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**WHO'S STEERING THE SHIP?: Construction Administration by Design**  
**Professionals and Agency Construction Managers**  
*("The Roles of the Design Professional and Construction Manager in Construction Administration")*

**Stanley J. Dobrowski**  
**Calfee, Halter & Griswold, LLP**  
**Columbus, OH**

**Karl F. Oles**  
**Stoel Rives, LLP**  
**Seattle, WA**

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## INTRODUCTION

One key decision in managing the risk of a construction project is choosing someone to represent the owner's interests during construction. This paper focuses on the options of using a design professional (usually an architect) or using an "agency" construction manager to provide construction administration services.<sup>1</sup> Part One defines terms and explains the services normally provided by architects and "agency" construction managers during the construction phase. Part Two discusses legal issues that can arise from the use of architects and "agency" construction managers. Part Three applies the lessons of Parts One and Two, showing how architects and "agency" construction managers can contribute to—and help resolve—problems when a "perfect storm" strikes a project.

Two attachments follow Part Three. Attachment One is a form of "agency" construction manager agreement that covers a broad spectrum of contracting issues. Attachment Two is a checklist of issues to consider when deciding how to use architects and "agency" construction managers during the construction phase.

Owners have options other than using architects or "agency" construction managers for construction administration. The owner can choose to administer the construction contract entirely with its own forces, retain a general contractor or an "at risk" construction manager, or choose a project delivery system other than design-bid-build. These and other options are outside the scope of this paper. For further information about architects and construction managers, the reader is invited to consult *Design Professional and Construction Manager Law*, a 2007 publication of the ABA Forum on the Construction Industry.

Note that, for simplicity, this paper sometimes refers to owners, architects, contractors, and construction managers as individuals.

**PART ONE**  
**CONSTRUCTION PHASE RESPONSIBILITIES**

**A. USING ARCHITECTS AND CONSTRUCTION MANAGERS DURING THE CONSTRUCTION PHASE**

In its simplest form, the traditional “design-bid-build” project delivery system involves three participants: the project owner, the architect, and the general contractor. Sometimes the owner acts as the general contractor, entering into direct contractual relations with the trade contractors. The owner, architect, and contractor all have important roles to play, and all must coordinate their activities to achieve success. Because the owner has direct contractual relations with the architect and contractor (who have no such relations between themselves), the owner typically plays a pivotal role in coordinating the construction phase activities. But coordination on a major project is a complex process, requiring considerable time and expertise, so most owners choose to retain skilled assistance.

1. *Design Professional.* One common option is for the owner to retain the design professional (usually an architect) who led the project design team to perform certain services during the construction phase. The designer brings the benefit of professional training and experience along with specific familiarity with the owner’s requirements and the project design.

Although the scope of a design professional’s services during construction may vary from project to project, a fairly well understood “normal” range of activities is reflected in standard form agreements, such as those published by the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (the EJCDC is a joint venture of the Associated General Contractors of America and various professional engineering groups).<sup>ii</sup> A broad consensus exists about the standards applicable to “normal” services performed by architects and other design professionals. This consensus is based on a long history of academic degree programs, state licensure requirements, and professional organizations like the AIA (founded in 1857) and the

American Society of Civil Engineers (founded in 1852). Also, a considerable body of published case law and legal writing describes and discusses standards of practice for design professionals.

Owners, however, often view the “normal” services as insufficient to fully serve the owners’ interests during the construction phase. Some design professionals respond by offering to provide “extended” services of a “project representative,” sometimes referred to as a “clerk-of-the-works,” to provide additional on-site services.<sup>iii</sup> Other design professionals will provide additional services or even serve as a construction manager by means of an amendment to the original owner-designer agreement.<sup>iv</sup> A significant number of design professionals, however, object that they are not trained or experienced in such services or that those services are not covered by professional liability (errors and omissions) insurance.

2. *Construction Manager.* Another option is for the owner to retain a construction manager to perform some or all of the administration services during the construction phase. This option is particularly appropriate in cases in which there is no general contractor and the owner must directly coordinate the work of the trade contractors. A construction manager is a person with experience in construction projects (often as a contractor) who may provide value engineering or constructability analysis during the programming and design phase, and assist the owner with contractor selection, as well as perform administration services during the construction phase. The duties of a construction manager vary from project to project, but generally include clerk-of-the-works duties (facilitating record keeping and paper flow), construction inspection, coordination and surveillance, review of the contractor’s cost and schedule submissions, risk assessment relating to actual and potential problems, and advice to the owner in case of contractor claims. A construction manager distinguishes itself from a clerk-of-the-works by direct responsibility for and involvement in managing the contractor and the project.<sup>v</sup>

Construction management is a relatively new specialty without a long tradition of academic degree programs. Few states currently require specific licensure for construction managers. Professional construction management organizations are of relatively recent origin. (The Construction Management Association of America, which has created a Code of Professional Ethics of the Construction Manager, was founded in 1982.) Little case law exists relating to the standards of practice applicable to construction managers. As a result, successful definition of the construction manager's scope of work, the standards to be met, and the interaction between the construction manager and the design team and contractor relies heavily on properly drafted contracts.<sup>vi</sup>

Construction managers are divided into two types: (1) "agency" construction managers and (2) "at risk" construction managers. The distinguishing feature is whether the construction manager bears the risk of nonperformance by the contractor(s). If the owner holds the construction contract and the construction manager is retained solely to provide advice and other services, the construction manager is of the "agency" type. If the construction manager holds the construction contract and is responsible for the contractor's proper performance, the construction manager is described as being "at risk." This paper focuses on "agency" construction managers.

3. *Deciding Whether to Retain a Construction Manager.* Even on simple projects, the owner normally retains the architect for some construction phase services, including response to design issues. On more complex projects, particularly if multiple prime contractors are involved, the owner may choose to expand the role of the architect or retain an "agency" construction manager to supplement the architect's services. Because the scope of services provided by architects and construction managers varies from project to project, and because those services can overlap, the owner's choice should be made in light of the specific circumstances of each project and the specific expertise of the available personnel. For clarity, this paper will employ a

distinction between the “normal” scope of architect services and the “normal” scope of “agency” construction management services.

In general, “normal” architect services during the construction phase are focused on the design. The architect reviews and responds to the contractor’s submittals, which document the conformity of materials and equipment to the design, and to requests for information, which seek to clarify or correct the design. The architect also has a role in writing change orders to describe changes in the scope of the work and in negotiating or determining equitable adjustments to the contractor’s schedule and compensation as a consequence of such changes. The architect visits the project site from time to time, but for limited purposes, such as to assess work progress in connection with the contractor’s monthly invoices and to certify substantial and final completion. The architect is not expected to review the construction in detail, but rather to determine whether or not the work conforms generally to the design. The 1997 AIA contract forms also gave the architect authority to decide certain disputes between contractor and owner, but owners frequently deleted this provision, and the 2007 edition permits the owner and contractor to select someone other than the architect as an “Initial Decision Maker.”

By contrast, a construction manager’s “normal” services include a daily jobsite presence, sometimes with a full-time staff, for the purpose of monitoring the work status and schedule; inspecting the work for defects; ensuring that the contractor, designer, and owner properly coordinate their activities; detecting and responding to risks affecting the work; and helping the owner respond to contractor claims. Construction managers are generally not given authority to interpret the design documents; their role normally is to expedite responses from the design professionals if such questions arise. A construction manager may supplement or even supplant the architect’s role in drafting and negotiating change orders and responding to pay requests.

Perceived advantages of retaining a construction manager include: (1) the construction manager has construction expertise that most architects and owners do not possess in terms of scheduling, means and methods of construction, contractor relations, and current market conditions for skilled labor and scarce materials; (2) retaining a construction manager frees the architect to concentrate on design-related issues; and (3) the construction manager can give the owner an objective opinion when a contractor makes a claim of design defect or delay due to a lack of timeliness by the designer. One obvious disadvantage of retaining a construction manager is that it adds a substantial cost to the project, though this disadvantage may be mitigated by eliminating the general contractor and its markup and by reducing the architect's construction phase fees. Additionally, the disadvantage should be mitigated because the project should be built more efficiently.

To be fair, it should also be recognized that a construction manager's opinion may not be completely objective when a contractor claims an adverse impact from the construction manager's untimeliness or lack of performance. Additionally, if the construction manager does not perform the basic clerical functions of collecting and transmitting paper work, it may actually impede progress on the project instead of facilitating it.

The question in most cases is whether retaining a construction manager will provide benefits that outweigh the added fees. Although this question must be resolved on a project-by-project basis, it may be stated as a general rule that construction managers are more cost effective on large, complex projects and in cases in which the owner lacks construction expertise. Attachment Two at the end of this paper is a checklist of issues to be considered when deciding whether to retain the services of a construction manager for construction administration.

The role of an "agency" construction manager during construction administration must be carefully understood by both the owner and the construction manager if it is to be successful. In

particular, a clear dividing line must be drawn between the construction manager's duties as the owner's eyes and ears (collecting and reporting information to inform owner decisions) and its authority as the owner's representative (deciding day-to-day issues to resolve or head off claims). Clarity about this issue will mitigate unwarranted claims based on misperceptions about the construction manager's ability to bind the owner.

The owner must not abdicate its role in the construction process. The construction manager should not expect to be able to take unilateral action on significant issues, but should act as an adviser, making recommendations to the owner. Above all, the construction manager must maintain a relationship of respect and confidence with all project participants. As a result, an important aspect of the role is to assure a sufficient level of meaningful communication between the owner, the architect, and the contractor so that timely decisions can be made. Similarly, the "agency" construction manager's relations with the contractor are based on an ability to negotiate with the contractor and to obtain cooperation from the contractor. An "agency" construction manager will have limited success in attempting to coerce the contractor, as the contractor's reaction will often be either to ignore threats and "end-run" the construction manager by directly communicating with the owner, or to escalate the issues into formal claims with which the owner will become involved.

4. *One Firm as Both Design Professional and Construction Manager.* Theoretically, an owner could engage a single design professional or construction management firm to fill the roles of both design professional and construction manager during construction administration. As a practical matter, attempts to accomplish this usually manifest themselves as construction management provided by the design professional or by a consultant of the design professional.<sup>vii</sup>

The chief advantage claimed for such an arrangement over using separate firms is that it provides the owner with a single point of responsibility. Legally, this is correct, as the design

professional is ultimately responsible for both roles. In practice, the arrangement may not be seamless, particularly when the design professional engages a consultant to fill the role of construction manager. Additionally, this arrangement does not provide a single point of responsibility for the actual construction, because that work is performed by one or more contractors. Most important, a single point of responsibility can work to the detriment of the owner. When a separate design professional and construction manager are engaged, the owner benefits from each serving as a check and balance on the other and from their diversity of backgrounds and experience. Thus the owner will more likely obtain objective advice and recommendations. When the construction manager is contractually obligated to the design professional, disagreement or constructive criticism is less likely.

## **B. SPECIFIC CONSTRUCTION PHASE ISSUES**

The following sections summarize some common construction phase issues and contrast the roles that architects and construction managers normally play with respect to them.

1. *Schedule.* Nearly every major construction project involves the performance of numerous tasks by various contractors, subcontractors, and suppliers, along with tasks performed by the owner itself. Some tasks must be completed before others can begin, and some tasks require long lead times for ordering and delivering materials and equipment. The most important tool for analyzing and tracking project tasks is the project schedule. From the owner's perspective, the project schedule must be created, updated, and enforced.

The architect's role in creating and updating the schedule is normally limited to reviewing the original schedule and any updated schedules prepared and submitted by the contractor, and providing comments to the owner. On a relatively simple project, or when the owner has expertise to analyze schedule information, the architect's limited review and advice may be sufficient. In

other cases, particularly when there is no general contractor, a construction manager can be a valuable addition to the owner's team.

A construction manager normally takes an active role in the creation and review of the project schedule. If the construction manager is involved in the design phase, which is common, it usually creates at least an outline schedule before the contractor is chosen. If there is no general contractor, the construction manager takes the lead in outlining and developing the project schedule for the use of the trade contractors. This is an appropriate use of the construction manager's expertise, though finalization of the schedule should include significant input from the contractor. After all, it is the contractor who will actually perform the work.

For example, some construction managers will attempt to dictate the project schedule to the contractor. The difficulty with such an approach is that it often fails to achieve buy-in from the contractor. As a result, when delays arise, so do complaints that the schedule was unrealistic from the outset. In contrast, although more difficult to create, a project schedule arrived at with significant input from the contractor is likely to be more realistic. When delays occur, resolving them by adjusting the schedule may be less adversarial if everyone involved feels some responsibility for having created the schedule in the first place.

Typically, the contract documents will require that the construction manager and the contractor create a project schedule in a relatively short period, sometimes as little as 30 days. In some circumstances, the process will commence with each contractor submitting its schedule for incorporation by the construction manager into an overall project schedule. The contractor will then have an opportunity to seek revisions to the overall schedule. In other cases, the construction manager will produce a preliminary project schedule and provide it to the contractor, who will respond with revisions. In yet other cases, particularly in the public sector, the owner will include an initial schedule for the first 30 to 90 days of the project in the bidding or contract documents.

The construction manager and the contractor will then follow that initial schedule until they produce a project schedule. However the process is initiated, hammering out a final project schedule often requires a meeting that the construction manager should call and chair. To be effective in this role, the construction manager must be thoroughly familiar with the owner's requirements, particularly milestone and completion dates. The owner can assist this process by providing as much flexibility as possible. Artificial or unrealistic dates rarely serve the owner well in the long run.

Even if there is a general contractor, the construction manager normally takes an active role in monitoring and updating the schedule. Updating is normal. The original schedule is usually to some extent an outline, with details to be filled in as the job progresses. For example, the original schedule may include an activity for "drywall level 5." Later, the contractor may refine the schedule by adding more detailed activities (*e.g.*, "stock drywall," "install drywall," and "tape" in various subsectors of level 5). The number of activities on the schedule naturally increases over time. In addition, the schedule must adapt to unexpected circumstances and changes to the scope of work. For example, inclement weather may prevent drywall installation in one sector, or the owner may change wall types.

Of course, if there is no general contractor, the construction manager will take the lead in updating the schedule, in consultation with the trade contractors. The construction manager must assure that trade contractors timely deliver schedule updates as required by the contract documents. It will be difficult, if not impossible, for the construction manager to sensibly revise the overall project schedule without timely information from the trade contractors.

Finally, the contractor may be required to certify that each schedule update submitted is reasonable and will be used as the basis of the contractor's work. Obtaining such a certification, often by means of the contractor's signature on the update, is the responsibility of the construction manager and can narrow disputes about delays. The contractor must be required to raise any issues

about the impact of an update on a timely basis so that the owner can consider measures to mitigate the impact. One means to accomplish this is to provide that the contractor's signature on an update waives any claims for time extension or additional compensation related to the update. If a contractor is unwilling to sign an update because of a legitimate concern, the construction manager should then assist the owner to address it.

The construction manager should work with the contractor to ensure that the project schedule remains a realistic and useful document. Just as with the original project schedule, adjusting the schedule may be less adversarial if everyone involved feels some responsibility for having updated it. Often the contract documents require that the contractor provide a schedule update for work accomplished in the past week and a "look ahead" estimate of work to be accomplished in the next two weeks at weekly progress meetings. By analyzing this information, comparing it to the existing project schedule, and incorporating it into revisions, the construction manager can keep the owner informed about whether the project is proceeding as anticipated, whether "float" (the amount of time an activity may take without adversely affecting the critical path) is being consumed without work being accomplished, and whether the owner itself is performing in a timely manner.

