4) directing acceleration in the performance of the Work. Furthermore, it is understood and agreed that refinement and detailing may be accomplished from time to time with respect to the drawings and specifications. The CMAR's entitlement to an increase in the GMP or an extension of time, or both, if any, for such changes shall be determined in accordance with this Contract.
- 32.3. No adjustment in the Guaranteed Maximum Price or the Scheduled Completion Date shall be made unless such change, refinement or detailing results in changes in the scope and/or design of the Project, as determined by the Owner.
- 32.4. The Owner's Representative has the authority to order minor changes in the Work not involving an adjustment in the GMP or time for completion, and not inconsistent with the intent of the Construction Documents. Such changes shall be effected by written order and shall be binding on the Owner and the CMAR. The CMAR shall not perform any changes in the Work unless authorized in writing by the Owner. The CMAR's performance of minor changes pursuant to this section shall not constitute a waiver of any claim the CMAR may have for additional compensation or time. Any claim the CMAR may have, however, shall be filed in strict conformance with this Contract.
- 32.5. No Change Order will be issued for resolution of conflicts in the documents which are to be covered by the CMAR-GMP Contingency.
- 32.6. Except in an emergency endangering life or property, no change shall be made by the CMAR except upon receipt of approved change order or written field order from the Project Designer, countersigned by the Owner's representative authorizing such change. No claim for increases in the GMP shall be honored or valid unless this procedure is followed. A field order, transmitted by fax or hand-delivered, may be used where the change involved impacts the critical path of the Work. A formal change order shall be issued within the time stated on the field order.

- 32.7. The CMAR shall notify the Owner in writing (and copy to Project Designer) if the CMAR believes that a change in scope or design will require a change in the GMP. The Owner shall have the right to require the performance thereof on a lump sum basis, a unit price not to exceed basis, or a time and material not to exceed basis.
- 32.8. The CMAR shall notify the Project Designer and the Owner of such changes before trade bids for the Work associated are requested. The Owner and CMAR shall reach agreement on the nature of the subject change and upon the Owner's direction eliminate the circumstances of the change or negotiate a mutually agreed cost change to be made to the GMP.
- 32.9. The CMAR acknowledges that some changes in the Project may require approval by the Board. So as not to delay the Project, the CMAR shall notify the Owner's representative of any deadlines for responses and how the Owner's failure to respond will impact the Project schedule.
- 32.10. Upon receipt of an Owner directed change request, the CMAR shall submit a proposal within ten (10) working days, or provide written justification acceptable to the Owner within five (5) working days stating the additional time required to submit a proper proposal for the change requested. The CMAR's proposal shall be itemized and segregated by labor and materials for the various components of the change in or addition to the Work (no aggregate labor total will be acceptable) and shall be accompanied by signed proposals by any Subcontractors who will perform any portion of the change in, or addition to, the Work, and of any persons who will furnish materials or equipment for incorporation therein. The proposal shall also include the CMAR's estimate of the time required to perform said changes or additional Work.
- 32.11. There will be no CMAR mark-up or Fee included in any single change order covering Work under this Contract. Rather, change order proposals will consist of actual costs only; that is, Subcontractors' change order proposals and CMAR General Conditions items, if applicable, only. All costs saved by scope reductions shall revert to the Owner in full. Any increase in CMAR Fee shall be calculated separately from individual change orders, subject to the limits set forth in Paragraph 3.3 herein.
- 32.12. All change orders shall be supported by a breakdown showing method of arriving at net cost as defined below. The Owner and Project Designer will review the CMAR's analysis and cost data and advise the CMAR of their findings. The CMAR will provide such supporting data in suitable format. The Project Designer shall verify correctness. Within fourteen (14) days after receipt of the CMAR's proposal, the Project Designer shall prepare the change order and forward to the CMAR for its signature or otherwise respond, in writing, to the CMAR's proposal. Within seven (7) days after receipt of the change order executed by the CMAR, the Project Designer shall certify the change order by its signature, and forward the change order and all supporting data to the Owner for the Owner's signature. The Owner shall endeavor to execute the change order within seven (7) days of receipt, or in accordance with the Owner's standard procedures when Board approval is required. Upon approval by the Owner, copies of the change order will be sent to the Project Designer and the CMAR and its surety. In case of emergency or extenuating circumstances, approval of changes may be obtained verbally by telephone or field orders approved by all parties, then shall be substantiated in writing as outlined under normal procedure.
- 32.13. The portions of the proposal relating to labor and materials may include the reasonably anticipated direct costs to any of the CMAR's Subcontractors for labor and materials to be purchased for incorporation in the change in the Work, plus transportation and applicable sales and use taxes. The term "direct cost" as used herein shall mean the difference between all proper cost additions and deductions. The "cost" as used herein shall be limited to the following:
- 32.13.1. The actual costs of materials and supplies incorporated or consumed as part of the Project;
- 32.13.2. The actual costs of labor expended on the Project site;

- 32.13.3. The actual costs of labor burden, limited to the costs of social security (FICA) and Medicare/Medicaid taxes; unemployment insurance costs; health/dental/vision insurance premiums; paid employee leave for holidays, vacation, sick leave, and/or petty leave, not to exceed a total of 30 days per year; retirement contributions; worker's compensation insurance premiums; and the costs of general liability insurance when premiums are computed based on payroll amounts; the total of which shall not exceed forty percent (40%) of the actual costs of labor;
- 32.13.4. The actual costs of rental for tools, excluding hand tools; equipment; machinery; and temporary facilities required for the Project;
- 32.13.5. The actual costs of premiums for bonds, insurance, permit fees, and sales or use taxes related to the Project;
- 32.13.6. Overtime and extra pay for holidays and weekends may be a cost item only to the extent approved by the Owner;
- 32.14. The CMAR may include up to fifteen percent (15%) of said costs as overhead and profit for its Subcontractors. In the case of deductible change orders, the CMAR shall deduct no less than five percent (5%) profit for its Subcontractors, but no allowances for overhead.
- 32.15. If any of the items included in the lump sum proposal are covered by unit prices, the Owner may, if it requires the change in the Work to be performed on a lump sum basis, elect to use these unit prices in lieu of the similar items included in the lump sum proposal, in which event an appropriate deduction will be made in the lump sum amount prior to the application of any allowed overhead and profit percentages. No additional Subcontractor overhead and profit shall be applied to any unit prices.
- 32.16. In the event that the CMAR fails to submit its proposal or obtain approval of an extension of time within the designated period, the Owner may order the CMAR to proceed with the change or addition to the Work and the CMAR shall so proceed. The Owner shall unilaterally determine the reasonable cost and time to perform the Work in question, which determination shall be final and binding upon the CMAR.
- 32.17. The Owner reserves the right to reject the CMAR's proposal for a change in the Work and to elect to perform said Work using a separate Subcontractor. Under such circumstances, the CMAR shall coordinate the performance of the Work.
- 32.18. If the Owner requests a change order and the CMAR's terms are unacceptable, the Owner may require the CMAR to perform such Work on a time and material basis. If the Owner elects to have the change in the Work performed on a time and material basis, the CMAR shall submit to the Owner daily time and material tickets, to include the identification number assigned to the change in the Work, the location and description of the change in the Work, the classification of labor employed (and names and social security numbers), the materials used, the equipment rented (not tools) and such other evidence of cost as the Owner may require. The Owner may require authentication of all time and material tickets and invoices by persons designated by the Owner for such purpose. The failure of the CMAR to secure any required authentication shall constitute a waiver by the CMAR of any claim for the cost of that portion of the change in the Work covered by a non-authenticated ticket or invoice.
- 32.19. In the event that the parties are unable to agree as to the reasonable cost and time to perform the change in or addition to the Work based upon the CMAR's proposal and the Owner does not elect to have the change in the Work performed on a time and material basis, Owner has the right to direct in writing that the CMAR perform the change in the Work. Failure of the parties to reach agreement regarding the cost and time of the performing the change in the Work regardless of any

pending protest, shall not relieve the CMAR from performing the change in the Work promptly and expeditiously.

- 32.20. At the time of signing a change order, the CMAR shall be required to certify as follows: "I certify that my bonding company will be notified forthwith that my contract has been changed by the amount of this change order, and that a copy of the approved change order will be mailed upon receipt by me to my surety."
- 32.21. A change order, when issued, shall be full compensation, or credit, for the Work included, omitted or substituted. It shall show on its face the adjustment in time for completion of the Project as a result of the change in the Work.
- 32.22. No changes will invalidate, relieve or release the CMAR from any guarantee given by him pertinent to the contract provisions. No changes will affect the validity of the performance bond or relieve the surety on said bond.
- 32.23. In the event of emergency endangering life or property, the CMAR and the Subcontractors may be directed to proceed on a time and material basis by the Owner's Representative whereupon the CMAR shall proceed and keep accurately on such form as may be required, a correct account of costs together with all proper invoices, payrolls and supporting data. Upon completion of the Work the change order will be prepared and settled as outlined herein.

### **33. CLAIMS FOR EXTRA COST**

- 33.1. If the CMAR or any of its Subcontractors asserts that any event or occurrence has caused a change in or addition to the Work which change causes an increase or decrease in the GMP or the time required for the performance of any part of the Work under the Contract, including Work not affected directly by the change, the CMAR shall, within ten (10) working days of such event, give the Owner and Project Designer written notice as herein required. Said notice shall include the instructions or circumstances that are the basis of the claim and the CMAR's best estimate of the cost and time involved. The statement of claim hereunder may be included in the notice required above. The statement of claim shall include all direct, indirect and impact costs associated with the change, as well as the CMAR's estimate of the schedule impact of the change, if any. The CMAR and its Subcontractors shall not be entitled to reimbursement or an increase in the GMP for any claims that are not filed in strict conformance with this section. The CMAR shall not proceed with the Work affected until further advised, except in emergency involving the safety of life or property. No claims for extra compensation will be considered unless the claim is so made. The Project Designer shall review and render a written decision on each claim for extra cost within seven (7) days of receipt of claim.
- 33.2. The CMAR shall not act on instructions received by it from persons other than the Project Designer, and any claims for extra compensation or extension of time on account of such instruction will not be honored. The Project Designer will not be responsible for misunderstandings claimed by the CMAR of verbal instructions which have not been confirmed in writing, and in no case shall instructions be interpreted as permitting a departure from the Contract Documents unless such instruction is confirmed in writing and supported by a properly authorized change order.
- 33.3. Under no circumstances shall a claim for extra cost include a claim for an increase in the CMAR Fee. Approved claims for extra cost, however, will be considered change orders for purposes of determining if the CMAR is entitled to an increase in its Fee under Paragraph 3.3 herein.
- 33.4. If the parties are unable to agree to the reasonable cost and time to perform the change, or are unable to agree as to whether a change occurred, the Owner's representative shall make a unilateral determination regarding the basis of proceeding, subject to dispute resolution at a later time. The CMAR shall proceed with the Work as directed by the Owner's representative.

- 33.5. Should a claim for an increase in the GMP by the CMAR be denied by the Owner the CMAR may request mediation in connection with the dispute resolution rules adopted for this Project.

#### **34. DIFFERING SITE CONDITIONS**

- 34.1. Should the CMAR encounter subsurface or latent conditions, or both at the site materially differing from those shown on the drawings or indicated in the specifications or differing materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in this Contract, the CMAR shall immediately, and in no event later than thirty (30) days later, give notice to the Owner of such conditions before they are disturbed. The Owner and the Project Designer shall thereupon promptly investigate the conditions and if they find that they materially differ from those shown on the drawings or indicated in the specifications, they shall at once make such changes in the drawings and/or specifications as they may find necessary. Any increase or decrease in the Cost of the Work resulting from such changes shall be adjusted in the manner provided herein for adjustments as to extra and/or additional Work and changes. However, neither the Owner nor the Project Designer shall be liable or responsible for additional Work, costs or changes to the Work that could have been reasonably determined from any geotechnical, soils and other reports, surveys and analyses made available for the CMAR's review or that could of been discovered by the CMAR through the performance of its obligations pursuant to this Contract.

#### **35. CORRECTION OF WORK BEFORE FINAL PAYMENT**

- 35.1. Any Work, materials, fabricated items or other parts of the Work which have been condemned, rejected, or declared not in accordance with the Contract by the Project Designer shall be promptly removed from the Work site by the CMAR, and shall be immediately replaced by new Work in accordance with the contract at no additional cost to the Owner. Work or property of the Owner, damaged or destroyed by virtue of such faulty Work, shall be made good at the expense of the CMAR.
- 35.2. Correction of condemned Work described above shall commence within seventy-two (72) hours after receipt of notice from the Project Designer, and shall make satisfactory progress until completed.
- 35.3. Should the CMAR fail to proceed with the required corrections, then the Owner shall have the right to complete the Work under the terms herein.

#### **36. CORRECTION OF WORK AFTER FINAL PAYMENT**

- 36.1. Neither the final certificate, final payment, occupancy of the premises by the Owner, nor any provision of the Contract, nor any other act or instrument of the Owner, nor the Project Designer, shall relieve the CMAR from responsibility for negligence, for faulty material or workmanship, for breach of any warranty or guarantee, or for failure to comply with the drawings and specifications. The CMAR shall correct any defects due thereto and repair any damage resulting therefrom, which may appear during the guarantee period following final acceptance of the Work in accordance with its warranty and guarantee. The Owner will report any defects as they may appear to the CMAR and establish a time limit for completion of corrections by the CMAR. The Owner will be the judge as to the responsibility for correction of defects.