If a critical delay is anticipated or actually occurs, the construction manager should coordinate with the contractor by suggesting or creating a recovery schedule. Contract language requiring that float be treated as an asset of the project that may be used by agreement of the owner and contractor can facilitate the development of a recovery schedule that protects the interests of all parties. Such a requirement may force a contractor who is responsible for a delay early in the project to implement realistic means to get back on schedule instead of simply ignoring the problem and relying on float. The construction manager must understand the availability of float and of other means to correct for a delay, such as overtime, and advise the owner of the appropriateness of

each option. In addition, contract provisions that require a contractor who refuses or fails to agree to a recovery schedule to create one that protects the interests of the owner and any other contractors, can assist the construction manager in motivating a recalcitrant contractor.

The construction manager should be required to keep a daily log showing work accomplished, deliveries made, equipment on-site, and the presence of appropriate types of labor and numbers of the work force. The owner may need this information later on to analyze and resolve delay claims.

To support the construction manager's efforts to create, update, and enforce the schedule, the contract documents should provide that no payment will be made to any contractor without an initial or updated project schedule, as applicable. On multiple-contractor projects, such a provision may create peer pressure that the construction manager can use to motivate an intransigent contractor. In addition, the contract documents may provide the owner with discretion to back charge, suspend, or terminate a contractor who fails to comply with the requirement to produce or update the project schedule. The construction manager can provide valuable insight into causes and effects of these alternatives and should submit a recommendation about which is appropriate.

2. *Safety.* Jobsite safety is critical, not only to prevent injury and death to workers and passersby, but also to avoid costly delays from governmental safety shutdowns to address perceived risks. Industrial safety requirements are subject to federal, state, and local regulation and may be affected by terms in building permits.

The architect normally resists any role in the formulation and monitoring of safety procedures. The AIA forms include disclaimers about the architect's involvement in safety in connection with a general disclaimer about the contractor's "means and methods." The architect has no special expertise with respect to workplace safety and naturally wishes to avoid the

potentially significant liability that can arise if a worker is injured or killed because of improper safety precautions or procedures, but the disclaimers are not always effective.<sup>viii</sup>

Although construction manager contracts usually disclaim control over safety (and generally over the contractor's means and methods), in practice it is common for construction managers to get involved with safety issues. Because construction managers have a full-time presence at the project site, they attend contractor safety meetings and are expected to notify the owner of potential project risks, including safety risks. Construction managers also may help owners develop project safety guidelines to which contractors are required to conform.

As a consequence, and despite exculpatory language denying liability for safety, construction managers frequently help coordinate the safety programs of the contractor and subcontractors to reduce inconsistencies, duplications, and omissions among the programs, or to require all persons working at the project site to adhere to an owner safety program. If an emergency arises threatening life or health, the construction manager's role normally will be to coordinate the owner's response with the responses of other project participants.

In some instances, the construction manager may provide security for the project site, either directly or by engaging a security firm. Such an arrangement may include additional safety responsibilities, such as facilitating calls to police, fire, or emergency response departments.

3. *Changes and Claims.* Nearly every construction project involves unexpected conditions, owner changes, and force majeure or other circumstances that give rise to claims by the contractor for adjustments to the schedule or the contract price. When such circumstances arise, the owner needs information right away to understand the situation and to mitigate any problems. To assure that timely information is received, the owner needs someone to see that contractually required procedures for providing information are followed, and that sensible responses are made. In the longer term, the owner probably will also need assistance to analyze and respond to the

contractor's claim for adjustment of the contract terms. When multiple contractors are involved, the construction manager can also provide assurance that claims resulting from the impact of one contractor's failure on the other contractors are properly addressed.

In general, the architect (or a subconsultant) is in the best position to advise the owner if issues arise relating to the design or the conformity of the work to the design. These issues fundamentally call for architectural judgment, and most states require that licensed professionals render them. Not surprisingly, the AIA form contracts make the architect an active participant in this area. For example, the architect participates in the request for information (RFI) process, which can include challenges to the adequacy of the design; drafts documents describing proposed changes in the scope of work; negotiates change orders; and reviews contractor submittals for conformity to the intent of the design. If a building component fails to perform as expected, or if unexpected subsurface or other physical conditions are discovered, the architect is most likely the best person to investigate and report on necessary changes to the design. Conversely, the architect is the project participant most likely to have a conflict of interest if a claim is made that the design was defective, because the design is primarily the architect's creation.

The construction manager is not immune from the possibility of a conflict of interest, either because the design may have been altered due to constructability analysis or value engineering provided by the construction manager, or because the claim is based on an allegation relating to the performance of one of the construction manager's responsibilities, such as coordination of the schedule. A construction manager may, nonetheless, provide valuable assistance in the change and claims processes.

Contract clauses relating to concealed physical conditions, change orders, and claims often have separate procedural requirements. In many cases, the construction manager can assure the

owner that the clauses are not being breached or ignored by the contractor and that the owner is not itself breaching the contract by an untimely or insufficient response.

Clauses relating to concealed physical conditions often require that the contractor who encounters them provide notice and then not disturb the conditions until they are inspected. Because construction managers are regularly on-site, time is saved by having the construction manager receive the notice and disseminate it to the architect and the owner. Depending on the nature of the condition and its effect on the design, the construction manager can either perform the inspection or notify the architect of the need for (and then schedule) the inspection to minimize any related delay. In any event, the construction manager should document the conditions and the contractor's efforts to preserve them. In fact, the construction manager is in a good position to investigate and document many circumstances that may lead to contractor claims, particularly in cases not directly affecting the design, such as adverse weather, strikes, owner-requested schedule changes, and trade contractor conflicts.

The construction manager also may be given authority to review and negotiate change orders, although the preparation of documents evidencing any changes to the design usually remain the responsibility of the architect. Using its familiarity with the project and the labor and materials markets, the construction manager should assure that contractor proposals for adjustments to the contract price and time comport with market realities and any limitations on recovery imposed by the contract documents. Similarly, if the contract documents permit the owner to require that work be done without a change order and to establish a price for the work, the construction manager should assist the owner to determine an appropriate price.

The construction manager usually is not retained to render decisions about contractor claim issues. Instead, the construction manager will provide recommendations to the owner about the validity of a claim and the owner's appropriate response. Most commonly, the owner reserves the

construction manager as its record keeper, adviser, and advocate in dispute resolution procedures that may include a structured settlement negotiation process, mediation, a disputes resolution board, arbitration, or litigation. If the contractor is required to submit notices or claim documents as a condition precedent to recovery, the construction manager is best situated to receive and analyze such submissions, calling in assistance from the design professionals as required. A construction manager will not alter the contractual allocation of the risks involved in changes any claims any more than a design professional does. The construction manager, however, should ameliorate the effect of changes and claims by efficiently and effectively processing them.

4. *Project Site Management and Payment.* On any construction project, it is to the owner's advantage to keep track of what is going on, both to facilitate planning and payment and to head off potential problems. As noted above, a major distinction between the normal services provided by an architect and by a construction manager is that the former performs periodic site visits and the latter provides daily on-site staffing.

The construction manager's on-site presence makes it much easier for the construction manager to call, conduct, and memorialize progress and other meetings and to maintain current paper and electronic files of correspondence, project documents, and transmission logs. The construction manager can focus discussions on the issues at hand and, depending on its experience, suggest means by which the contractor and subcontractors can stay out of each other's way or even improve their productivity. Many modern projects require more formal coordination to assure that increasingly complex mechanical systems can fit and be readily installed in limited spaces. In addition to the usual progress meetings, a construction manager can hold "coordination meetings" in which the purpose is to plan the installation of all those important systems. The construction manager's daily interaction with the contractor facilitates regular follow-up on open questions. The construction manager also can provide an informal claim resolution process to keep minor matters

from turning into substantial disputes. Someone must resolve the day-to-day issues, such as who will have first access to a portion of a project; who will control hoists, elevators, or other equipment to be used in common; where materials will be stored; and who will be responsible for cleanup. The construction manager also will assist or coordinate project close-out activities, such as punch-list inspections, commissioning, and the turnover of operation and maintenance manuals and “as built” drawings. In general, courts hold that when an owner has elected a delivery system that does not involve a general contractor, and instead uses multiple prime contractors, the owner has additional responsibility for the coordination of the contractors. Assisting the owner to fulfill this responsibility is central to the role of a construction manager.

The construction manager also can play a significant role in the payment process, assisting or even supplanting the architect’s efforts. The construction manager can review payment requests for completeness and assess whether the amount requested is proportionate to the state of completion of the project. This is an important task because overpaying a contractor not only can create difficulties in obtaining complete performance from that contractor, but also may cause a surety to deny a claim against a performance bond. Because the construction manager is typically on the project site full time, it can often produce a better estimate of project completion than the architect, especially if the construction manager has been tracking actual costs against the project budget. As noted above, one thing that the construction manager may not be able to do as well as the architect is to determine whether the work conforms to the contract documents.

To support the construction manager’s role in the payment request process, the construction contract may provide that the construction manager has authority to withhold amounts requested or assess liquidated damages, or at least to recommend to the owner that such actions be taken.

In some states, construction managers are prohibited from performing any construction work on public projects. In other states, owners may wish to limit work performed by a construction

manager to avoid the possibility that the construction manager will file a lien.<sup>ix</sup> In those situations, common facilities may be assigned to a single contractor or distributed among contractors on the basis of the services provided, *e.g.*, the electrical contractor may be required to provide temporary electrical service for the entire project, or the plumbing contractor may be required to provide temporary water for the entire project. When the construction manager is not so constrained, it may make sense for the construction manager to provide some or all common facilities and services, particularly if the various contractors' schedules are not coextensive. Most often, construction managers will provide meeting space; limited storage of contract documents, submittals, and correspondence; jobsite telephone, facsimile, and electronic mail service; and security. Depending on the owner's preference, the construction manager also may provide sanitary and eating facilities, select testing laboratories, and manage Web-based project documentation systems.

**PART TWO**  
**SOME LEGAL CONSEQUENCES OF USING A DESIGNER**  
**OR CONSTRUCTION MANAGER**

**A. DOES THE ARCHITECT OR CONSTRUCTION MANAGER EXPOSE THE OWNER TO LIABILITY?**

1. *Architect or Construction Manager as Agent.* To the extent the architect or construction manager are seen as the owner's agents, their acts and omissions can be attributed to the owner, exposing the owner to liability. In the construction arena today, it is almost unheard of for either architects or construction managers to be considered the "general agents" of the owner. General agency is a product of a different age, when the world was larger and communications were slow, limited, and expensive. All parties to the construction process are better served to recognize the design professional and the construction manager for what they are: independent contractors who serve as representatives of the owner only to the limited extent permitted by the applicable contracts.<sup>x</sup> The primary reaction of most owners, sophisticated or unsophisticated, to the notion that an architect or construction manager could subject the owner to open-ended liability is to be aghast. Moreover, when an architect or construction manager is the agent of a disclosed principal, the architect or construction manager cannot be liable for any contract it makes on behalf of the principal.<sup>xi</sup> As a result, the owner may find itself the sole defendant against claims that its agent agreed to cardinal change orders. Few, if any, architects or construction managers are willing to undertake the fiduciary responsibility, *i.e.*, to act in the interest of the owner even at the expense of their own interests, that full-blown agency involves. Contractors want clear lines of authority with concomitant levels of responsibility so that they can be assured that decisions are not subject to multiple reversals and that services provided will be paid for without interminable wrangling and unnecessary expense. Even the AIA documents have ceased to use the term "agent" to describe the role of the architect, and other construction participants and practitioners would be well-served to follow and expand the practice.<sup>xii</sup> Nonetheless, some courts still refer to the law of agency,

particularly the Restatement (Second) of Agency, to resolve disputes about the effect of designer and construction manager acts and omissions, often to the surprise of the litigants.<sup>xiii</sup> In contrast, some courts have held that construction managers are not agents for purposes of clauses which require contractors to provide insurance or indemnification to owners and their agents.<sup>xiv</sup>

During the design phase, the architect is not generally considered an agent of the owner, but rather an independent contractor, responsible for preparing design information using its special skill and experience. During the construction phase, the same relationship generally obtains to the extent the architect is applying its skill and experience to design issues that arise. Beyond design issues, the architect's services during the construction period are normally limited to observing and recommending, not to making decisions or acting for the owner. However, there can be exceptions if the owner gives the architect actual or apparent authority to act on its behalf.

Despite the lack of an agency relation under common law, the architect may be considered the owner's agent for purposes of one or more specialized statutes.<sup>xv</sup>

Construction managers, because of their normally greater "hands on" presence at the project site, are more likely than architects to be considered agents of the owner. However, the term "agency construction manager" does not mean that the construction manager always (or even usually) has inherent and broad authority to bind the owner. A construction manager, like the design professional, generally has only the authority expressly provided by its contract with the owner, particularly in the public sector.<sup>xvi</sup> A construction manager's duties usually fall into two categories: (1) serving as the eyes and ears of the owner and making recommendations to the owner about project developments, and (2) serving as the owner's representative to consider and resolve project issues. It is in the performance of the latter services that the construction manager is most likely to be found to be acting as an agent of the owner. Whether or not a construction manager is an owner's agent, substandard performance by a construction manager will likely cause contractors

to file claims with the owner.<sup>xvii</sup> Moreover, failure by a construction manager to timely discover defects may give rise to a claim by a contractor that it relied on inspection by the construction manager despite the contractor's separate obligation to build in conformity with the plans and specifications.

The construction manager also may be found to be an agent for purposes of special statutes.<sup>xviii</sup>

By contrast, a "construction manager at risk" is normally considered to be not an agent of the owner, but rather an independent contractor.<sup>xix</sup> Consequently, the question of whether an owner may be held liable to a contractor for the actions or omissions of an architect or engineer typically turns on whether the architect or construction manager was acting within the scope of the authority conferred by the contract with the owner. If, for example, the contract documents make clear that a change order is not valid unless executed by an officer or employee of the owner, in addition to any signature by the architect or construction manager, then a contractor puts itself at some risk in relying on oral or even written promises of payment from the architect or construction manager.

2. *Site Safety.* Lacking contractual privity with the contractor, the construction manager has only limited exposure to employees of the contractor and subcontractors for injuries occurring on the project, and the owner's risk of such liability based solely on the actions or omissions of the construction manager is similarly attenuated. Typically, courts find that, absent direct control of a worker's performance of the specific task that resulted in the injury, construction managers and owners owe no duty to workers and, therefore, have no liability in tort.<sup>xx</sup> In some states, workers' compensation laws provide immunity to construction managers and owners in addition to employers. In other states, contract provisions may require contractors to waive any workers' compensation immunity and participate in the defense of any worker's claim or even indemnify or insure construction managers and owners against such claims. Nonetheless, the

Occupational Safety and Health Administration has on occasion cited construction managers for violations based on a failure to adequately supervise the project.<sup>xxi</sup> Some courts also have concluded that construction managers similarly may be liable.<sup>xxii</sup>

3. *Tortious Interference.* If a contractor is not performing and settlement fails, one option is for the owner (acting through the construction manager) to take over the contractor's work and deal directly with the subcontractors. Even if the owner has reserved this right in the construction contract, the contractor may resist, alleging that conditions do not justify the remedy. One possible target for the contractor is the construction manager, who—the contractor may assert—is wrongfully interfering with its subcontractor relationships. This situation was discussed in *J. Kinson Cook of Georgia, Inc. v. Heery/Mitchell*,<sup>xxiii</sup> in which the court held that the “agency” construction manager was not liable for tortious interference because, having a contract with the owner, it was not a “stranger” to the owner-contractor contract. The court also held that the construction manager could not be liable to the contractor for negligent management of the project because of the economic loss rule.

4. *Licensing Laws.* As noted above, a construction manager can get in trouble with the professional licensing laws if it performs design work normally performed by an architect or work that falls within the definition of a general contractor. In such cases, the construction manager may need to employ or engage appropriately licensed persons to avoid fines or other penalties.<sup>xxiv</sup>

## **B. EXTENT OF ARCHITECT AND CONSTRUCTION MANAGER LIABILITY TO OWNER**

1. *Contract Claims.* The architect and construction manager have contracts with the owner and can be liable for breach of those contracts. Such liability becomes problematic when no direct contractual relationship exists.<sup>xxv</sup> As with any cause of action, timely filing is essential to prevent dismissal under statutes of limitation or repose.<sup>xxvi</sup>

2. *Contractual Provisions Affecting Liability.* Contracts also may contain provisions affecting the extent of the architect's or construction manager's liability. Important provisions in this connection are those that (1) define the scope of work, (2) define the standard of care (a standard stricter than the one provided by common law can be agreed on), (3) define damages for breach (*e.g.*, liquidated damages), (4) limit liability (either in general or for particular kinds of breach), or (5) require one party to indemnify another against liability or cost. The enforceability of such provisions may vary from jurisdiction to jurisdiction. Note that neither the architect nor the construction manager has liability for the actual construction of the project. Their liability results from a failure to adequately provide the services their contracts require of them. In other words, neither an architect nor a construction manager constructs the project for the owner. Instead, they manage the construction of the project for the owner.<sup>xxvii</sup>

3. *Negligence Claims.* Architects are held to well-recognized standards of professional care. Construction managers must also perform with care, though the standards are less well established. When personal injury or property damage is involved, the application of negligence law is relatively straightforward.<sup>xxviii</sup> When only economic losses are involved, states have varying forms of the economic loss rule that may restrict a party's ability to pursue a tort claim.<sup>xxix</sup> In some cases, misrepresentation may provide a cause of action separate from negligence.<sup>xxx</sup>

4. *Fiduciary duty.* In the absence of an express contractual assumption or some special relationship, it is exceedingly unlikely that a court will find the existence of a fiduciary duty.<sup>xxxi</sup> Consequently, language in the contract describing the relationship with the owner becomes paramount.<sup>xxxii</sup> Short of a fiduciary duty, an architect or construction manager might be held to a lesser standard more akin to a duty to meet a professional standard of care or to perform in a good and workmanlike manner.

## C. INSURANCE

To what extent should an owner expect the architect or construction manager to bear a significant share of project risk? Traditionally, owners have relied on architects to bear the risk of professional negligence and (because most architects have limited assets available to satisfy a judgment) to secure that obligation with a policy of professional liability insurance. This is an appropriate allocation of risk, because the architect is in control of its professional services and can obtain professional liability insurance not available to the owner.

Architects sometimes are asked to bear a larger share of risk, for example, when asked to render opinions about construction cost, to select contractors, or to get involved in the handling or remediation of hazardous materials. Architects resist such added responsibilities, both because of a lack of requisite expertise and because of a lack of ability to insure against the potential liability. The latter concern can be mitigated through use of a project insurance policy that covers the architect.

Because construction managers become involved in the day-to-day operations at the project site, it is tempting to suppose that they should bear a substantial share of project risk. The problem, however, as with architects, is that construction managers may have limited assets and only limited ability to obtain insurance at reasonable rates. Again, this concern can be mitigated through use of a project insurance policy, but such insurance comes at the owner's expense.

If the architect or construction manager is expected to bear a share of the risk for the owner's benefit, care should be taken to ensure that its duties and actions remain within the scope of its insurance coverage. Professional liability policies normally are triggered by professional negligence and do not cover contractual obligations outside the scope of professional services.<sup>xxxiii</sup> General liability policies (such as might be obtained by the construction manager) normally do not

insure against professional negligence. If an architect or construction manager performs services outside the scope of insurance coverage, the goal of shared liability may be frustrated.

In the scenario in which the architect and construction manager obtain their own insurance policies, and the owner and contractor obtain their own insurance policies, the question arises as to whether any of these policies should include other parties as additional insureds.

Owners often ask to be included as additional insureds on architect and construction manager policies, presumably with the thought that they could be sued for the acts or omissions of their architects and construction manager, and so want to share in any available coverage. One risk that should be kept in mind is that joining a policy as an additional insured may bar coverage if the owner later brings a claim against the architect or construction manager (as a result of the “insured vs. insured” exclusion). This risk can sometimes be mitigated by giving the owner a status other than insured while reserving the owner’s right to policy proceeds.

Another option is for the owner to insist that the contractor include the architect and construction manager as additional insureds (or beneficiaries) under the contractor’s own policy of insurance. This can sometimes result in an extension of coverage.<sup>xxxiv</sup> Although the owner may agree to require contractors to provide such coverage, it generally does not agree to enforce such provisions for the benefit of the architect or construction manager.<sup>xxxv</sup>

**PART THREE**  
**THREE PERFECT STORM SCENARIOS**

**A. SERIOUS WORKSITE INJURY**

On November 16, 2006, a tower crane suddenly collapsed on an office building construction project near Seattle. The operator rode the crane to the ground and sustained minor injuries. The falling crane damaged three buildings and killed a 31-year-old Microsoft engineer. The site was immediately shut down by the Washington State authorities. A representative of the crane manufacturer flew in from Germany to inspect the wreckage. The crumpled crane mast and base were required to remain in place while the investigation continued. A new crane was finally installed in January 2007, more than two months after the accident. Numerous news articles speculated about the causes of the accident and mentioned the crane manufacturer, crane operator, general contractor, and structural engineer (who had designed the crane's base) by name. In April 2007, Washington's governor, in well-publicized proceedings, signed a new crane safety law (effective in 2010) that requires crane operators and erectors to be certified and requires nonstandard crane bases to be reviewed and approved by an independent engineer. In May 2007, Washington's Department of Labor and Industries publicly announced its conclusion that the crane base had not provided sufficient support for the crane and that the general contractor had not maintained the crane adequately. The department fined both the structural engineer and general contractor. Claims relating to the deceased engineer and the damaged buildings have not been adjudicated.

Workplace death or injury poses great risks to a project, risks that may be outside the experience of even veteran owners and architects. Contractors (and construction managers who have been contractors) are familiar with minor workplace injuries, but may never have had to deal with serious injury or death. In such emergencies, medical services must be obtained, the hazard that caused injury or death must be analyzed and contained, governmental agencies with jurisdiction

must be notified, and evidence bearing on the cause of the accident must be documented and preserved. In the longer term, the construction work must be modified to correct the hazardous condition, and all work affected by the accident must be rescheduled.

Personal injury falls outside the scope of the economic loss rule, opening the door to negligence claims against parties that might otherwise have been protected by that rule. Personal injury and property damage claims can include amounts for pain and suffering, loss of consortium, lost earning capacity, and business interruption. These are items that the owner cannot accurately assess at the time of the accident, yet can be substantial. Serious accidents call into question the jobsite safety procedures and may result in a shutdown of the site by governmental agencies investigating the cause of the accident and compliance with safety regulations. Serious accidents also commonly lead to damaging publicity, when accusations of wrongdoing can be highlighted and defenses obscured. In the crane case described above, an early headline alleged that the crane operator had a history of drug problems. The state investigators, months later, concluded there was no operator error and that the operator was skilled and experienced.

Architects are normally not well qualified, by education or experience, to respond to workplace injury or death. Most architects have little familiarity with litigation, particularly in relation to serious personal injury and property damage. They lack experience in managing publicity. Members of the design team may be valuable resources to help in assessing hazardous conditions (*e.g.*, after a partial building collapse), but they may have at least an apparent conflict of interest if the cause of injury or death is alleged to have been some aspect of the design. In such cases, the architect may be reluctant to make positive statements or take public positions with respect to the accident, out of concern for liability.

A construction manager with experience as a contractor is likely to prove more helpful to the owner than the architect in case of workplace injury or death. The construction manager is already

in close touch with all project participants and can act efficiently as a clearing house for information and decisions in an emergency. As always, a clear dividing line should be maintained between the construction manager's role as the owner's "eyes and ears," collecting information for the owner, and as the owner's limited agent, making decisions that bind the owner. The construction manager may have a potential conflict of its own, if the injury or death is alleged to have occurred because of faulty safety procedures or failure to follow safety procedures. This problem can be mitigated by maintaining clarity about the construction manager's role with respect to safety from the beginning of the project.

## **B. COMPLEX CLAIMS AND DISPUTES**

Claims may become complex for a number of reasons, including the technical nature of the matter in dispute, the number of persons involved, and the interaction of contractual procedures with practical reality. In addition, claims alleging a failure of performance by a design professional or a construction manager raise issues of potential conflicts of interest.

Claims result from any number of causes, but they generally follow one of two basic processes to reach resolution or formal dispute. One process involves the negotiation of change orders satisfactory to all parties. The other process is more adversarial in nature and involves an informal dispute resolution process.

The change order process typically starts with a decision by the owner to alter the scope of the project. The architect drafts documents describing the change to the work and provides the documents to the contractor. The contractor responds with proposals of the price (including overhead and profit) and time involved to perform the change. In the simplest of cases, the contractor's proposals are accepted and both the documents describing the change and the proposals are incorporated into a change order that amends the contract between the contractor and the owner. More typically, some negotiation is necessary to align the owner's and the contractor's different

perspectives of the impact of the proposed change on the scope, price, and schedule of the work and the contract. The architect or the construction manager or both may negotiate on the owner's behalf. In the event of an impasse, contract documents usually give the owner some ability to require that the change be performed for a price and time specified by the owner, and provide the contractor with some opportunity to dispute the change while performing the work.

The claim process usually is instituted by a contractor who believes that the work it is being asked to perform is different from or in addition to the work required by the contract. Similarly, the contractor may believe that it is not being afforded sufficient time to perform the work. Whatever the cause, the contractor often must file a notice of its claim within a specified period after the occurrence of the event giving rise to the claim, and frequently a more detailed description of the claim and its scope, price, and time impacts thereafter. The filings are often delivered to the architect or construction manager who reviews the claim, and sometimes by meetings with the contractor. Occasionally, the architect or the construction manager will decide the claim. The AIA documents provide that the architect is to decide the claim on an impartial basis. In other cases, the architect or construction manager will have limited authority to resolve the claim and will instead report the results of its review to the owner, with a recommendation of a resolution. If the owner and contractor are able to resolve the dispute on the basis of the architect's or construction manager's decision or recommendation, the contract is amended. If no resolution is reached, formal dispute resolution or litigation ensues.

Under either the change order process or the claim process, the architect or the construction manager will have some opportunity to reach a settlement with the contractor. Failure to accomplish this will expose the contractor and the owner to the expenditure of time and resources attendant to litigation or formal dispute resolution, such as mediation or arbitration. In turn, the contractor or the owner may seek recovery from the architect or construction manager. As a result,

the interests of the architect and the construction manager are always at some risk, particularly if the dispute centers on a claim that the architect or the construction manager failed to perform by, for example, providing defective drawings or failing to produce a meaningful project schedule. By engaging both an architect and a construction manager and assigning each roles appropriate to their training and experience in the change order and claim processes, however, the owner achieves a system of checks and balances that provides that legitimate concerns of the contractor and the owner are fairly evaluated and timely addressed and claims are appropriately valued and resolved.

In 1997, a state university awarded separate contracts for heating, ventilation, and air conditioning; site; plumbing; electrical; and general trades work totaling \$33 million. The project involved the construction of three buildings and was expected to be completed in a little less than two years.

Although a construction manager was nominally engaged for the project, its duties were essentially to serve as a “clerk-of-the-works” to facilitate paper flow. The general trades contractor was designated as the lead contractor with responsibility, but little authority, to schedule and coordinate the contractors.

Nonetheless, the project progressed according to schedule for almost a year. As interior work began, however, problems began to surface, including framing, ceiling and beam conflicts, and insufficient space for piping. Contractors began to make claims that the plans and specifications were defective, possibly exacerbated by personality issues between the employees of the general trades contractor and the architect. Communications between the general trades contract and the owner also broke down. The owner terminated the general trades contractor, replacing it with the nominal construction manager. The project was completed several months late, and liquidated damages were assessed against three of the contractors.

Ultimately, the contractors issued over 1,000 RFIs about the plans and specifications. Although some of the RFIs met with little more than a handwritten response that the contractor should proceed “per plans and specs,” ultimately 240 field work orders, 85 architect supplemental instructions, 115 change orders, and 1,000 revision drawings were issued. The contractors claimed that this amounted to the proverbial “death by a thousand cuts” and sought cumulative impact damages. The contractually required dispute resolution process was invoked, but neither the architect nor the construction manager participated in the process. No informal resolution was reached and litigation ensued.

Nearly four years later, after a trial lasting 11 days, the contractors were awarded damages of roughly \$4 million. Two years after that, the \$2.7 million portion awarded to the general trades contractor was reversed on appeal with a decision limiting the application of the Spearin doctrine, and denying recognition of cumulative impact claims. After an additional two years, the appellate court’s ruling was upheld by the state supreme court, despite 17 amicus briefs urging reversal.

Whether the plans and specifications were actually defective remains unclear. The contractors argued vigorously that they were. Unsurprisingly, the architect insisted just as vigorously that they were not, and without any reliable second opinion, the owner supported the architect. An objective opinion from a construction manager involved in the interchanges between the parties and serving as a buffer as personalities and tempers became engaged might have diffused the situation enough to allow cooler heads to prevail and find a solution acceptable to all. Similarly, a construction manager charged with maintaining the progress of the project might have been able to reduce the letter-writing campaigns that produced many of the RFIs and design revisions. Finally, a construction manager with responsibility to monitor and update the schedule might have discovered some of the problems earlier and been able to propose means to mitigate them and the delays they caused. If, on the other hand, a construction manager had been the cause of the

problems, the architect might similarly have been able to provide the owner with an objective opinion about that issue.

No one really won in this situation. All parties, including the architect and the nominal construction manager, expended time and resources in extended litigation that did not significantly improve their finances. Sometimes simply having a disinterested, knowledgeable advisor can be incredibly valuable.

### **C. CLAIM LITIGATION**

The scene is a conference room in a major city. At the head of the table is an arbitrator hearing evidence about a major construction claim. Among the owner's witnesses are the architect and construction manager. There are strong points and weak points in the testimony of each.

The strongest part of the architect's testimony is its description of when RFIs were received and answered, and a contemporaneous list it compiled to categorize the contractor's RFIs as "genuine questions," "already answered before," "answer obvious on plans," "really a submittal, not an RFI," and the like. The weakest part of the architect's testimony is the admission that, because it was not involved on a day-to-day basis during the project, it cannot rebut the contractor's allegations about how particular design changes affected work progress.

The strongest part of the construction manager's testimony relates to photographs it took to illustrate the work in progress and letters it wrote during the project. The weakest part of its testimony is its attempt to speak as a consulting expert about the contractor's schedule and cost records, because it is obvious that the construction manager's views are not objective, but rather strongly colored by events that occurred during the project.

Most major projects result in contractor claims for more money and time based on design error, owner changes, or force majeure events. Although most such claims are settled, the parties employ more or less veiled threats of litigation in their negotiation. From the owner's perspective, a

credible threat of litigation must be based in part on confidence about what the architect and construction manager will say under oath. It is best to plan ahead rather than waiting until a claim is made and then reacting to it. Both the architect and the construction manager can play valuable roles during the construction period to prepare the owner to resist excessive contractor claims. But their roles are different because their roles in litigation are usually different.

It can be expected that a contractor's claim will include allegations of design defect. This puts the architect on the defensive and makes the architect's interests adverse to those of the owner. As long as the owner reserves the right to assert a claim against the architect for design defects, the architect (advised by its insurer and insurer's counsel) will be wary of cooperating closely with the owner. This concern will affect the architect's effectiveness as an adviser to and advocate for the owner in settlement negotiations and in litigation.