#### **37. UNCORRECTED FAULTY WORK**

- 37.1. Should the correction of faulty or damaged Work be considered inadvisable or inexpedient by the Owner and the Project Designer, the Owner shall be equitably reimbursed by the CMAR. The reimbursement may be deducted from any amounts due or to become due to the CMAR. Should the cost of such reimbursement exceed the amount due or to become due the CMAR, then the CMAR or its surety, or both, shall be liable for and shall pay to the Owner the amount of said deficiency.

The CMAR may in turn deduct such reimbursements from amounts due to responsible Subcontractors including funds retained by the Owner for warranty period.

### **38. OWNER'S RIGHT TO DO WORK**

- 38.1. If, during the progress of the Work or during the period of guarantee, the CMAR fails to prosecute the Work properly or to perform any provision of the Contract, the Owner, after fifteen (15) days' written notice sent by certified mail, return receipt requested, to the CMAR and the Project Designer, may perform or have performed that portion of the Work. The cost of the Work may be deducted from any amounts due or to become due to the CMAR, such action and cost of same having been first approved by the Project Designer. Should the cost of such action of the Owner exceed the amount due or to become due the CMAR, then the CMAR or its surety, or both, shall be liable for and shall pay to the Owner the amount of said excess.

### **39. TERMINATION FOR CONVENIENCE**

- 39.1. The Owner may terminate this Contract at any time and for any reason including, without limitation, failure of the parties to reach agreement on any GMP. In the event this Contract is terminated pursuant to this provision, the CMAR shall, as requested by the Owner, cancel all contracts for Work or cooperate with the Owner to assign contracts for Work to the Owner or the Owner's designee. The Owner shall pay the CMAR all costs of the Work incurred by the CMAR, including cancellation costs, settlement costs, demobilization costs and restocking Fees, until all contracts with the CMAR can be canceled or assigned. Otherwise, the CMAR shall only receive its Fee, and general conditions costs incurred through demobilization from the Project, through the date of termination plus a reasonable period for demobilization.
- 39.2. Termination under this paragraph shall not release either the CMAR or its surety from liability or responsibility for any default or other transaction or occurrence prior to the date of termination and demobilization from the Project.

### **40. TERMINATION FOR DEFAULT**

- 40.1. If the CMAR fails to begin the Work under the Contract within the time specified, or the progress of the Work is not maintained on schedule, or fails to complete the Work within the time above specified, or shall allow the Work to be performed unsuitably or shall discontinue the prosecution of the Work, or if the CMAR shall become insolvent or be declared bankrupt or commit any act of bankruptcy or insolvency, or allow any final judgment to stand against it unsatisfied for a period of seventy-two (72) hours, or shall make an assignment for the benefit of creditors, or for any other cause whatsoever shall not carry on the Work in an acceptable manner, the Owner may give notice in writing, sent by certified mail, return receipt requested, to the CMAR and its surety of such delay, neglect or default, specifying the same, and if the CMAR within a period of thirty (30) days after such notice shall not proceed in accordance therewith, then upon the Owner's issuance of notice of default, the surety shall promptly take over the Work and complete the performance of this Contract in the manner and within the time frame specified. In the event the surety shall fail to take over the Work to be done under this Contract within fifteen (15) days after being so notified and notify the Owner in writing, sent by certified mail, return receipt requested, that it is taking the same over and stating that it will diligently pursue and complete the same, the Owner shall have full power and authority, without violating the Contract, to take the prosecution of the Work out of the hands of said CMAR, to appropriate or use any or all Contract materials and equipment on the grounds as may be suitable and acceptable and may enter into an agreement, either by public letting or negotiation, for the completion of said Contract according to the terms and provisions thereof or use such other methods as in its opinion shall be required for the completion of said Contract in an acceptable manner. All costs and charges incurred by the Owner, together with the costs of completing the Work under Contract, shall be deducted from any monies due or which may become due said CMAR and surety. In case the expense so incurred by the Owner shall be less than the sum which would have been payable under the Contract, if it had been completed by said

CMAR, then the said CMAR and surety shall be entitled to receive the difference, but in case such expense shall exceed the sum which would have been payable under the Contract, then the CMAR and the surety shall be liable and shall pay to the Owner the amount of said excess.

- 40.2. It is further mutually agreed between the parties hereto that if at any time after the execution of this Contract and the surety bonds hereto attached for its faithful performance, the Owner shall deem the surety or sureties upon such bonds to be unsatisfactory, or if for any reason such bonds cease to be adequate to cover the performance of the Work, the CMAR shall, at its expense, within five (5) days after the receipt of notice from the Owner so to do, furnish an additional bond or bonds in such form and amount, and with such surety or sureties as shall be satisfactory to the Owner. In such event no further payment to the CMAR shall be deemed to be due under this Contract until such new or additional security for the faithful performance of the Work shall be furnished in manner and form satisfactory to the Owner.
- 40.3. In the event it is determined by a court of law that termination under this paragraph was not justified, the termination of the CMAR will be treated as if it were a termination for convenience hereunder.

#### **41. CONSTRUCTION MANAGER'S RIGHT TO STOP WORK OR TERMINATE THE CONTRACT**

- 41.1. Should the Work be stopped for a period of three months by order of a court having jurisdiction or by order of any other public authority due to cause beyond the fault or control of the CMAR, or if the Owner should fail or refuse to make payment on account of a certificate issued by the Project Designer within thirty (30) days after receipt of same, then the CMAR, after fifteen (15) days' written notice to the Owner and the Project Designer, may suspend operations on the Work or terminate the Contract.
- 41.2. The Owner shall be liable to the CMAR for the cost of the Work delivered and performed on this Contract plus all General Conditions costs incurred to date plus its fee earned to date, and shall make such payment. The Project Designer shall determine and certify the correctness of such payment.

#### **42. REQUEST FOR PAYMENT**

- 42.1. Prior to payment by the Owner, the Project Designer shall review and approve the CMAR's pay applications. Based on applications for payment submitted to the Project Designer by the CMAR and certificates for payment issued by the Project Designer, the Owner shall make progress payments to the CMAR as provided below and elsewhere in the Contract Documents.
- 42.2. E-VERIFY. As a condition of payment for services rendered under this Contract, CMAR shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes. CMAR shall require its Subcontractors to comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes as well. Upon request by Owner CMAR shall verify, by affidavit, compliance of the terms of this section.
- 42.3. The period covered by each application for payment shall be one calendar month ending on the last day of the month.
- 42.4. No advance payments or interim payments will be made by the Owner.
- 42.5. Provided a proper and complete application for payment is received by the Project Designer not later than the 1<sup>st</sup> day of a given month, the Owner shall make payment to the CMAR not later than the last day of the same month. If an application for payment is received by the Project Designer after the application date fixed above, payment shall be made by the Owner not later than thirty days after the Project Designer receives the application for payment.

- 42.6. With each application for payment for Work performed directly by the CMAR and such Subcontractors as the Owner may specify, the CMAR shall submit transaction summaries and, if requested by the Owner, payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Project Designer to demonstrate that cash disbursements already made by the CMAR on account of general conditions and the Cost of the Work equal or exceed (1) progress payments already received by the CMAR less (2) that portion of those payments attributable to the CMAR's Fee; plus (3) payrolls and costs for the period covered by the present application for payment.
- 42.7. The CMAR shall submit a schedule of values that allocates the entire GMP among the various portions of the Work, except that the CMAR's Fee shall be shown as a separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Project Designer may require. This schedule, unless objected to by the Project Designer, shall be used as a basis for reviewing the CMAR's applications for payment. The Project Designer may also use the Project critical path schedule when reviewing the CMAR's applications for payment.
- 42.8. Each application for payment shall be compared to the most recent schedule of values submitted by the CMAR. Applications for payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the application for payment. The percentage completion shall be the percentage of that portion of the Work which has actually been completed.
- 42.9. Subject to other provisions of the Contract, the amount of each progress payment shall be computed as follows:
- 42.9.1. Take that portion of the GMP properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the GMP allocated to that portion of the Work in the schedule of values.
- 42.9.2. Add that portion of the GMP properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or if approved in advance by the Owner, suitably stored off site at a location agreed upon in writing.
- 42.9.3. Add the CMAR's Fee: the CMAR's portion of the Fee for construction phase services shall be an amount which bears the same ratio to the fixed-sum Fee as the total payment described in the two preceding clauses bears to the cost of the Work defined in the Contract Documents, without retainage until the Work is 50% complete. The remaining fifty percent (50%) portion of the CMAR's Fee shall be paid to the CMAR upon satisfactory completion and close out of the Project.
- 42.9.4. Subtract the aggregate of previous payments made by the Owner.
- 42.9.5. Subtract the amount, in any, by which the CMAR has been previously overpaid, as evidenced by the Owner's review of the CMAR's documentation required herein or by any audit of the CMAR records.
- 42.9.6. Subtract amounts, if any, for which the Project Designer has withheld or nullified a certificate of payment.
- 42.9.7. Subtract retainage as provided below.
- 42.10. Except with the Owner's prior approval, payments allocated to Subcontractors shall be subject to a retention of five (5%). Whenever any item of Work indicated on the CMAR's schedule of values is completed on or before a target date mutually agreed upon by the Owner, Project Designer and the CMAR, and the Project Designer and Owner agree the Work is completed, the Owner may reduce the amount of retainage on that item by fifty percent (50%) for the remainder of the Project.

- 42.11. In addition, the CMAR shall retain one percent (1%) of the contract sum of each or any Subcontractor during the warranty period for contracts up to \$\_\_\_\_\_, or one half percent (1/2%), with a \$\_\_\_\_\_ minimum, during the warranty period for contracts over \$\_\_\_\_\_.
- 42.12. Retainage in the traditional sense shall not be held on the CMAR's Fee; the CMAR's Fee shall be paid in accordance with this paragraph, meaning the fifty percent (50%) of the CMAR's Fee for construction services shall be held by the Owner until satisfactory completion and close out of the Project. Satisfactory completion and close out of the Project means that the Owner and Project Designer are satisfied that the Project has been completed in accordance with the Construction Documents and within the GMP, all general conditions of the Contract pertaining to close out have been satisfied, and all Subcontractors have satisfactorily completed their respective contracts.
- 42.13. Except with the Owner's prior approval, the CMAR shall not make advance payments to suppliers for materials or equipment that has not been delivered and stored at the site.
- 42.14. The Project Designer shall take action on the CMAR's application for payment in accordance with the agreement between the Owner and Project Designer. The Project Designer's certification for payment shall be based upon the Project Designer's on-site observation and the documentation submitted in accordance with this paragraph and the CMAR's application for payment.

### **43. CERTIFICATES OF PAYMENT AND FINAL PAYMENT**

- 43.1. Within five (5) days from receipt of request for payment from the CMAR, the Project Designer shall issue and forward to the Owner a certificate for payment. This certificate shall indicate the amount requested or as approved by the Project Designer. If the certificate is not approved by the Project Designer, it shall state in writing to the CMAR and the Owner its reasons for withholding payment. No certificate issued or payment made shall constitute an acceptance of the Work or any part thereof.
- 43.2. The Owner reserves the right, prior to making final payment to the CMAR, to conduct a final audit of the expenditures by the CMAR on the Project for assurances that the final payment to the CMAR does not exceed the amounts properly payable to the CMAR for the Cost of the Work, General Conditions, any special allowances, and CMAR-GMP Contingency savings. In the event an audit determines that the CMAR has been paid more than it is entitled to be paid under the Contract, the CMAR will refund the overpayment to the Owner.
- 43.3. The making and acceptance of final payment shall constitute a waiver of all claims by the Owner except:
- 43.3.1. Claims arising from unsettled liens or claims against the CMAR.
  - 43.3.2. Faulty Work or materials appearing after final payment.
  - 43.3.3. Failure of the CMAR to perform the Work in accordance with drawings and specifications, such failure appearing after payment.
  - 43.3.4. As conditioned in the performance bond and payment bond.
- 43.4. The making and acceptance of final payment shall constitute a waiver of all claims by the CMAR except those claims previously made and remaining unsettled.
- 43.5. Prior to submitting request for final payment to the Project Designer for approval, the CMAR shall fully comply with all requirements specified in the "Project closeout" section of the specifications. These requirements include but not limited to the following:

- 43.5.1. Submittal of Product and Operating Manuals, Warranties and Bonds, Guarantees, Maintenance Agreements, As-Built Drawings, Certificates of Inspection or Approval from agencies having jurisdiction. (The Project Designer must approve the Manuals prior to delivery to the Owner).
- 43.5.2. Transfer of required attic stock material and all keys in an organized manner.
- 43.5.3. Record of Owner's training.
- 43.5.4. Resolution of any final inspection discrepancies.
- 43.6. The CMAR shall forward to the Project Designer the final application for payment along with the following documents:
  - 43.6.1. List of minority business subcontractors and material suppliers showing breakdown of contracts amount.
  - 43.6.2. Affidavit of Release of Liens.
  - 43.6.3. Affidavit of Subcontractors of payment to material suppliers and subcontractors.
  - 43.6.4. Consent of Surety to Final Payment.
  - 43.6.5. Certificates of state agencies required by state law.
- 43.7. The Project Designer will not authorize final payment until the Work under contract has been certified by Project Designer, certificates of compliance issued, and the CMAR has complied with the closeout requirements. The Project Designer shall forward the CMAR's final application for payment to the Owner along with respective certificate(s) of compliance required by law.