During the construction phase, it can be valuable for an architect to keep records relating to RFI responses and other design-related issues, for use in responding to claims at the end of the job. If the RFI process is being abused by the contractor, a contemporaneous list of RFIs sorted into categories such as "genuine question," "already answered before," "answer obvious on plans," "really a submittal, not an RFI," and the like can be an effective tool for countering a contractor's claim that its problems arose from a multitude of (individually minor) design errors.

The construction manager's day-to-day involvement with the project puts it in a good position to support the owner against excessive contractor claims. The construction manager should be able to correlate the schedule, project meeting minutes, change orders, and other project documentation to give a clear picture of major events on the job and to respond to the contractor's allegations that certain design defects, owner changes, or force majeure events caused delay and extra cost. When both an architect and a construction manager are involved on the project, it is normally the construction manager that takes the lead as the owner's advocate.

The construction manager may itself have a potential conflict of interest if the contractor's claims are alleged to rest on errors or omissions in the construction manager's own services, but this is less of a problem than in the case of the architect. Part of the reason is that the construction manager's role as the owner's agent (as opposed to the owner's adviser) is limited, so often the contractor's complaints about construction management arise from decisions in which the owner took an active part. Another reason is that the construction manager's support is so important to the owner's successful defense against the contractor that the owner is reluctant even to threaten a claim against the construction manager.

Although the construction manager can provide valuable support to the owner's position against the contractor, there are limits to the construction manager's effectiveness. It is difficult to present the construction manager credibly as an objective expert (*e.g.*, on scheduling issues) because the construction manager was a project participant, and its testimony will be colored by that experience and by the perceived allegiance to the owner. If the construction manager concluded during the project that the contractor's claim was excessive, the records of that contemporaneous conclusion will tend to cast doubts on any claim that the construction manager's later acted wholly objectively. The absence of such a record, on the other hand, will also tend to cast doubt on the construction manager's later conclusion. So using the construction manager to support the owner's position should not be assumed to eliminate the need for retained expert witnesses.

**[ATTACHMENT ONE IS A FORM OF CM CONTRACT]**

## ATTACHMENT TWO

### CHECKLIST FOR CHOOSING DESIGNER OR CONSTRUCTION MANAGER FOR CONSTRUCTION ADMINISTRATION

Owners must consider a variety of factors in making the choice between engaging a design professional or a construction manager for construction administration. Owners must also recognize that the appropriate weight to give any of the factors depends on the owner's determination of its own capabilities and needs. Finally, owners may conclude that the best solution is to engage both a design professional and a construction manager, with each having primary responsibility for particular tasks.

#### A. NATURE OF PROJECT

1. Project Budget and Complexity. A larger project budget normally means a more complex project, making the use of a construction manager more desirable, all other things being equal.
  - a. Under \$5 million – Designer
  - b. \$5 million or more – Construction Manager
2. Number and Nature of Contractors. The absence of a general contractor throws the bulk of the coordination function onto the owner.
  - a. General contractor or two or three trade contractors and reputation for cooperation – Designer
  - b. Multiple trade contractors or disputatious contractor reputation – Construction Manager
3. Owner's Schedule Requirements. If time is tight, the owner needs to monitor the work closely to detect and deal with potential delays.
  - a. Flexible milestones and deadline – Designer
  - b. Inflexible milestones or deadline – Construction Manager
  - c. Regular business work hours – Designer
  - d. Multiple shifts, significant overtime, or weekends and holidays – Construction Manager
4. Scope of Project.
  - a. Straightforward new construction – Designer
  - b. Complex construction, renovation, brown-field site, or operation of facility during construction – Construction Manager

5. Design Development. Working with an incomplete design gives rise to numerous issues that need to be analyzed and resolved quickly.
  - a. Complete design documents – Designer
  - b. Incomplete design, or phased or fast track approach – Construction Manager
  
6. Labor Availability. Limitations on labor complicate the contractor's ability to perform in a timely manner and drive up the cost of rescheduled work.
  - a. Abundance of skilled craftspeople available – Designer
  - b. Tight market for skilled craftspeople – Construction Manager
  
7. Materials.
  - a. Abundance of critical materials and few long-lead items – Designer
  - b. Scarcity of critical materials or several long-lead items – Construction Manager
  
8. Financing.
  - a. Basic cost and disbursement monitoring and ready source of additional funds – Designer
  - b. Detailed cost and disbursement monitoring and lack of additional funds – Construction Manager

## **B. OWNER'S RESOURCES AND EXPERTISE**

1. Staff Experience.
  - a. Significant in-house construction experience – Designer
  - b. Little or no in-house construction experience – Construction Manager
  
2. Staff Expertise.
  - a. Significant in-house technical expertise relevant to the type of project – Designer
  - b. Little or no in-house technical expertise relevant to the type of project – Construction Manager
  
3. Staff Availability.
  - a. In-house staff not otherwise fully occupied – Designer
  - b. In-house staff fully occupied by existing responsibilities – Construction Manager

## **C. SCOPE OF SERVICES EXPECTED**

1. Periodic observation – Designer
2. Full-time on-site staff – Construction Manager
3. Review of work and submittals for conformity to plans and specifications – Designer
4. Constructability analysis, value engineering, or cost estimating – Construction Manager
5. Description of additional or extra work for change orders – Designer
6. Administering multiple change orders – Construction Manager
7. Limited or no role in resolving disputes – Designer
8. Advocate in disputes – Construction Manager
9. Periodic schedule monitoring – Designer
10. Constant or detailed schedule monitoring – Construction Manager
11. Safety coordination – Construction Manager

**D. LIKELIHOOD OF UNEXPECTED ISSUES AND PROBLEMS**

1. Potential issues and problems requiring redesign or additional design – Designer
2. Potential issues or problems requiring significant communication with and coordination of contractors – Construction Manager
3. Potential issues requiring architectural or engineering judgment – Designer
4. Potential issues requiring cost estimating or labor or schedule analysis – Construction Manager

**ATTACHMENT ONE - CONTRACT FORMS**

**AGREEMENT  
FOR  
CONSTRUCTION MANAGEMENT SERVICES**

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This Agreement for Construction Management Services (this “Agreement”), is made by and between the State of Ohio through the *Ohio School Facilities Commission* (the “Commission”), whose contact person and address is set forth below, and «*CM*» (the “Construction Manager”), whose contact person and address is set forth below.

The Commission, under the terms and conditions set forth herein, does employ the Construction Manager to provide management services with respect to the «*Project*» Project (the “Project”).

The Commission and the Construction Manager understand the Project is being undertaken on behalf of the «*SchoolDistrict*» School District Board of Education (the “School District Board”), and the School District Board is an intended third party beneficiary of the Agreement, so as to permit the School District Board to obtain full performance of the Construction Manager’s obligations under this Agreement.

The Commission and the Construction Manager acknowledge that the School District Board has employed «*Architect*» (the “Architect”) to provide professional design services on the Project, whose contact person and address is set forth below:

**Project Name:** «*Project*»  
**Project Number:** «*Project1*»

**The Ohio School Facilities Commission:**

Contact Person: «*PA*»  
Address: *10 W. Broad Street, 14<sup>th</sup> Floor*  
*Columbus, Ohio 43215*  
Phone Number(s): *(614) 466-6290*  
Fax Number(s): *(614) 995-9908*

**Construction Manager:**  
Contact Person: «*CMContact*»  
Address: «*CMAdd1*»  
«*CMAdd2*»  
«*CMAdd3*»  
Phone Number(s): «*CMPhone*»



- 1.1.1 Scope of Services; Applicable Law. The Construction Manager shall provide construction management services for the Project in accordance with the terms of this Agreement. The Construction Manager shall provide such services in accordance with the applicable Sections of the Ohio Revised Code and any applicable State rules and regulations, any applicable federal and local statutes, ordinances, rules and regulations, and the School District Board's Program of Requirements (comprised of, without limitation, the Master Plan, Bracketing Forms and Summary of Renovations, Project Budget and Cost Estimates) as incorporated by reference herein.
- 1.1.2 Construction Budget. The total amount available for the construction of the Project is «**ConstBudget**» (the "Construction Budget"). The School District Board and the Commission shall provide written notice to the Construction Manager and the Architect of any change in the Construction Budget. It is recognized that the Construction Manager, the Commission, the Architect and the School District Board do not have control over the cost of labor, materials or equipment, over Contractors' methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the Construction Manager cannot and does not warrant or represent that bids or negotiated prices will not vary from the Construction Budget or from any estimate of cost or evaluation prepared by or agreed to by the Construction Manager.
- 1.1.3 Timeliness; Standard of Care. The Construction Manager shall perform services in accordance with professional standards of skill, care and diligence in a timely manner in accordance with the Project Schedule and so that the Project shall be completed as expeditiously and economically as possible within the Construction Budget and in the best interests of the Commission and the School District Board. The Construction Manager's duty of care extends to the School District Board as well as the Commission.
- 1.1.4 Project Schedule. Within thirty (30) days of receipt of the Architect's Design Schedule, the Construction Manager shall, in consultation with the Architect, merge the Design Schedule into a Project Schedule. Upon approval of the Project Schedule by the Architect and the Construction Manager, the Construction Manager shall submit the Project Schedule to the School District Board and the Commission for approval. It shall be the Construction Manager's responsibility to monitor, update, coordinate and seek adherence to the Project Schedule. The Project Schedule, when approved by the School District Board and the Commission, shall not be exceeded without notice and adjustment of the Project Schedule approved by the School District Board and the Commission.
- 1.1.5 Personnel. The identities of the principal persons and the extent of their participation in performing the Construction Manager's services shall not be altered without the consent of the Commission.
- 1.1.6 Non-Discrimination. The Construction Manager represents that the Construction Manager is in compliance with all applicable equal employment opportunity requirements under law, as required by Section 153.59 of the Ohio Revised Code and/or any other applicable state or federal laws.

- 1.1.7 Consultants. The Construction Manager may provide services through one or more consultants employed by the Construction Manager (the “Consultants”); provided, the Construction Manager shall remain responsible to the Commission and the School District Boards for all duties and obligations of the Construction Manager under this Agreement. Unless waived or otherwise modified in writing by the Commission upon written request of the Construction Manager, no Consultant shall be retained upon terms inconsistent with this Agreement. The identity of any Consultant and the extent of such Consultant’s participation in performing the Construction Manager’s services shall not be altered without the consent of the Commission.
- 1.1.8 Anti-Abuse of Drugs and Alcohol. The Construction Manager shall make a good faith effort to ensure that no employee of the Construction Manager will purchase, transfer, use or possess or be under the influence of alcohol or illegal drugs or abuse legally obtained drugs while on or about the Projects. Except for the term “employee,” terms in this Subparagraph are used as defined in Rule 123:1-76 of the Ohio Administrative Code.
- 1.1.9 Ethics. The Construction Manager represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code, and certifies that it is in compliance with such requirements. Effective prospectively, December 15, 2005, by executing this Agreement, the Consultant affirms that no party listed in Division (I) or (J) of Section 3517.13 of the Ohio Revised Code, or spouse of such party, has made, as an individual, within the two previous calendar years, or one calendar year subsequent to December 15, 2005, if this Agreement is entered into prior to January 1, 2007, one or more contributions totaling in excess of \$1000.00 to the Governor or the Governor's campaign committee.
- 1.1.10 Ohio Services. Unless otherwise authorized by the Commission, the Construction Manager’s services shall be performed within the State of Ohio.
- 1.1.11 Limitation of Authority. The Construction Manager shall not have any authority to bind the Commission or the School District Board for the payment of any costs or expenses without the express written approval of the Commission or the School District Board, as applicable. The Construction Manager shall have authority to act on behalf of the Commission and the School District Board only to the extent provided herein. In the event of an emergency affecting the safety of persons, the Project or adjacent property, the Construction Manager, without special instruction or authorization, shall act reasonably to prevent or minimize any threatened damage, injury or loss. The Construction Manager’s authority to act on behalf of the Commission and the School District Board shall be modified only by an amendment in accordance with Subparagraph 9.5.2.
- 1.1.12 Approval or Disapproval of Construction Manager’s Services. The Commission, with the concurrence of the School District Board, shall have the right to reasonably disapprove, by written notice stating the reasons for the disapproval, any portion of the Construction Manager’s services for the Project. In the event that any of the Construction Manager’s services are disapproved by the Commission, the

Construction Manager shall proceed, when directed by the Commission, with corrections to the services to attempt to satisfy the objections. The Construction Manager acknowledges that any review or approval by the Commission and the School District Board of any services performed by the Construction Manager pursuant to this Agreement shall not relieve the Construction Manager of the Construction Manager's responsibility to properly and timely perform such services.

- 1.1.13 Conflict of Interest. Unless waived or otherwise modified in writing by the Commission upon written request of the Construction Manager, the Construction Manager and any consultant employed by the Construction Manager shall abstain from participating, either directly or indirectly, in any construction contract let in association with the Commission.
- 1.1.14 Project Status Report. Unless waived or otherwise modified in writing by the Commission, the Construction Manager shall, upon commencement of services through Project closeout, submit a project status report on a monthly basis to the Commission and the School District Board.
- 1.1.15 Project Website. The Construction Manager shall, upon commencement of services through Project closeout, maintain and summarize project information and reports as specified by the Commission on the Commission/Construction Manager website.
- 1.1.16 Unresolved Finding for Recovery. The Construction Manager represents that the Construction Manager is not subject to a finding for recovery under Section 9.24, ORC, or that Construction Manager has taken the appropriate remedial steps required under Section 9.24, ORC, or otherwise qualifies under this section.

## ARTICLE II

### SCOPE OF CONSTRUCTION MANAGER'S BASIC SERVICES

#### 2.1 General.

- 2.1.1 The Construction Manager shall provide the Basic Services set forth in Paragraphs 2.2 through 2.7, inclusive, including services customary and typical. The Construction Manager shall provide services according to an Implementation Plan approved by the Commission. It is recognized that the School District Board's Program of Requirements may consist of multiple Pre-Design, Schematic Design, Design Development, Construction Document, Bidding/Negotiation and Construction Phases. The Construction Manager shall provide services to accommodate the School District Board's Commissioning Authority and Maintenance Plan Advisor.

#### 2.2 Predesign Phase (Program Validation).

- 2.2.1 Program of Requirements. The Construction Manager shall visit the site with the Architect prior to the Architect's providing an evaluation of the School District Board's Program of Requirements. The Construction Manager shall review and comment upon the Architect's evaluation of the School District Board's Program of Requirements, schedule and budget requirements, including the Construction Budget, each in terms of the other.

2.2.2 Approved Program of Requirements and Revisions. The Construction Manager shall receive from the Architect a Program of Requirements approved and signed by the School District Board for approval thereof and signature thereon; the Construction Manager shall deliver with comments the Approved Program of Requirements to the Commission for approval. If any changes or adjustments to the Approved Program of Requirements are desired at any time after the Approved Program of Requirements has been delivered to the Commission, the Architect shall prepare a written amendment to the Approved Program of Requirements describing the changes or adjustments, and shall obtain the School District Board's written approval thereof and deliver the amendment to the Commission and the Construction Manager for review, comment and consent. The Approved Program of Requirements, as amended, shall determine the Scope of the Project.

2.2.3 Soil Testing. The Construction Manager shall assist the School District Board in obtaining proposals to test surface and subsoil conditions at the site, obtaining additional borings, and carrying out any other test as deemed necessary.

### **2.3 Schematic Design Phase (Preliminary Drawings).**

2.3.1 Review and Consultation. The Construction Manager shall assist the Architect's investigation of existing conditions.

2.3.2 Recommendations and Costs. The Construction Manager shall provide recommendations on constructability, logistics, availability of materials and labor, and time requirements for construction and factors related to the Commission Design Manual and the cost of the Project including costs of alternative designs or materials, preliminary budgets and possible economies.