#### **44. CONTRACTOR'S AFFIDAVIT**

- 44.1. The final payment of retained amounts due the CMAR on account of the Contract shall not become due until the CMAR has furnished to the Owner through the Project Designer an affidavit signed, sworn and notarized to the effect that all payments for materials, services or contracted Work to Subcontractors in connection with this Contract have been satisfied, and that no claims or liens exist against the CMAR in connection with this Contract. In the event that the CMAR cannot obtain similar affidavits from Subcontractors to protect the CMAR and the Owner from possible liens or claims against the CMAR, the CMAR shall state in its affidavit that no claims or liens exist against any Subcontractor to the best of its (the CMAR's) knowledge, and if any appear afterward, the CMAR shall save the Owner harmless from all claims by any Subcontractor or other claimant for payment or any other compensation for Work on the Project.

#### **45. TAXES**

- 45.1. North Carolina sales tax and use tax, as required by law, apply to materials entering into county Work and such costs shall be included in all bid proposals and contract sums.
- 45.2. Local option sales and use taxes, as required by law, apply to materials entering into county Work as applicable and such costs shall be included in all bid proposals and contract sums.
- 45.3. The CMAR shall give the Owner a signed tax statement containing the information listed in G.S. 105-164.14(e) before any payment requests submitted will be due.
- 45.4. The Department of Revenue has agreed as of April 1, 1991 that in lieu of obtaining copies of sales receipts from Subcontractors, an agency may obtain a certified statement from the Subcontractor

setting forth the date, the type of property and the cost of the property purchased from each vendor, the county in which the vendor made the sale and the amount of local sales and use taxes paid thereon. If the property was purchased out-of-state, the county in which the property was delivered should be listed. The Subcontractor should also be notified that the certified statement may be subject to audit.

- 45.5. In the event the CMAR makes several purchases from the same vendor, such certified statement must indicate the invoice numbers, the inclusive dates of the invoices, the total amount of the invoices, the counties, and the county sales and use taxes paid thereon. The position of a sale is the retailer's place of business located within a taxing county where the vendor becomes contractually obligated to make the sale. Therefore, it is important that the county tax be reported for the county of sale rather than the county of use. When property is purchased from out-of-state vendors and the county tax is charged, the county should be identified where delivery is made when reporting the county tax. Such statement must also include the cost of any tangible personal property withdrawn from the CMAR's warehouse stock and the amount of county sales or use tax paid thereon by the CMAR. Similar certified statements by its Subcontractors must be obtained by the CMAR and furnished.
- 45.6. The CMAR and its Subcontractors are not to include any tax paid on supplies, tools, and equipment which they use to perform their contracts and should include only those building materials, supplies, fixtures and equipment which actually become a part of or annexed to the building or structure.
- 45.7. Any sales tax refunds paid to the Owner shall be exclusively for the Owner's use and shall not in any way reduce the cost of the Project or impact the GMP.

#### **46. PAYMENTS WITHHELD**

- 46.1. The Project Designer may withhold a certificate for payment in whole or in part, to the extent reasonably necessary to protect the Owner. If the Project Designer is unable to certify payment in the amount of the application, the Project Designer will notify the CMAR and the Owner in writing. If the CMAR and Project Designer cannot agree on a revised amount, the Project Designer will promptly issue a certificate for payment for the amount for which the Project Designer is able to make such representations to the Owner. The Project Designer may also withhold a certificate for payment, in whole or in part, to such extent as may be necessary in the Project Designer's opinion to protect the Owner from loss for which the CMAR or the Subcontractor(s) is responsible, including loss resulting from acts and omissions, because of:
  - 46.1.1. Defective Work not remedied;
  - 46.1.2. Third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the CMAR;
  - 46.1.3. Failure of the CMAR or Subcontractor(s) to make payments properly to Subcontractors or sub-subcontractors or for labor, materials or equipment;
  - 46.1.4. Reasonable evidence that the Work cannot be completed for the unpaid balance of the GMP;
  - 46.1.5. Damage to the Owner or another Subcontractor;
  - 46.1.6. Reasonable evidence that the Work will not be completed within the contract time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;

- 46.1.7. Failure to carry out the Work in accordance with the Contract Documents;
  - 46.1.8. Failure to provide sales tax documentation as required by the Owner;
  - 46.1.9. Failure or refusal of the CMAR or Subcontractors to submit the required information on minority business enterprises;
  - 46.1.10. Any other reason deemed necessary by the Project Designer to protect the Owner unless arbitrary and unreasonable; or
  - 46.1.11. Subsequently discovered evidence that Work previously approved was not performed in accordance with the Contract Documents.
- 46.2. When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.
- 46.3. The Owner's Representative may withhold a certificate for payment in whole or in part, to the extent reasonably necessary to protect the Owner.

#### **47. INSURANCE REQUIREMENTS**

- 47.1. CMAR shall procure and maintain for the duration of the contract the following insurance coverage from an insurance company(s) possessing a rating of A-VI or higher from the A.M. Best Company or an equivalent rating service. All of the policies required of the CMAR shall contain a waiver of subrogation provision to waive all rights of recovery under subrogation or otherwise against the Owner. CMAR shall advise the Owner of any cancellation, non-renewal, or material change in any policy within ten (10) days of notification of such action and provide updated certificates of insurance evidencing renewals within fifteen (15) days of expiration. All of the policies required of the CMAR shall be primary and the CMAR agrees that any insurance or self-funded liability programs maintained by the Owner shall be non-contributing with respect to the CMAR's insurance.

Insurance coverage shall be obtained from companies that are authorized to provide such coverage and that are authorized by the Commissioner of Insurance to do business in North Carolina. CMAR, upon request, shall furnish Owner with complete copies of insurance policies required. By requiring insurance herein, the Owner does not represent that coverage and limits will necessarily be adequate to protect CMAR, and such coverage and limits shall not be deemed as a limitation on CMAR's liability under the indemnities granted to the Owner in this Contract. Any umbrella or excess liability coverage must be at least as broad as the primary coverage and contain all coverage provisions that are required of the primary coverage.

The failure of the Owner at any time to enforce the insurance provisions, to demand such certificates of insurance, or to identify a deficiency shall not constitute a waiver of those provisions, nor reduce the obligations of the CMAR to maintain such insurance or to meet its obligations under the indemnification provisions.

The CMAR shall provide the Owner a valid certificate of insurance, in advance of the performance of any work, exhibiting coverage as required by the Owner. Providing and maintaining adequate insurance coverage is a material obligation of the CMAR. CMAR shall require its subcontractors to maintain insurance coverage required herein or cover the subcontractors' under the CMAR's policies. The Certificate of Insurance shall be provided on the industry standard form, ACORD 25.

Notwithstanding the foregoing, nothing contained in this section shall be deemed to constitute a waiver of the governmental immunity of Orange County, which immunity is hereby reserved to Orange County.

The Work under this Contract shall not commence until the CMAR has verified to the Owner that all required insurance coverage as described herein has been obtained and verifying certificates of insurance have been approved in writing by the Owner. These certificates shall contain a provision that coverage afforded under the policies will not be cancelled, reduced in amount, or coverage eliminated until at least thirty (30) days after mailing written notice, by certified mail, return receipt requested, to the insured and the Owner of such alteration or cancellation.

Insurances to be provided are as follows:

- 47.1.1. **Commercial General Liability:** The CMAR shall ensure that it and all Subcontractors shall provide commercial general liability insurance with a limit of not less than **\$5,000,000** per occurrence and **\$10,000,000** aggregate. Coverage must be in a form providing coverage not less than the standard Insurance Services Office Form CG 00 01 and include products and completed operations, property damage, bodily injury, and personal & advertising injury. The products-completed operations coverage shall be provided for a minimum of six (6) years following final acceptance of the work.
- 47.1.2. **Commercial Automobile Liability:** The CMAR shall ensure that it and all Subcontractors shall provide commercial automobile liability insurance of not less than **\$2,000,000** per occurrence for any vehicle.
- 47.1.3. **Worker's Compensation and Employer's Liability:** The CMAR shall ensure that it and all Subcontractors provide and maintain, during the life of the Contract, worker's compensation insurance, as required by law, as well as employer's liability coverage, with minimum limits of \$1,000,000 per accident for bodily injury of disease.
- 47.1.4. **Professional Liability:** The CMAR shall ensure that it and all professional service providers under this contract provide professional liability insurance with a limited of not less than **\$5,000,000** per occurrence or claim, and **\$5,000,000** aggregate. There shall be an extended reporting period of not less than six (6) years.
- 47.1.5. **Builders Risk:** Builder's Risk: The CMAR shall ensure that it and all Subcontractors purchase and maintain property insurance during the life of this Contract, upon the entire Work at the site in amount equal to the completed value of the project with no coinsurance penalty provisions utilizing an "All Risk" (Special Perils) coverage form. This insurance shall include the interests of the Owner, the CMAR, the Subcontractors and sub-subcontractors in the Work and shall insure against the perils of fire, extended coverage, and vandalism and malicious mischief. If the Owner is damaged by failure of the CMAR to purchase or maintain such insurance, then the CMAR shall bear all reasonable costs properly attributable thereto; the CMAR shall effect and maintain similar property insurance on portions of the Work stored off the site when request for payment per articles so includes such portions.
- 47.1.6. **Pollution Legal Liability:** The CMAR shall ensure that it and all Subcontractors shall provide Pollution legal liability insurance in an amount not less than **\$5,000,000** per occurrence or claim and **\$5,000,000** aggregate.
- 47.1.7. **"All Risk" Property (CMAR's Property):** The CMAR shall ensure that it shall provide replacement cost coverage under an "All Risk" policy for any of the CMAR's real or personal property. Policy must include coverage for equipment owned, leased, rented, and borrowed, whether such equipment is located at a job site or "in transit."

47.1.8. **Public Liability and Property Damage:** The CMAR shall ensure that it and all Subcontractors provide and maintain, during the life of the Contract, comprehensive general liability insurance, including coverage for premises operations, independent Subcontractors, completed operations, products and contractual exposures. Such insurance shall protect the CMAR and the Subcontractors from claims arising out of any bodily injury, including accidental death, and claims for property damages which may arise from operations under this Contract, whether such operations are by the CMAR or by any Subcontractor, or by anyone directly or indirectly employed by either of them. The minimum limits of such insurance shall be \$2,000,000 for each occurrence and \$4,000,000 aggregate, or such lower limits as may be agreed to by the Owner on a case-by-case basis. Such coverage for completed operations must be maintained for at least two (2) years following final acceptance of the Work performed under the Contract.

47.2. **Deductible:** Any deductible, if applicable to loss covered by insurance provided, is to be borne by the CMAR and/or its Subcontractors.

47.3. **Proof of Coverage:** The CMAR shall ensure that it and all Subcontractors furnish the Owner with satisfactory proof of coverage of the insurance required before written approval is granted by the Owner.

#### 48. INDEMNIFICATION

48.1. To the fullest extent permitted by law, the CMAR shall indemnify and hold harmless the Owner, the Project Designer, and the officers, agents, consultants and employees of the Owner and Project Designer, from and against all claims, damages, losses and expenses, including, but not limited to attorneys' fees, arising out of or resulting from the performance or failure of performance of the Work, provided that any such claim, damage, loss, or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the CMAR, the CMAR's Subcontractors, or the agents of either the CMAR or the CMAR's Subcontractors; provided that nothing herein shall require the CMAR or its Subcontractors to indemnify the Owner or the Project Designer against negligent acts of the Owner or Project Designer. Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Contract. Such obligation shall not be affected or limited by the immunity granted under any worker's compensation plan.

48.2. The CMAR shall cause each contractor and Subcontractor to indemnify and hold harmless the Owner, CMAR, and Designer from and against any and all claims, demands, suits, damages, including consequential damages and damages resulting from personal injury or property damage, costs, expenses, and fees that are asserted against the Owner, CMAR and the Designer and that arise out of or result from negligent acts or omissions or the breach of the Contract by the CMAR, its employees, agents, contractors, Subcontractors, and representatives in performing the Work.

48.3. The Owner shall cause the Designer to indemnify and hold harmless the Owner, its officers, employees, agents, and representatives to the same extent and in the same manner that the CMAR has provided indemnification for the Owner.

48.4. The CMAR acknowledges liens may not be filed against governmental property and that such liens are not authorized by law. In the event any agent, materials or services provider, contractor, or Subcontractor of CMAR files or attempts to file any notice of lien, claim of lien, or lien against Owner's property CMAR shall take immediate affirmative steps to remove and/or terminate any such claim of lien, lien, or lien action. Immediate affirmative steps means the CMAR, at CMAR's sole expense, shall without delay take whatever action is necessary, including without limitation litigation, to remove and/or terminate such claim of lien, lien, or lien action from Owner's property. If Owner determines CMAR is not proceeding as required by this section to remove and/or terminate any claim of lien, lien, or lien action Owner may take any action necessary to remove

and/or terminate such claim of lien, lien, or lien action and all costs or expense related to such action by Owner shall be borne by CMAR.