2.3.3 Preliminary Life Cycle Analysis. The Construction Manager shall review any alternative design concepts for a Preliminary Life Cycle Analysis prepared or to be prepared by the Architect and provide recommendations thereon about the matters listed in Subparagraph 2.3.2 and forward a copy to the Commission.

2.3.4 Schematic Design Documents. The Construction Manager shall receive four (4) copies of the School District Board's Approved Schematic Design Documents from the Architect. The Construction Manager will attend a meeting with the Architect, the School District Board and the Commission where those parties may make comments or suggestions to the Architect. After receiving comments and suggestions, the Architect shall submit an amended set of Schematic Design Documents to the School District Board and obtain its approval in writing, then forward the approved amended set of Schematic Design Documents to the Commission for final review and approval.

2.3.5 Preliminary Cost Estimate. The Construction Manager shall, with the assistance of the Architect, prepare and submit a Statement of Probable Construction Cost based on current area volume and other unit costs, for approval of the School District Board. The Construction Manager and the Architect shall review any difference between the Construction Budget and the Statement of Probable Construction Cost, identify reasons for any difference and recommend means to eliminate the difference. The Construction Manager shall prepare a report describing the agreed upon means and submit the report to the Commission.

## **2.4 Design Development Phase (Basic Drawings).**

- 2.4.1 Life Cycle Analysis. The Construction Manager shall review any Life Cycle Cost Analysis, provide recommendations thereon about the matters listed in Subparagraph 2.3.2 and forward a copy to the Commission. This section does not apply if the Architect utilizes a system set forth in the Design Manual. The applicable Life Cycle Analysis calculations have already been prepared for systems contained in the Design Manual.
- 2.4.2 Design Development Documents. The Construction Manager shall receive four (4) copies of the Design Development Documents from the Architect. The Construction Manager will attend a meeting with the Architect, the School District Board and the Commission where those parties may make comments or suggestions to the Architect. After receiving comments and suggestions, the Architect shall submit an amended set of Design Development Documents to the School District Board and obtain its approval in writing, then forward the approved amended set of Design Development Documents to the Commission for final revision and approval.
- 2.4.3 Cost Estimate and Project Schedule. Upon completion of the Design Development Phase for each phase of the Project or appropriate portion thereof, the Construction Manager, with the assistance of the Architect, shall prepare and submit a Detailed Estimate of Construction Cost and a Project Schedule indicating milestone completion dates for approval by the School District Board. In establishing the Detailed Estimate of Construction Cost, the Construction Manager shall include reasonable contingencies for design, bidding and price escalation and determine in conjunction with the Architect and the School District Board the materials, equipment, component systems and types of construction to be included in the Contract Documents. The Construction Manager and the Architect shall review any difference between the Construction Budget or the Statement of Probable Construction Cost and the Detailed Estimate of Construction Cost, identify reasons for any difference and recommend means to eliminate the difference. The Construction Manager, the Architect, and the School District Board shall agree upon the means to eliminate any difference between the Construction Budget and the Detailed Estimate of Construction Cost, and the Construction Manager shall prepare a report describing the agreed upon means. The Construction Manager and the Architect shall review any differences between the initial Project Schedule and the updated Project Schedule, identify reasons for the differences and recommend whether the differences should be eliminated and, means to eliminate the differences. If the parties agree to eliminate any such differences, the Construction Manager shall prepare a report describing the agreed upon means. The Construction Manager, the Architect and the School District Board shall make any necessary amendments to the Approved Program of Requirements in accordance with Subparagraph 2.2.2. The Construction Manager shall forward the approved Program of Requirements to the Commission.

## **2.5 Construction Documents Phase (Construction Drawings and Specifications).**

- 2.5.1 Final Construction Documents, Drawings and Specifications. The Construction Manager shall prepare the Scope of Work for inclusion by the Architect in the

Drawings and Specifications, taking into consideration factors including, but not limited to, time of performance, availability of labor, overlapping trade jurisdictions, provision of training for start-up and maintenance, provision of operation and maintenance manuals and provisions for temporary facilities, and to eliminate areas of conflict and overlapping in the Work to be performed by the various Contractors. The Construction Manager shall receive all Drawings and Technical Specifications from the Architect, review them and transmit them to the School District Board and the Commission for approval with recommendations thereon about the matters listed in Subparagraph 2.3.2 and possible Alternates.

- 2.5.2 Cost Estimate and Project Schedule. The Construction Manager shall inform the Architect, the School District Board and the Commission of the need for any changes in Project requirements or in construction materials, systems or equipment as the Drawings and Specifications are developed and of the need for any adjustments in the Detailed Estimate of Construction Cost and the Project Schedule. Upon approval of the School District Board and the Commission of any such changes or adjustments, the Construction Manager, with the assistance of the Architect, shall prepare a revised Detailed Estimate of Construction Cost or a revised Project Schedule, as applicable, incorporating such changes or adjustments and provide a copy to the Commission.
- 2.5.3 Bidding Documents. With the aid of the Architect, the School District Board, and Commissioning Authority, if any, the Construction Manager shall prepare documents necessary for bidding of Contracts by reviewing those documents and making recommendations about the division of Work and matters to be included in the Special Conditions. The Architect shall review and provide comments to the School District Board and the Construction Manager on bid packages. Additionally, the Construction Manager shall work with the Architect to divide the Work into an appropriate number of bid packages so as to effect the greatest possible benefit, taking into full account the Construction Manager's responsibilities herein to schedule, coordinate and monitor the multiple Contractors.
- 2.5.4 Government Approvals. The Construction Manager shall cooperate with the Architect in submitting to the Division of Code Compliance of the Ohio Department of Commerce (the "Division"), such sets of the Drawings and Specifications as the Division may require for approval, together with any necessary completed applications. The Construction Manager shall assist the Architect to secure any necessary National Pollution Discharge Elimination System Storm Water General Permit by submitting a notice of intent application form to the Ohio Environmental Protection Agency at least forty-five (45) days prior to the commencement of the Construction Phase, to prepare and certify a storm water pollution prevention plan to provide sediment and erosion controls at the Project and to prepare and process the required notice of termination prior to Contract Completion. In addition, the Construction Manager shall cooperate with the Architect with filing of documents required for the approval of any other governmental authorities having jurisdiction over the Project.
- 2.5.5 Additional Filings. Upon approval of the Division of the Drawings and Specifications, the Construction Manager shall receive from the Architect one (1) set

of corrected copies of the Drawings and Specifications bearing approval stamps of the Division.

- 2.5.6 Special Items. The Construction Manager shall schedule any necessary meetings with the Architect and the School District Board and provide recommendations and information to the Architect and the School District Board for discussion at such meetings regarding the assignment of responsibilities for refuse removal and for safety precautions and programs; temporary Project facilities and utilities, weather protection, fire protection and scaffolding; and equipment, materials and services for common use of Contractors, if any. The Construction Manager shall also review the Contract Documents to verify that the requirements for and assignment of responsibilities are included in the Contract Documents.
- 2.5.7 Labor Recommendations. The Construction Manager shall provide to the Architect and the School District Board an analysis of the types and quantities of labor required for the Project, review the availability of appropriate categories of labor required for all Contracts and shall make recommendations for actions designed to minimize adverse effects of labor shortages.

## **2.6 Bidding or Negotiation Phase (Bidding Assistance and Recommendation).**

- 2.6.1 Obtaining Bids. The Construction Manager shall assist with the development of and make recommendations for bidding criteria, bidding schedules and bidding information and shall develop Bidders' interest in the Project.
- 2.6.2 Prebid Conferences. The Construction Manager, with the assistance of the Architect, shall conduct prebid conferences with prospective Bidders to familiarize Bidders with the Contract Documents, any special requirements of the Contract Documents and equal employment opportunity and set aside requirements. The Construction Manager shall obtain responses from the Architect to all questions at prebid conferences and review Addenda prepared by the Architect to incorporate those responses. The Construction Manager shall prepare a record of the questions and answers discussed at the prebid conferences, which shall be used by the Architect to prepare Addenda.
- 2.6.3 Bid Packages and Addenda. The Construction Manager shall assemble the Contract Documents into appropriate packages and shall distribute the packages to prospective Bidders, the Architect, the Commission, the School District Board and other appropriate persons, including without limitation any applicable local or regional plan room organizations. The Construction Manager shall review any Addenda and provide a copy to each person of record holding Drawings and Specifications.
- 2.6.4 Bid Review. The Construction Manager, with the assistance of the Architect and the School District Board, shall coordinate the bid opening and the review of all bids received for responsiveness, participate in investigating the responsibility of Bidders and deliver a written recommendation of the Construction Manager and the Architect to the School District Board about the award of, or rejection of, any bid or bids for each Contract for the Project in accordance with applicable law. The Construction

Manager shall deliver a copy of such recommendation to the Commission. In making the recommendation, the Construction Manager and the Architect shall evaluate all applicable Alternates referenced in the Contract Documents.

- 2.6.5 Bid Substitutions. Substitutions contained in the bid of any Bidder shall not be considered by the Construction Manager in recommending the award of any Contract.
- 2.6.6 Preaward Conferences. The Construction Manager, with the assistance of the Architect, shall conduct pre-award conferences with apparently successful Bidders and shall gather documentation for contract execution from such Bidders. Upon the failure of a Bidder to provide such documentation in a timely manner, the Construction Manager shall assist the School District Board in considering whether an extension of time for submitting such documentation is appropriate.
- 2.6.7 Subcontractor and Material Supplier Review. The Construction Manager, based upon review of the Contract Documents, any past experience and reasonable inquiry, shall participate in investigating any Subcontractor or Material Supplier proposed by any Contractor and recommend approval or disapproval in accordance with the Standard Conditions.
- 2.6.8 Over Budget Options. If the Construction Budget is exceeded by the total of the lowest responsive and responsible bids and any legally negotiated prices for the Project, the Commission and the School District Board shall, at their option (1) approve in writing an increase in the Construction Budget; (2) authorize 2.6.8 rebidding or renegotiation for some or all parts of the Project within a reasonable time without an increase in the Construction Budget; (3) abandon the Project, in whole or in part, and terminate this Agreement in accordance with Subparagraph 8.1.2 or Subparagraph 8.1.4, as applicable; or (4) cooperate in the revision of the Scope of the Project as defined in Subparagraph 2.2.2 to reduce the actual cost of construction to the Construction Budget. If the Commission and the School District Board adopt option (1) and such increase in the Construction Budget is more than ten percent (10%), the Construction Manager may request, in writing, an adjustment to the Basic Fee in accordance with Subparagraph 5.6.5. If the Commission and the School District Board adopt options (2), (3) or (4), the Construction Manager, with the assistance of the Architect, shall modify the Approved Program of Requirements, the Project Schedule and the Contract Documents and cooperate in any necessary bidding or negotiation without additional charge.
- 2.6.9 Further Revisions to Cost Estimate and Project Schedule. If necessary, the Construction Manager shall inform deliver the signed, revised Detailed Estimate of Construction Cost or Project Schedule to the Commission and inform the Architect, the Commission and the School District Board of the need for any adjustments in the Detailed Estimate of Construction Cost and the Project Schedule. Upon approval of the Commission and the School District Board of any such adjustments, the Construction Manager, with the assistance of the Architect, shall prepare a revised Detailed Estimate of Construction Cost or a revised Project Schedule, as applicable, incorporating such adjustments, obtain the School District Board's signature thereon

and deliver the signed, revised Detailed Estimate of Construction Cost or Project Schedule to the Commission.

- 2.6.10 Contract Execution/Notices. The Construction Manager, with the assistance of the Architect, shall assist the School District Board in the preparation and issuance of Notices of Award and Notices to Proceed, preparation and execution of the Construction Contracts, preparation and issuance of Notices to Surety and the Notice of Commencement.

## **2.7 Construction Phase (Administration of Construction).**

- 2.7.1 Duration; Extent, Access. The Construction Phase will commence with the award of a Contract for the Project to a Contractor and will terminate upon Final Acceptance of the Project by the Commission and the School District Board. The Construction Manager shall at all times have access to the Project whenever any Work is in preparation or in progress.
- 2.7.2 Duties Generally. The Construction Manager shall provide administration of the Project, scheduling of Work and coordination of the Contractors and any other persons on the site of the Project. Unless otherwise waived in writing by the Commission and the School District Board, the Construction Manager shall maintain a competent staff at the Project in preparation of progress on the Project and shall establish and implement on-site organization and authority so that the Work on the Project may be accomplished timely and efficiently. The Construction Manager shall refer all questions for interpretation of the Contract Documents to the Architect and shall notify the Architect when the presence of the Architect on the Project site is necessary. The Construction Manager's duties shall not, and shall not be deemed to, require the Construction Manager to undertake any of the Contractor's Responsibilities as set forth in Subparagraph 2.7.18.
- 2.7.3 Investigation of Conditions for Renovation or Remodeling. For renovation and remodeling, the Construction Manager, with the assistance of the Architect, shall, as portions of the Project become accessible and as reasonably necessary, investigate existing conditions and assist in determining the accuracy of information provided by the School District Board about existing conditions.
- 2.7.4 Inspections. The Construction Manager shall inspect the Work of each Contractor for Defective Work. If, through inspection or otherwise, the Construction Manager shall become aware of any Defective Work on the Project, the Construction Manager shall report all Defective Work to the Commission, the School District Board and the Architect, together with recommendations for the correction thereof, and shall notify any applicable Contractor to correct such Defective Work.
- 2.7.5 Progress and Records. The Construction Manager shall record the progress of the Project and provide written reports to the Commission and the School District Board on a monthly basis unless otherwise agreed in writing. Such reports shall include, without limitation, information about variations between actual and budgeted or estimated costs and information on each Contractor's Work, as well as completion status on the entire Project, showing percentages of completion. The Construction

Manager shall require each Contractor to submit a safety program. The Construction Manager shall review those safety programs for the purpose of coordinating them with each other. The Construction Manager's responsibilities to coordinate the safety programs shall not require the Construction Manager to control the acts of Contractors, Subcontractors or any other persons not employees of the Construction Manager. The Construction Manager shall keep a log containing a daily record of weather, number of workers on site for each Contractor, identification of equipment, work accomplished, problems encountered and other similar relevant data. The Construction Manager shall provide for the maintenance at the Project site, on a current basis of records of all Contracts, Drawings, Specifications, Shop Drawings, Product Data, Samples, purchase orders, materials, equipment, maintenance and operating manuals and instructions, and other construction-related documents, including all revisions. The Construction Manager shall maintain records of principal building layout lines, elevations of the bottom of footings, floor levels and key site elevations to the extent certified by a qualified surveyor or professional engineer and any test results, make all such records available to the Architect, the Contractors, the Commission and the School District Board at all times and at the completion of the Project deliver all such records to the School District Board.

- 2.7.6 Construction Schedule. The Construction Manager shall, with the cooperation of the Architect and the Contractors, prepare the Construction Schedule in accordance with the Standard Conditions. The Construction Manager shall provide copies of the Construction Schedule and schedule of submittals to the Architect, the Commission and the School District Board and incorporate the Construction Schedule and schedule of submittals into the Project Schedule so that the Project Schedule includes a Critical Path for the Project and provides for each scope of Work, including without limitation, phasing of construction, times for commencement and completion required of each Contractor and ordering and delivery of materials requiring long lead-time. The Construction Manager shall require each Contractor to provide records for any materials that require long lead-time and to certify to the Construction Manager that such materials have been ordered for timely delivery to the Project. The Construction Manager shall, if requested by the School District Board, provide a priority of occupancy in accordance with the Standard Conditions. The Construction Manager shall review the sufficiency of the Contractors' workforce and the number and types of equipment assigned and provided by each Contractor to the Project and shall make recommendations to the Commission and the School District Board about the adequacy of such workforce and equipment. The Construction Manager shall periodically inform the Architect, the Commission and the School District Board of the need to update the Project Schedule as required to show current conditions, including without limitation, to conform to the Construction Schedule, as updated from time to time. If such conditions indicate that milestone completion dates shown on the Project Schedule may not be met, the Construction Manager shall recommend corrective action to the Architect, the Commission and the School District Board and carry out the directions of the Commission so that the milestone completion dates may be met, unless the Commission and the School District Board agree in writing to revise the milestone completion dates. Whenever the Project Schedule is revised or updated as provided in this Subparagraph, the Construction Manager, with the assistance of the Architect, shall prepare a revised

Project Schedule, obtain the School District Board's signature thereon and deliver the revised Project Schedule to the Commission.