#### **49. PERFORMANCE BOND AND PAYMENT BOND**

- 49.1. Within fifteen (15) days of the establishment of each GMP, the CMAR shall provide a performance bond and payment bond, each in the amount of the GMP plus the Owner's allowance. The amount of the performance and payment bonds may be adjusted if the guaranteed maximum price is reduced after the bids are received. Each time a new GMP is established and approved by the Owner, the CMAR shall increase the amount of the performance and payment bonds to the amount of the cumulative GMP, including Owner's allowances, so that at all times a single performance bond and a single payment bond shall be in effect for the entire Project under contract at that time.
- 49.2. The performance bond and payment bond shall be executed by a surety company authorized to do business in North Carolina. Bonds shall be executed in the form bound with the RFQ unless the Owner accepts another form of bond.
- 49.3. All bonds shall be countersigned by an authorized agent and attorney-in-fact for the bonding company who is licensed to do business in North Carolina. The title "Licensed Resident Agent" shall appear after the signature. There shall be attached to each copy of the bond a certified copy of power of attorney properly executed and dated. The seal of the bonding company shall be impressed on each signature page of the bonds.

#### **50. ASSIGNMENTS**

- 50.1. The CMAR shall not delegate or subcontract its duties under this Contract or any portion of this Contract except as expressly set forth herein for general conditions and construction subcontracts. The CMAR may not make a general assignment of its rights under this Contract to any third party without the express consent of the Owner. Except as may be required under terms of the performance bond or payment bond, no funds or sums of money due or to become due to the CMAR under the Contract may be assigned or pledged as collateral for a loan or other debt without the consent of the Owner. In the event the CMAR has prior to execution of this Contract pledged payments hereunder as collateral for any loan or debt, the CMAR shall advise the Owner, in confidence if required by the CMAR, of the circumstances of the loan or debt, and arrange for the subordination of the security interest of the creditor or lender to the Owner's rights under this Contract.

#### **51. DISPUTE RESOLUTION**

- 51.1. In the event that a dispute of any nature cannot be resolved by the Project Team pursuant to the terms and conditions herein, the parties shall endeavor to resolve the dispute pursuant to the Dispute Resolution Rules and Procedures as shown in Appendix B attached hereto. Mediation in accordance with those rules and procedures shall be a condition precedent that must occur before any party may bring a civil action against the Owner, Project Designer or CMAR.
- 51.2. Should a dispute arise that cannot be finally settled through the claims and dispute resolution procedures in this Contract, the CMAR agrees that any civil action related to the Project in which the Owner is or may be a party shall be brought only in the General Court of Justice of North Carolina, Superior Court Division, seated in Orange County, North Carolina. Any such action shall be tried by a judge without a jury.

#### **52. CONTRACTOR EVALUATION**

- 52.1. The CMAR's overall Work performance on the Project shall be fairly evaluated for determining qualifications to bid on future Orange County capital improvement projects. In addition to final

evaluation, interim evaluation may be prepared during the progress of the Project. The Owner may request the CMAR's comments to evaluate the Project Designer.

### **53. NOTICES**

- 53.1 Whenever any provision of the Contract Documents requires the giving of notice or written notice such notice shall be delivered in writing. It shall be deemed to have been validly given if delivered in person to, and signed for by, the individual or to a member of the firm or to an officer of the corporation for whom it is intended or if delivered or sent by registered or certified mail, postage prepaid, addressed as follows:

**If to Owner:**

**If to CMAR:**

**[SIGNATURE PAGE TO FOLLOW]**

**IN WITNESS WHEREOF**, the Parties hereto have executed this contract on the day and date first above written in four (4) counterparts, each of which shall without proof or accounting for other counterparts, be deemed an original contract.

**CONSTRUCTION MANAGER AT RISK**

**By:** \_\_\_\_\_

**Title:** \_\_\_\_\_  
(Corp. Pres. or Vice Pres. only)

**Attest:** \_\_\_\_\_

**Title:** \_\_\_\_\_  
(Corp. Sec. or Asst. Sec. only)

**(CORPORATE SEAL)**

**ORANGE COUNTY**

**By:** \_\_\_\_\_

**Title:** \_\_\_\_\_

**This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act.**

\_\_\_\_\_  
**Orange County Chief Financial Officer**

**Approved as to form:** \_\_\_\_\_  
**County Attorney**

PRELIMINARY DRAFT

## **APPENDIX B**

### **DISPUTE RESOLUTION RULES AND PROCEDURES FOR ORANGE COUNTY BUILDING CONSTRUCTION RENOVATION AND REPAIR PROJECTS**

#### **RULE 1. INITIATING MEDIATED SETTLEMENT CONFERENCES**

**A. Purpose of Mandatory Settlement Conferences.** Pursuant to G.S. §143-128(f1) and 143-135.26(11), these Rules are promulgated to implement a mediated settlement program designed to focus the parties' attention on settlement rather than on claim preparation and to provide an opportunity for orderly settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time prior to or during commencement of the dispute resolution process.

#### **B. Initiating the Dispute Resolution Process**

1. Any party to a County public construction contract (referred to herein generally as the "Contract") governed by Article 8. Ch. 143 of the General Statutes and identified in G.S. § 143-128(f1) and who is a party to a dispute arising out of the Contract and the construction process in which the amount in controversy is at least \$15,000 may submit a written request to the County for mediation of the dispute.
2. Prior to submission of a written request for mediation to the County, the parties should give notice of any and all claims in accordance with their respective contracts, obtain decisions on the claims as required or allowed by their respective contracts, and attempt to resolve the dispute according to the terms and conditions in their respective contracts. The Mediator may adjourn any mediated settlement conference if the Mediator believes, in his or her sole discretion, that the parties have not satisfied all of the terms and conditions of their respective contracts and that doing so will enhance the prospects for a negotiated settlement.

**C. Condition Precedent to Litigation.** Before any party to a Contract may commence a civil action against the County seeking remedies for breach or non- performance of the Contract by the County, said party must first initiate the dispute resolution process under these rules and attend the mediated settlement conference.

#### **RULE 2. SELECTION OF MEDIATOR**

**A. Mediator Listing.** A list of Mediators acceptable to the County is maintained by the County Attorney and that list is incorporated by reference into these Rules. The party requesting mediation shall select a Mediator from the designated list. If the County fails to provide a list of acceptable mediators, the list of Mediators shall be deemed to be the list of mediators certified by the North Carolina Dispute Resolution Commission to conduct mediated settlement conferences in the North Carolina Superior Courts.