- 2.7.7 Meetings. The Construction Manager shall schedule, conduct and participate in preconstruction, progress, quality control, commissioning and special meetings with the Architect, the Commission as needed, the School District Board, appropriate Consultants, the Contractors and any other parties involved in the Project to discuss such matters as procedures, progress, problems and scheduling. The Construction Manager shall prepare and distribute minutes of all such meetings to the Architect, the Commission, the School District Board, the Contractors and any other parties involved. The Construction Manager shall initiate and coordinate partnering meetings with the Architect, the Commission, the School District Board, appropriate Consultants, the Contractors and other parties involved in the Project.
- 2.7.8 Tests; Inspections. The Construction Manager shall advise and consult with the Architect and the School District Board during the Construction Phase as to the need for any special testing, inspections or approval of Work on the Project.
- 2.7.9 Submittal Review. The Construction Manager shall receive, review for completeness and responsiveness the Contractors' submittals such as Shop Drawings, Product Data and Samples and shall deliver them to the Architect for review and approval as provided in the Standard Conditions.
- 2.7.10 Bulletins; Change Orders. The Construction Manager shall recommend necessary or desirable changes in the Project to the Commission, the School District Board and the Architect, review any Bulletins prepared by the Architect prior to their issuance, review Contractor proposals and submit recommendations thereon to the Commission, the School District Board and the Architect, assist in negotiating Change Orders in accordance with the Standard Conditions for authorization and execution by the Commission, the School District Board and the Architect. The Construction Manager shall keep a log of all requests for information, Field Work Orders, Bulletins, Contractor Proposals and Change Orders.
- 2.7.11 Project Costs. The Construction Manager shall maintain Project cost accounting records on Work performed by Contractors under unit costs, actual costs for labor and materials, or other appropriate basis and afford the Commission and the School District Board access to these records at all times. The Construction Manager shall approve all invoices to be paid from the Project Construction Fund and maintain a log to track and record each approved expenditure. The Construction Manager shall review and reconcile the Construction Manager's log with records maintained by the School District Treasurer on a quarterly basis and submit a report to the Commission and the School District Board.
- 2.7.12 Contractor Payments. Based upon the Construction Manager's review of the applicable Work and evaluations of the applicable Contractor's Applications for Payment, the Construction Manager shall review and recommend for approval, modification or rejection the amounts shown on such Applications as being due to the applicable Contractor in accordance with the Contract Documents. Each

Application for Payment shall be signed by the Architect, the Construction Manager and the School District Board, as applicable.

- 2.7.13 Partial Occupancy and Maintenance Plan. The Construction Manager shall assist the Commission and the School District Board in determining dates of Partial Occupancy of the Work or portions thereof designated by the School District Board and shall assist in obtaining any necessary temporary occupancy certificate or other certificate from any applicable government authority. The Construction Manager shall review any lists prepared by the Architect of incomplete or unsatisfactory Work and prepare schedules for the completion or correction of such Work. The Construction Manager will initiate the process for developing a preventative maintenance and capital planning program for the completed facilities at least six months prior to the completion of any facility for occupancy. The Construction Manager will collect and organize the facility equipment information in accordance with procedures and instructions provided in Appendix B to this Agreement.
- 2.7.14 Contract Closeout. Upon receipt of a Contractor's Punch List, the Construction Manager shall provide written notice to the Commission, the School District Board and the Architect that the Work is ready for Final Inspection, notify the Contractor of acceptance or rejection of the request for Final Inspection, conduct the Final Inspection with the concurrence of the Architect, review an Architect's Punch List, if applicable, and prepare and process a Certificate of Contract Completion in accordance with the Standard Conditions. Upon Contract Completion, the Construction Manager shall receive, review for conformity with the requirements of the Contract Documents and transmit to the Commission any affidavits and turn over to the School District Board any keys, manuals and the originals of any guarantees, warranties, releases, bonds and waivers with copies to the Commission. The Construction Manager shall assist the School District Board with the check out of utilities and of operations systems and equipment for readiness and shall assist the School District Board in the initial start-up and testing of such equipment and systems including coordinating the training of the School District Board's staff on the operation and maintenance of new systems.
- 2.7.15 Contractor Claims. The Construction Manager shall endeavor to timely and proactively identify, address and resolve matters involving persons, entities or events which may give rise to a request for equitable adjustment of the Contract. The Construction Manager shall properly document and review claims from Contractors for additional compensation or time extension in accordance with the provisions set forth in the Standard Conditions. In the event the field level review does not resolve the issues brought forth by the Contractor, the Construction Manager shall make arrangements for, and attend dispute resolution or partnering intervention meetings related to each claim.
- 2.7.16 Record Drawings. The Construction Manager shall review the As-Built Drawings provided by the Contractors and verify that the As-Built Drawings, to the best of the Construction Manager's knowledge based upon the Construction Manager's observations during the progress of the Project, detail the actual construction of the Project. The Construction Manager shall transmit the verified As-Built Drawings to the Architect for the preparation of Record Drawings.

- 2.7.17 Eleven-Month Inspection and Project Close Out. The Construction Manager shall schedule and conduct a walk-through of the Project with the School District Board one month prior to the expiration of the one year Guarantee provided by the Contractor. The Construction Manager shall consult with the Architect and the School District Board to address any issue identified in the walk-through according to the procedures specified in the Standard Conditions. The Construction Manager will assist the School District Board to provide a final accounting of the Project Construction Fund, including a total cost and total revenue for all funds related to the Project.
- 2.7.18 Contractor Responsibilities. The Construction Manager shall not be responsible for and shall not have control or charge of construction means, methods, techniques, sequences, procedures or scheduling used by a Contractor to comply with the Contractor's obligations under its Contract for the Project or for safety precautions and programs in connection with the Work on the Project. The Construction Manager shall not be responsible for or have control or charge over the acts or omissions of Contractors or Subcontractors or any of their agents or employees, or any other persons performing any Work on the Project. The Construction Manager shall not be responsible for the presence, handling, exposure or disposal of hazardous materials or mold at the Project site.

### **ARTICLE III ADDITIONAL SERVICES**

#### **3.1 General.**

- 3.1.1 Basic Services. The following services are not included in Basic Services and shall be provided only if approved by the Commission in writing with the concurrence of the School District Board. The following services shall be paid for as provided in this Agreement in addition to the compensation for Basic Services; provided, however, the Construction Manager shall not be compensated for any of the following services made necessary by the act or omission of the Construction Manager or any Consultant. Unless waived by the Commission in writing, authorization to provide Additional Services must be obtained prior to providing the Additional Services.
- 3.1.2 Specialized Services. Providing any service not included in this Agreement or not ordinarily furnished in accordance with customary practice.
- 3.1.3 Partnering Facilitator. Serving as a partnering facilitator.
- 3.1.4 Grant Applications. Preparing applications and supporting documents for governmental grants, loans or advances.
- 3.1.5 Replacement Work. Providing consultation concerning replacement of any Work on the Project damaged by fire, casualty or other cause not due to negligence of the Construction Manager or any Consultant and furnishing services as may be required in connection with the replacement of such Work.

- 3.1.6 Special Studies. Providing Planning Site Evaluations, Environmental Studies or Comparative Studies of alternative sites and preparing special surveys, studies and submissions required for approval of governmental authorities or others having jurisdiction over the Project.
- 3.1.7 Surveys. Providing Survey services including land surveys and right of way studies.
- 3.1.8 Contractor Default. Providing services made necessary by the default of a Contractor.
- 3.1.9 Site Availability. Providing services necessary for the School District Board to obtain ownership or leasehold interest in the Project site, in order to permit the Contractor to perform the Work.

#### **ARTICLE IV**

#### **RESPONSIBILITIES OF THE SCHOOL DISTRICT BOARD AND THE COMMISSION**

- 4.1 **Required Actions**. The Commission and the School District Board shall review, approve or take such actions as are required of them by this Agreement, the Contract Documents and applicable law in a reasonable and timely manner.
- 4.2 **Instructions to Contractors**. All instructions of the Commission, the School District Board or the Architect to Contractors shall be through, or in consultation with, the Construction Manager, with notice to the Architect.
- 4.3 **School District Board's Requirements**. The School District Board and the Commission shall provide full information regarding its requirements for the Project including without limitation the Program of Requirements, any agreements related to the Project, design and construction standards and work rules which shall set forth the School District Board's and the Commission's use, design, time and financial objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability, time constraints imposed by fiscal and budgetary considerations, special equipment and systems and site requirements.
- 4.4 **Stated Representative**. If any party shall change its stated representative as set forth on Page 1 of this Agreement, they shall notify all other parties of that change immediately in writing.
- 4.5 **School District Board's Representative**. The School District Board shall designate a School District Board's Representative; i.e. **an individual** authorized to act on the School District Board's behalf with respect to the Project to the extent provided in the Contract Documents. If the School District Board changes the School District Board's Representative, the School District Board shall notify the Construction Manager immediately in writing.
- 4.6 **Site Description**. If reasonably requested by the Construction Manager as necessary for the Project, the School District Board shall furnish a legal description and a certified land survey of the site, giving, as applicable, grades and lines of streets, alleys, pavements and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions,

boundaries and contours of the site; locations, dimensions, and complete data pertaining to existing building, other improvements and trees; and full information concerning available service and utility lines both public and private, above and below grade, including size, inverts and depths. The Construction Manager shall be entitled to rely upon the accuracy and completeness of information provided by the School District Board under this Paragraph.

- 4.7 Notice to Construction Manager.** If the School District Board or the Commission observes or otherwise becomes aware of any Defective Work or other fault or defect in the Project, prompt notice thereof shall be given to the Construction Manager.
- 4.8 Legal Representation.** The School District Board and the Commission shall not be responsible to provide, or pay for, any legal representation of the Construction Manager.

## ARTICLE V COMPENSATION

- 5.1 Total Compensation.** The total compensation of the Construction Manager shall consist of the overall Direct Personnel Expense, Reimbursable Expenses, the Basic Fee, and any Optional Demolition/Abatement Fees and shall not exceed the total amount of «*CMContractAmt*».

**5.2 Direct Personnel Expense.**

- 5.2.1 Definition.** Direct Personnel Expense shall mean the hourly portion of the direct cost of salaries and wages of all personnel of the Construction Manager, as applicable, including professional, technical, management, administrative and clerical employees, and principals engaged on the Project related to their time devoted to the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto such as employment taxes and other statutory employee benefits, social security contributions, insurance, sick leave, holidays, vacations, pension and profit sharing pursuant to plans qualified under federal law and similar benefits related to their time devoted to the Project. Direct Personnel Expense shall not include any bonus or similar plan or agreement related to the Construction Manager's performance on, or profit from, the Project.
- 5.2.2 Amount of Direct Personnel Expense.** The Construction Manager will invoice the actual Direct Personnel Expense of the approved personnel on the Project. The Construction Manager may group employees within the same category of labor to determine a blended rate per job position for the purpose of invoicing. The Direct Personnel Expenses, excluding Optional Demolition/Abatement shall not exceed the amount of «*DPE*», as defined in Subparagraph 5.2.1 unless approved by amendment in accordance with Subparagraph 9.5.2.
- 5.2.3 Reconciliation of Actual Direct Personnel Expense with Invoiced Direct Personnel Expense.** The Construction Manager shall, at the end of the performance of the services under this Agreement, and prior to final payment being due, provide the Commission with an accounting that reconciles all invoiced hourly rates with the actual Direct Personnel Expense as defined for all hours billed on the project.

**5.3 Basic Fee.** In addition to the Direct Personnel Expense, the Construction Manager will receive a Basic Fee for home office overhead and profit in the amount of «*BasicFee*». The Basic Fee portion of compensation is a condition of the proposal submittal process. The Basic Fee shall be 2% of the construction budget as determined at the time of entering into this Agreement, with no representation that additional Basic Fee will be approved if the construction budget changes.

**5.4 Reimbursable Expenses.**

5.4.1 Definition. Reimbursable Expenses means actual expenditures incurred by the Construction Manager or its Consultants in the interest of the Project approved by the Commission according to the Commission's Policy on Overhead and Reimbursable Expenses, attached to this Agreement and labeled Exhibit A, for: (1) the Project field office and equipping and furnishing thereof, including without limitation utilities; (2) postage, telephone, photographs, copying expenses and expenses incurred in the event of an emergency; (3) transportation and living when traveling in connection with the Project, if approved in advance by the Commission; and (4) expenses that are negotiated prior to entering into an Agreement and specifically listed in the approved Implementation Plan.

5.4.2 Limits on Transportation and Living Expenses. The cost for transportation and living expenses in connection with the Project shall be in accordance with OBM Administrative Travel Rule, OAC 126-1-02, as amended from time to time. The Commission will provide a copy of travel reimbursement rates to a Construction Manager upon request.

5.4.3 Limits on Tangible Property. The determination of whether to purchase or rent tangible property as Reimbursable Expenses must be approved in advance by the Commission. The Construction Manager shall maintain a current inventory of all such property and any such property that has been purchased and has a useful life after Project Closeout for disposition in accordance with procedures and instruction issued by the Commission. No other expenditures shall be Reimbursable Expenses unless so provided in an amendment in accordance with Subparagraph 9.5.2.

5.4.4 Limit. The Construction Manager shall use all reasonable means to minimize Reimbursable Expenses. In all events, Reimbursable Expenses, excluding Optional Demolition/Abatement shall not exceed «*Reimbursables*» without the written approval of the Commission and the School District Board and an amendment in accordance with Subparagraph 9.5.2. Reimbursable Expenses for the following items shall not exceed the respective amounts unless approved by the Commission.

**5.5 Optional Demolition/Abatement Expenses and Fees.** The Commission shall pay the Construction Manager the respective expenses and fees for optional demolition/abatement services. The optional demolition/abatement budget for the project is «*DemoBudget*». The optional demolition budget is not included in the amount of the Construction Budget. The Direct Personnel Expenses shall not exceed the amount of «*DemoDPE*». Reimbursable Expenses shall not exceed the amount of «*DemoReimbursables*». A Basic Fee will be due to the Construction Manager in the amount of «*DemoBasicFee*», 2% of the contract price of the optional demolition/abatement.

## 5.6 Method and Terms of Payment.

- 5.6.1 Direct Personnel Expenses. Payment of the Direct Personnel Expenses will be made on a monthly basis upon receipt of a properly completed and certified Construction Manager's Pay Request. The Construction Manager will retain documentation to support its request for payment, and this documentation will be available for audit upon the request of the Commission or the School District Board.
- 5.6.2 Basic Fee. Payment of the Basic Fee shall be made monthly in proportion to services performed in each Phase in accordance with the following percentages of the Basic Fee:

Preconstruction	35%
Construction Phase	60%
Project Closeout	5%

Any balance of the final 5% of the Basic Fee shall be paid upon Project Closeout as follows; one-half after review of all Punch-Lists by the Construction Manager and one-half after completion of all Punch-List items to the reasonable satisfaction of the Commission and the School District Board and delivery of Project Record Submittals to the Architect. The Commission may waive the withholding of any final balance or part thereof, if Construction Manager has performed to the reasonable satisfaction of the Commission and the School District Board. The Basic Fee, including without limitation the final 5% thereof, shall be subject to all setoffs in favor of the State for claims against the Construction Manager. Payments for Basic Services shall be based upon a properly completed Construction Manager's Pay Request and shall be made within the applicable time limits provided by Section 126.30 of the Ohio Revised Code.

- 5.6.3 Direct Personnel Expense, Reimbursable Expenses, Additional Fees. Payments for Direct Personnel Expense as set forth in Paragraph 5.1 and for Reimbursable Expenses as set forth in Paragraph 5.2 and any Additional Fees for Additional Services in accordance with Article III and Subparagraph 5.4, shall be made monthly based upon services performed or expenses incurred, as applicable, and as shown by a properly completed Construction Manager's Pay Request. Without exceeding the total compensation approved in Section 5.1 of this Agreement, the allocation of costs in the Construction Manager's approved Implementation Plan may be adjusted upon request of the Construction Manager and approval by the Commission.
- 5.6.4 Payments by Construction Manager. Within ten (10) business days of receipt of payment made pursuant to this Agreement, the Construction Manager shall pay all portions thereof due to Consultants and to persons who provided items the expenses of which are Reimbursable Expenses.
- 5.6.5 Compensation for Extension of Project Time. If the Construction Manager notifies the Commission not less than thirty (30) days prior to the time for completion of the Project set by the Project Schedule approved pursuant to Subparagraph 2.6.9, that such time for completion is reasonably expected to be exceeded by more than thirty (30) days through no fault of the Construction Manager, the compensation, if any,

for Basic Services to be rendered and Reimbursable Expenses to be incurred during such extended period shall be negotiated to the mutual reasonable satisfaction of the Commission and the Construction Manager. If, as a result of such negotiation, the Commission agrees that the Construction Manager shall be paid additional compensation, an amendment to that effect shall be executed in accordance with Subparagraph 9.5.2 before the Construction Manager renders any services made necessary by such extension of the time of completion, unless otherwise agreed in writing by the Commission.

- 5.6.6 Compensation for Change of Scope of Project or Construction Budget. The Scope of the Project is defined by the Approved Program of Requirements as provided in Subparagraph 2.2.2. The Construction Budget is defined in Subparagraph 1.1.2. If the Commission and the School District Board materially change the Scope of the Project after the Schematic Design Phase or the Construction Budget at any time after the execution of this Agreement through no fault of the Construction Manager, any necessary adjustment in the compensation of the Construction Manager shall be negotiated to the mutual reasonable satisfaction of the Commission and the Construction Manager. If, as the result of such negotiation, the Commission agrees that the Construction Manager shall be paid additional compensation, an amendment to that effect shall be executed in accordance with Subparagraph 9.5.2 before the Construction Manager renders any services made necessary by such change in the Scope of the Project or the Construction Budget, unless otherwise agreed in writing by the Commission.

## ARTICLE VI

### INSURANCE, INDEMNIFICATION AND FINANCIAL ASSURANCE

#### 6.1 Insurance

- 6.1.1 Casualty Insurance. Except when a modification is requested in writing by the Construction Manager and approved in writing by the Commission and the School District Board, the Construction Manager shall carry and maintain at the Construction Manager's cost, with companies authorized to do business in Ohio, all necessary liability insurance (which shall include as a minimum the requirements set forth below) during the term of this Agreement:
- a. Workers' Compensation and employer's liability insurance to the full extent as required by applicable law;
  - b. Commercial general liability coverage for bodily injury and property damage, including limited contractual liability coverage, in not less than the following amounts:
    - i. General Aggregate Limit:  
\$2,000,000 each occurrence;
    - ii. Each Occurrence Limit:  
\$1,000,000 each occurrence; and
  - c. Commercial automobile liability coverage, including non-owned and hired, in an amount not less than \$1,000,000.

6.1.2 Certificates. The Construction Manager shall provide the Commission and the School District Board with certificates of insurance evidencing the required coverages and amounts, including without limitation any certificates of renewal of insurance. The certificates of insurance shall contain a provision that the policy or policies will not be canceled without thirty (30) days' prior written notice to the Commission and the School District Board.

## **6.2 Indemnification.**

6.2.1 Indemnification by Construction Manager Generally. To the fullest extent permitted by law, the Construction Manager shall and does agree to indemnify and hold harmless the Commission, the School District Board and their members, officers, employees and representatives from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including attorney's fees and other costs of defense), of any nature, kind or description, which (a) arise out of, are caused by or result from performance of the Construction Manager's services hereunder and (b) are attributable to bodily injury, personal injury, sickness, disease or death of any person, or to damage to or destruction of property, including the loss of use and consequential damages resulting therefrom, but (c) only to the extent they are caused by any negligent acts of the Construction Manager, anyone directly or indirectly employed by the Construction Manager or anyone for whose acts the Construction Manager is legally liable. This Subparagraph is intended to be, and shall be construed as consistent with, and not in conflict with, Section 2305.31 of the Ohio Revised Code.

6.2.2 Intellectual Property Indemnification. To the fullest extent permitted by law, the Construction Manager shall and does agree to indemnify and hold harmless the Commission, the School District Board and their members, officers, employees and representatives from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including attorney's fees and other costs of defense), of any nature, kind or description, which result from any claimed infringement of any copyright, patent or other intangible property right caused by the Construction Manager, anyone directly or indirectly employed by the Construction Manager or anyone for whose acts the Construction Manager is legally liable. The Construction Manager shall not be required to indemnify and hold harmless such persons for such matters when the claimed infringement occurs in materials provided by the Commission, the Architect, or the School District Board.

**6.3 Financial Assurance.** Except when a modification is requested in writing by the Construction Manager and approved in writing by the Commission, the Construction Manager, as required by Section 9.333 of the Revised Code, shall provide to the School District Board a letter of credit pursuant to Chapter 1305 of the Ohio Revised Code, a surety bond pursuant to Sections 153.54 to 153.57 of the Ohio Revised Code, a certified check or cashier's check in an amount equal to the value of this Agreement or other reasonable financial assurances of a nature and amount satisfactory to the Commission and the School District Board before performing any services hereunder.

**ARTICLE VII**  
**DISPUTE RESOLUTION PROVISIONS**

- 7.1 Mediation.** Instead of, or in addition to, the procedures set forth below, the Commission, the School District Board and the Construction Manager may, by written agreement, submit any claims, requests, disputes or matters in question between or among them to mediation upon such terms as shall be mutually reasonably agreeable.
- 7.2 Notice and Filing of Requests.** Any request by the Construction Manager for additional fees or expenses shall be made in writing to the Commission and filed prior to payment of the final 5% of the Basic Fee. Failure of the Construction Manager to timely make such a request shall constitute a waiver by the Construction Manager of any request for such fees and expenses.
- 7.3 Request Information.** In every written request filed pursuant to Paragraph 7.2, the Construction Manager shall provide the nature and amount of the request; identification of persons, entities and events responsible for the request; activities on the Project Schedule affected by the request or new activities created by any delay and the relationship with existing activities; anticipated duration of any delay; and recommended action to avoid or minimize any future delay.
- 7.4 Meeting with Project Administrator.** If the Construction Manager files a written request with the Commission pursuant to Paragraph 7.2, the Commission shall, within thirty (30) days of receipt of the request, schedule a meeting in an effort to resolve the request and render a decision on the request promptly thereafter or render a decision on the request without a meeting, unless a mutual agreement is made to extend such time limit. The meeting scheduled by the Commission shall be attended by persons expressly and fully authorized to resolve the request on behalf of the Construction Manager.
- 7.5 Performance.** The Construction Manager shall proceed with the Construction Manager's performance of this Agreement during any dispute resolution process, unless otherwise agreed by the Construction Manager and the Commission in writing. The Commission shall continue to make payment, in accordance with this Agreement, of any amounts not in dispute pending final resolution of any dispute in accordance with this Paragraph.

**ARTICLE VIII**  
**TERMINATION AND REMEDIES**

- 8.1 Termination of Agreement.**
- 8.1.1 Means of Termination.** This Agreement may be terminated by either party upon seven (7) days written notice should the other party fail to perform in accordance with the terms of this Agreement; provided, however, the Construction Manager shall not terminate this Agreement for non-payment if the Commission initiates the payment process by preparing, executing and submitting a voucher for all reasonably undisputed amounts due to the Construction Manager within ten (10) days of receipt of the Construction Manager's written notice to terminate. This Agreement may be terminated by the Commission without cause upon fifteen (15) days written notice to

the Construction Manager. This Agreement may be terminated at any time upon the mutual consent of the Commission and the Construction Manager.

- 8.1.2 Construction Manager's Remedies Upon Termination by Commission Without Cause or Termination by Construction Manager. In the event of a termination which is not due to the failure of the Construction Manager to perform in accordance with the terms of this Agreement, the Construction Manager shall be compensated for all Basic Services of a completed Phase performed prior to the termination date in accordance with the percentages set forth in Subparagraph 5.4.1, together with Direct Personnel Expense and Reimbursable Expenses incurred prior to the termination date, and all reasonable demobilization costs. In such event, for services rendered prior to the termination date in an uncompleted Phase and for Additional Services, the Construction Manager shall receive compensation based on the percentages of completion of that Phase or those Additional Services, as applicable, and as reasonably determined by the Commission, together with Direct Personnel Expense and Reimbursable Expenses incurred prior to the termination date.
- 8.1.3 Construction Manager's Remedies Upon Termination by Commission for Cause. In the event of a termination which is due to the failure of the Construction Manager to perform in accordance with the terms of this Agreement, the Construction Manager shall be compensated only for Basic Services performed and paid for prior to the termination date in accordance with the percentages set forth in Subparagraph 5.4.1, together with Additional Services completely performed prior to the termination date. In such event, the Construction Manager shall be reimbursed only for that portion of the Basic Fee and Reimbursable Expenses incurred prior to the date of the notice of termination, unless the Commission consents in writing to the payment of Direct Personnel Expense and Reimbursable Expenses incurred after that date.
- 8.1.4 Construction Manager's Remedies Upon Termination by Mutual Consent. In the event of a termination upon the mutual consent of the Commission and the Construction Manager, any compensation for Basic Services or for Additional Services or payment of Direct Personnel Expense and Reimbursable Expenses shall be negotiated and set forth in an amendment to this Agreement in accordance with Subparagraph 9.5.2 prior to such termination.
- 8.1.5 Post-Termination Matters. If the Commission and the Construction Manager agree that any services are to be performed for the Project by the Construction Manager after any termination date, the amount of any compensation and the method and terms of payment of such compensation or any Direct Personnel Expense and Reimbursable Expenses related to such services shall be negotiated and set forth in an amendment to this Agreement in accordance with Subparagraph 9.5.2 prior to the commencement of such services. Such amendment and any relevant provisions of this Agreement shall survive termination of this Agreement.

## **8.2 Remedies**

- 8.2.1 Cumulative Remedies. No remedy conferred upon the Commission or the School District Board by the terms of this Agreement is intended to be exclusive of any

other remedy provided at law or in equity. Each and every remedy of the Commission or the School District Board shall be cumulative and shall be in addition to any other remedy given to the Commission or the School District Board hereunder or now or hereafter existing. Except as otherwise provided in this Agreement, no remedy conferred upon the Construction Manager by the terms of this Agreement is intended to be exclusive of any other remedy provided at law or in equity. Except as otherwise provided in this Agreement, each and every remedy of the Construction Manager shall be cumulative and shall be in addition to any other remedy given to the Construction Manager hereunder or now or hereafter existing.

- 8.2.2 **Remedies Not Waived.** No delay, omission or forbearance to exercise any right, power or remedy accruing to the Commission, the School District Board or the Construction Manager hereunder shall impair any such right, power or remedy or shall be construed to be a waiver of any breach hereof or default hereunder. Every such right, power or remedy may be exercised from time to time and as often as deemed expedient.

## **ARTICLE IX MISCELLANEOUS PROVISIONS**

### **9.1 School District Boardship and Use of Documents.**

9.1.1 **Property of State.** Drawings, Specifications and other documents prepared by, or with the cooperation of, the Construction Manager or any Consultant pursuant to this Agreement are the property of the School District Board whether or not the Project for which they are prepared is commenced or completed. The Construction Manager or Consultant, as applicable, may retain copies, including reproducible copies of such Drawings, Specifications and other documents for information and reference.

9.1.2 **Construction Manager's Intellectual Property.** All inventions, patents, design patents and computer programs acquired or developed by the Construction Manager in connection with or relation to the Project shall remain the property of the Construction Manager and shall be protected by the Commission and the School District Board from use by others except by agreement in writing with appropriate and agreed upon compensation to the Construction Manager.

9.2 **Public Relations.** Prior to completion of the Project, any public relations or publicity about the Project shall be solely within the control and with the consent of the Commission.

9.3 **Records.** The records of all the Construction Manager's Direct Personnel Expenses, Reimbursable Expenses and payments to Consultants pertaining to the Project shall be kept on a generally recognized accounting basis and shall be available to the Commission and the School District Board at all times and shall be maintained for seven (7) years after Final Acceptance of the Project by the Commission. All other records kept by the Construction Manager related to the Project shall be available to the Commission at all times and shall be maintained for seven (7) years after Final Acceptance of the Project by the Commission and the School District Board. The Commission may request the Construction Manager to retrieve requested project records at no additional cost during the time they are to be maintained by the Construction Manager.

**9.4 Successors and Assigns.** The Commission and the Construction Manager, each bind themselves, their successors, assigns and legal representatives, to the other party to this Agreement and to the successors, assigns and legal representatives of the other party with respect to all terms of this Agreement. The Commission and the Construction Manager each acknowledge that the School District Board is an intended third-party beneficiary of this Agreement. The Construction Manager shall not assign, or transfer any right, title or interest in this Agreement without the prior written consent of the Commission.

**9.5 Extent of Agreement.**

9.5.1 Entire Agreement. This Agreement and the Contract Documents represent the entire and integrated agreement between the Commission and the Construction Manager and supersede all prior negotiations, representations or agreements, either written or oral.

9.5.2 Amendments. This Agreement may be amended only by an amendment prepared by the Commission and signed by both the Construction Manager and the Commission..

9.5.3 Multiple Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be regarded as an original and all of which shall constitute but one and the same instrument.

9.5.4 Captions. The captions or headings in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections hereof.

9.5.5 Precedence. If there are any inconsistencies between the provisions of the Contract Documents, or this Agreement, the provisions of the Contract Documents shall prevail. In addition, the Construction Manager should refer to the provision of the Ohio School Design Manual for guidance wherever appropriate, including without limitation all exhibits thereto, for applicable procedures, policies and forms.

9.5.6 Conditions to Validity. None of the rights, duties and obligations contained in this Agreement shall be binding on any party until all legal requirements have been complied with, including without limitation that the Director of Budget and Management of the State first certifies that there is a balance in the appropriation not already obligated to pay existing obligations, as required by Section 126.07, Ohio Revised Code, all necessary funds are available from the applicable state agencies or instrumentalities and, when required, the expenditure of such funds is approved by the Controlling Board of the State of Ohio or other applicable approving body.

**9.6 Governing Law.**

9.6.1 Law of Ohio. This Agreement shall be governed by the law of the State of Ohio to the exclusion of the law of any other jurisdiction and the State of Ohio shall have jurisdiction over any action hereunder or related to the Project to the exclusion of any other forum.

9.6.2 Capitalized Terms. Capitalized terms in this Agreement shall have the same meaning as those in the Standard Conditions, unless otherwise defined herein or unless another meaning is indicated by the context.