**B. Selection of Mediator.** The party requesting mediation shall select a Mediator and shall file, with the County, a Notice of Selection of Mediator within 21 days of the request for mediation. Such notice shall state the name, address, and phone number of the Mediator selected. If the Mediator selected is not available or declines to participate for any reason, the requesting party shall select another person from the County's list of Mediators. If the party requesting mediation does not select and designate a mediator within 21 days of the request for mediation, the County shall have the right in its absolute discretion to appoint a mediator from its list of Mediators.

**C. Disqualification of Mediator.** Any party may request replacement of the Mediator for good cause. Nothing in this provision shall preclude Mediators from disqualifying themselves.

### **RULE 3. THE MEDIATED SETTLEMENT CONFERENCE**

**A. Where Conference is to be Held.** Unless all parties and the Mediator otherwise agree, the mediated settlement conference shall be held in county seat of Orange County. The Mediator shall be responsible for reserving a place, making arrangements for the conference, and giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons or entities required to attend.

**B. When Conference is to be Held.** The mediation shall be completed within 90 days after selection of the Mediator unless all parties to the mediation agree to a different schedule.

**C. Request to Accelerate or Extend Deadline for Completion.** Any party or the Mediator may request the County to accelerate or extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the Mediator. Objections to the request must be promptly communicated to the County and to the Mediator.

The County, with the concurrence of the designated Mediator, may grant the request by adjusting the time for completion of the conference.

**D. Recesses.** The Mediator may recess the mediation conference at any time and may set times for reconvening. If the Mediator determines the time and place where the conference is to reconvene before the conference is recessed, no further notice is required to persons present at the conference.

**E. Project Delay.** The mediated settlement conference that results from a construction contract dispute shall not be cause for the delay of the construction project.

### **RULE 4. DUTIES OF PARTIES AND OTHER PARTICIPANTS IN FORMAL DISPUTE RESOLUTION PROCESS**

#### **A. Attendance.**

1. All parties to the dispute must designate an official representative to attend the mediation.
2. "Attendance" means physical attendance, not by telephone or other electronic means. Any attendee representing a party must have authority from that party to bind it to any agreement reached as a result of the mediation.
3. Attorneys representing parties may attend the mediation, but are not required to do so.

4. Sureties and insurance company representatives are required to physically attend the mediation unless the Mediator and all of the other parties to the mediation excuse their attendance or consent to their attendance by telephone or other electronic means.

5. The parties who attend a duly scheduled mediation conference shall have the right to recover their share of the Mediator's compensation from any party or parties who fail to attend the conference without good cause.

**B. Finalizing Agreement.** If an agreement is reached in the conference, the terms of the agreement shall be confirmed in writing and signed by all parties.

**C. Payment of Mediation Fee:** Mediation Fees charged by the Mediator shall be paid in accordance with G.S. § 143-128(f1).

**D. Failure to Compensate Mediator.** Any party's failure to compensate the Mediators in accordance with G.S. § 143-128(f1) shall subject that party to a withholding of said amount of money from the party's payment by the County.

Should the County fail to compensate the Mediator, it shall hereby be subject to a civil cause of action from the Mediator for the County's portion of the Mediator's total fee as required by G.S. § 143-128(f1).

## **RULE 5. AUTHORITY AND DUTIES OF MEDIATORS**

### **A. Authority of Mediator.**

1. Control of Conference. The Mediator shall at all times be in control of the conference and the procedures to be followed.
2. Private Consultation. The Mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.
3. Scheduling the Conference. The Mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and Mediator. In the absence of agreement, the Mediator shall select the date for the conference.
4. Determining good cause for a party's failure to appear at a scheduled mediation conference.

### **B. Duties of Mediator.**

1. The Mediator shall define and describe the following at the beginning of the conference:
  - a. The process of mediation.
  - b. The difference between mediation and other forms of conflict resolution.
  - c. The costs of the mediated settlement conference.
  - d. That the mediated settlement conference is not a trial, the Mediator is not a judge, and the parties retain their legal rights if they do not reach settlement; however, the

Mediator will advise all parties that failure to appear at mediation without good cause may result in imposition of sanctions and may be asserted as a bar to lawsuits by claimants who have failed to exhaust this administrative remedy.

e. The circumstances under which the Mediator may meet and communicate privately with any of the parties or with any other person.

f. Whether and under what conditions communications with the Mediator will be held in confidence during the conference.

g. The inadmissibility of conduct and statements as provided by G.S. §7A-38.1(1).

h. The duties and responsibilities of the Mediator and the participants.

i. That any agreement reached will be reached by mutual consent.

2. Disclosure: The Mediator has a duty to be impartial and to advise all participants of any possible bias, prejudice or partiality.

3. Declaring Impasse: The Mediator may determine at any time during the mediation conference that an impasse exists and that the conference should end.

4. Reporting Results of Conference. The Mediator shall submit a written report to the County and the other parties within 10 days of the conference stating whether or not the parties reached an agreement. The Mediator's report shall indicate the absence of any party from the mediated settlement conference without permission or good cause.

5. Scheduling and Holding the Conference. It is the duty of the Mediator to schedule the conference and conduct it prior to the deadline of completion set by the rules. The Mediator shall strictly observe deadlines for completion of the conference unless said time limit is changed by agreement of the parties.

#### **RULE 6. COMPENSATION OF THE MEDIATOR**

The parties shall compensate the Mediator for mediation services at the rate proposed by the Mediator and agreed to by the parties at the time the Mediator is selected.

#### **RULE 7. RULE MAKING**

These Rules may be amended by the County at any time. Amendments will not affect mediations where claims and/or requests for mediation have been filed at the time the amendment takes effect.

#### **RULE 8. DEFINITIONS**

**A.** "County" shall mean Orange County North Carolina.

**B.** "Project Designer" is that person or firm stipulated as project designer in the Contract Documents for the project.

C. "Claim" is a demand or assertion by a party seeking adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the parties to a Contract involved in the County's building construction renovation and repair projects arising out of or relating to the Contract or the construction process. Claims must be initiated by a written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

D. "Good Cause" generally includes any circumstance beyond the control of a party, which prevents that party from meeting obligations. When good cause is asserted as an excuse for a party's failure to appear at a mediation conference or to otherwise comply with the requirements of these Rules, the Mediator, in his or her sole discretion, will determine whether good cause exists to excuse the party's failure to appear or otherwise comply with these rules.

#### **RULE 9. TIME LIMITS**

A. Any time limit provided for by these Rules may be waived or extended at the sole discretion of the County, if no Mediator has been selected, and at the discretion of the County with concurrence of the Mediator if a Mediator has been selected.