**9.7 Assignment of Antitrust Claims.** Each party to this Agreement recognizes that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the ultimate purchaser of goods and services; in this instance the ultimate purchaser is the School District Board. Therefore, the following assignment is made:

Intending to be legally bound, the Construction Manager, acting herein by and through the person signing this Agreement on its behalf as a duly authorized agent, hereby assigns, sells, conveys and transfers to the School District Board any and all right, title and interest in and to any and all claims and causes of action which the Construction Manager may now have or hereafter acquire under the antitrust laws of the United States of America or the State, PROVIDED that the claims or causes of action relate to the particular goods, products, commodities, intangibles, or services purchased, procured, or acquired by, or rendered to, the School District Board pursuant to this Agreement, and EXCEPT as to any claims or causes of action which result from antitrust violations commencing after the price is established under this Agreement and which are not passed on to the School District Board by any means. In addition, the Construction Manager warrants and represents that it will require any and all of its Consultants and suppliers to assign any and all federal and State antitrust claims and causes of action to the School District Board, subject to the proviso and exception stated above. The provisions of this Subparagraph shall become effective at the time the School District Board executes its concurrence to this Agreement without further acknowledgment by any of the parties.

**9.8 Notices.**

9.8.1 Addresses. All notices, certificates, requests or other communications hereunder shall be in writing and shall be deemed to be given if delivered to the Contact Person, listed on Page 1 of the Agreement. The term 'in writing' shall include electronic communication through the information management systems established by the Commission.

9.8.2 (Reserved).

9.8.3 Facsimiles. For convenience of communication only, notices, certificates, requests or other communications hereunder of fewer than ten (10) pages, except requests for payment, may be sent by facsimile transmission. Notices, certificates, requests or other communications sent by facsimile transmission shall not be deemed to be given unless a counterpart is received or mailed in accordance with Subparagraph 9.8.1. Requests for payment may be sent to the Commission by facsimile transmission only upon specific direction from the Commission.

9.8.4 Emergencies. In the event of an emergency involving the Project, including, without limitation, a fatality, serious injury, fire, collapse, flood, utility or power loss to occupied facilities, explosion, or environmental damage, the Construction Manager

shall immediately notify the Commission and the School District Board by telephone.

9.8.5 Change of Address. The Commission, the School District Board or the Construction Manager may, by notice given hereunder, designate any further or different addresses telephone numbers or facsimile numbers to which subsequent notices, certificates, requests or communications shall be sent.

**9.9 Severability.** If any provision of this Agreement, or any covenant, obligation or agreement contained herein is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect any other provision, covenant, obligation or agreement, each of which shall be construed and enforced as if such invalid or unenforceable provision were not contained herein. Such invalidity or unenforceability shall not affect any valid and enforceable application thereof, and each such provision, covenant, obligation or agreement, shall be deemed to be effective, operative, made, entered into or taken in the manner and to the full extent permitted by law.

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**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement as of the date and year written below.

**«CM»  
("Construction Manager")**

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

\_\_\_\_\_

(Print Name)

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

Tax ID #: \_\_\_\_\_

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

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**OHIO SCHOOL FACILITIES COMMISSION**

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

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

**Appendix A**  
**POLICY ON**  
**OVERHEAD AND REIMBURSABLES**  
**INTRODUCTION**

This memo establishes the Commission's policy on compensating Construction Managers for overhead, reimbursable expenses, and mileage expenses. It is the intent of the Commission to compensate all Construction Manager's in a manner consistent with their corporate accounting methodologies, in accordance with Generally Accepted Accounting Procedures. This policy is not intended to contradict any requirements that are currently in the Construction Manager Agreement; rather it clarifies the Commission's requirements for submission of cost information as a precursor to reimbursement by the state.

**OVERHEAD**

Each Construction Manager will submit a statement that describes its actual procedures for incurring overhead costs. In general, overhead contains costs that cannot be segregated to a specific project. The following list of typical overhead costs is provided for **example only**:

Home office telephone

*Home office telephone charges*

*Home office facsimile*

*Telegrams*

*Postage*

*Photos*

*Photocopying*

*Home office clerical and accounting support*

*Home office labor (management, supervision)*

*Legal services*

*Travel and parking expenses*

This procedure should be consistent with corporate accounting policy and procedures, and should not be inconsistent with or contradict the methodology currently being used by the Construction Manager. Included within the description of overhead accounting procedures should be a list of cost items that are considered overhead costs. Additionally, each Construction Manager will detail its overhead rates for each of the past three years to the Commission.

**IMPLEMENTATION PLAN**

At the outset of executing its contract, the Construction Manager will provide a fee proposal and proposed Implementation Plan for hourly direct personnel expenses and reimbursable costs. This plan will describe the items the Construction Manager plans to purchase, when they will be purchased, and the estimated cost for all items. No reimbursable expenditures will be authorized until the Implementation Plan has been approved by the Commission. The Construction Manager

may include certain expenses in its Implementation Plan, in accordance with the following list of expenses that have been identified as appropriate by the Commission:

*Project Field Office (including “satellite headquarters”)*

*When a core office is approved as part of an Implementation Plan for a Commission project, the Construction Manager is permitted to include a project trailer, including move-in and set-up, in bid packages. None of the associated costs of a project field office may be included in bid packages. Whenever a core office is not established for central administrative purposes, the Construction Manager is to provide one (1) project field office for each district. The Construction Manager is permitted to include a trailer for separate project sites within a district, including move-in and set-up, in bid packages. None of the associated costs of a separate project site field office may be included in bid packages.*

*Office trailer rental*

*Office trailer move-in/set-up*

*Office trailer maintenance/repair*

*Office trailer utilities*

*Office furniture*

*Fax and answering machine*

*Copier & supplies*

*Office supplies*

*Postage*

*Express mail*

*Telephone and long distance*

*First aid materials*

*Bottled water*

*Communication Equipment (as defined by the Construction Manager’s communication strategy included in the Implementation Plan)*

*Miscellaneous blueprint expenses*

*Computer Equipment*

Description	Quantity	Similar to
Server capable of hosting web site and database applications	1 per CM	Dell PowerEdge 1300 with 128 MB RAM, 9GBhard drive, 15" monitor, mouse, keyboard, 40x CD-ROM sound card, Windows NT 4.0, or Windows 2000, UPS, Anti-virus, Backup system, plus 3-year warranty.  <a href="http://www.dell.com">www.dell.com</a>
Desktop PC's	As determined by OSFC	Dell OptiPlex GX110 with 128 MB RAM, 10 GB HD, mouse, keyboard, 16x CD-ROM, sound card, Windows98 or Windows 2000, Office 97 Pro, Adobe Acrobat, WinZip, Anti-virus, Backup, UPS  <a href="http://www.dell.com">www.dell.com</a>
Scanner capable of scanning 11 x 17 documents and photos	1 per CM	HP 8100C Digital Sender  <a href="http://www.hp.com">www.hp.com</a>
Color printer capable of printing to 11 x 17 documents	As determined by OSFC	HP 2500C with cable  <a href="http://www.hp.com">www.hp.com</a>
Laser printers	1 per job site	HP Laser 4050T with cable
Analog modems	1 per trailer, plus 2 at central	Cable, DSL or ISDN preferred, 56K acceptable

	location	
Digital camera	1 per school district	Sony MVC-FD73 digital camera  www.sony.com
Scheduling software	1 per CM	Primavera Project Planner, Suretrak
Project documentation	1 per school district	Expedition or ProLog Manager
Software upgrades	As required by OSFC	

The Construction Manager shall maintain a current inventory of all equipment, materials and supplies. Any such equipment, materials and supplies which has been purchased and has a useful life after Project Closeout shall be disposed of in accordance with procedures and instruction issued by the Commission. The Construction Manager will maintain an inventory with serial numbers of all equipment, materials and supplies, and will update it periodically.

All reimbursable items purchased by the Construction Manager and compensated by the Commission will be used solely for the management and administration of the projects being overseen by the Construction Manager; this includes any satellite or project offices. The Commission reserves the right to verify that the reimbursable items are being used exclusively on Commission projects.

If, during the course of the project, the Construction Manager becomes aware of an expense that has not been identified on the above list, or, if the Construction Manager has determined that the costs of a specific item may exceed \$5,000, the Construction Manager should notify the Project Administrator in writing, of all pertinent information relating to the proposed cost. The Project Administrator will make a determination of the appropriateness of the expense prior to the Construction Manager incurring the cost. In the event that written notification is not possible due to time constraints, the Construction Manager will contact the Project Administrator and discuss the proposed expenditure. Any information that relates to the expenditure will be included as support documentation to the invoice for cost for the specific expenditure.

## **MILEAGE REIMBURSEMENT**

The following guidelines define the Commission's policy in reimbursing mileage expenses incurred by the Construction Manager.

### **AUDIT RIGHTS**

The Commission shall have the right to examine all books, records, documents and other data related to the projects that it is overseeing.

The above referenced materials shall be made available at the office of the Construction Manager as applicable, at all reasonable times for inspection, audit and reproduction until the expiration of six (6) years after the date of acceptance of the project(s) by the Commission. Any documents copied by the Commission shall be protected as trade secrets and not subject to public disclosure under Section 149.43, ORC.

The right of inspection, audit and reproduction shall extend to all documents necessary to permit adequate evaluation of the cost of pricing data submitted along with the computations and projections used therein.

If the Contract has been terminated, in whole or in part, the records relating to the Work terminated shall be made available to the Commission for a period of three (3) years from the date of any applicable final settlement.

Records that relate to disputes, litigation, or settlement of claims arising out of the performance of the Work shall be made available until such dispute, litigation or claims have been finally decided or settled.

## Appendix B

### FACILITY DATA AND INFORMATION COLLECTION GUIDELINES FOR SCHOOL DISTRICTS / CONSTRUCTION MANAGERS

The Facility Information Collection by the team shall follow the written methodology and organizational procedures. The methodology and organizational guidelines are outlined below:

**The following is the required information to be collected, organized and *made available* to the Maintenance Plan Advisor by the team. This information is as per the scope and services of the Architect / CM team deliverables. Thus, this outline is for organizational purposes only relevant to the District & OSFC close-out documents. All information shall be collected and made available in compliance with these guidelines in a format as deemed appropriate by the District's Team.**

**Note: One option is to have all information placed in legal size manila folders and identified by tabs on file pockets and by labels on the manila folders.**

#### Required Data collection items:

1. A copy of the facilities drawings and specifications, preferably as-built documents if available.
2. A copy of the District's OSFC Master Plan sheet
3. Access to the Districts Original 'OSFC Assessment Report' (Renovated buildings only)
4. A copy of the construction documents (CD) cost estimate sheet(s) prepared by the construction manager for the facility.
5. A separate contact sheet with facilities locations, contact personnel including phone numbers and e-mail of superintendents, principals and maintenance personnel, etc.
6. A separate contact sheet listing all prime contractors and sub contractors names, addresses, phone, fax and e-mail.
7. A copy of all equipment submittals and submittal log.
8. A copy of *all* manufacturers equipment operation and maintenance manuals including kitchen, stage and any/all other state funded equipment.
9. A copy of all warranties including kitchen, stage and any/all other state funded equipment. (Construction Managers shall provide school districts with all equipment warranties and facilitate their completion and mailing). The Construction Manager shall log and retain a copy of the completed equipment warranties. The completed equipment warranties shall be placed in the individual equipment or system file.
10. Documentation of any system or equipment training activities given to the school facilities maintenance staff and administrators by vendors or technicians prior to or after the building was turned over to the school district. The Construction Manager shall log the type and date of any training activities and provide the MPA with any ancillary materials from the training sessions. Example: training tapes or written materials. The training log and materials shall be kept in a separate "Training" file.

The organization of the materials shall be compiled according to the 11 building categories and 52 Building Systems. All information associated with the system components and sub-components shall be placed in the individual system file.

The 11 categories are:

1. **Life/ Fire Safety**
2. **ADA/ Elevators/ Lifts**
3. **HVAC Systems**
4. **Building Envelope**
5. **Plumbing**
6. **Electrical**
7. **Misc. Equipment**
8. **Interiors**
9. **Site**
10. **Structure/ Support**
11. **Kitchen Equipment**

Each of the 52 individual building system information collection files shall be organized in the following manner.

Example:

Category: Life/Fire Safety LFFS-01

Building System: **Fire Protection System-General:** inclusive of all system components (fire hydrant, post indicator valve, backflow preventer, fire pump, jockey pump, flow device, sprinkler heads, control panel, enunciator panel, pull stations, duct detectors, smoke detectors, heat detectors, water storage tank (tower), water storage tank (ground level).

The information for each component of a building system shall be organized in the following order:

1. Any system or component certification documentation.
2. Building system component cut sheets and/or submittal information.
3. Building system component operations and maintenance manuals.
4. Building system component completed warranty. This would be a copy. The construction manager shall facilitate the completion of the warranty forms by the school district and log and file a copy.
5. Documentation of building system training and information.

State of Ohio  
Ohio School Facilities Commission

**INSTRUCTIONS TO BIDDERS**

[ABRIDGED TO FOCUS UPON ROLE OF CONSTRUCTION MANAGER]

***ARTICLE 1 - CONTRACT INFORMATION***

**1.2 PROJECT SCHEDULING AND COORDINATION**

- 1.2.2 The Construction Manager shall be responsible for scheduling the Project, coordinating the Contractors, and providing other services identified in the Contract Documents.
- 1.2.3 The award of separate Contracts for the Project requires sequential, coordinated and otherwise interrelated Contractor operations and may involve interference, disruption, hindrance or delay in the progress of any individual Contractor's Work. Each Contractor shall be an intended third party beneficiary of the Contract of each other Contractor performing Work on the Project. Each Contractor shall cooperate with the Architect, the Construction Manager and any other Contractors to minimize interference, disruption, hindrance or delay of any Work on the Project.

**1.3 GIVING NOTICE**

- 1.3.1 Whenever any provision of the Contract Documents requires the giving of notice, such notice shall be deemed to have been validly given if delivered personally to the individual or to a member of the entity for whom the notice is intended, or if delivered at or sent by registered or certified mail, postage prepaid, to the last business address of such individual or entity known to the giver of the notice.
- 1.3.1.1 All notices provided to the Bidder from the Construction Manager shall be copied to the Architect, the School District Board and the Project Administrator.
- 1.3.1.2 All notices provided to the Bidder from the Architect shall be copied to the Construction Manager, the School District Board and the Project Administrator.
- 1.3.1.3 All notices provided to the Bidder from the School District Board shall be copied to the Architect, Construction Manager and the Project Administrator.
- 1.3.1.4 All notices provided to the Bidder from the Commission shall be copied to the Architect, the Construction Manager and the School District Board.
- 1.3.1.5 All notices provided to the Architect from the Bidder shall be copied to the Construction Manager, the School District Board and the Commission.

1.3.1.6 All notices provided to the Construction Manager from the Bidder shall be copied to the Architect, the School District Board and the Commission.

1.3.1.7 All notices provided to the School District Board from the Bidder shall be copied to the Architect, the Construction Manager and the Commission.

1.3.1.8 All notices provided to the Commission from the Bidder shall be copied to the Architect, the Construction Manager and the School District Board.

## ***ARTICLE 2 - BIDDING PROCEDURES***

### **2.2 PRE-BID MEETING**

2.2.1 The Bidder is strongly encouraged to attend any pre-bid meetings, where the Architect and the Construction Manager will answer questions regarding the Contract Documents.

2.2.2 The Construction Manager, with the assistance of the Architect, shall prepare minutes of the pre-bid meeting for the Project record, which will be provided to a Bidder upon request.

### **2.3 INTERPRETATION**

2.3.1 If the Bidder finds any perceived ambiguity, conflict, error, omission or discrepancy on or between any of the Contract Documents, including without limitation the Drawings and Specifications, or between any of the Contract Documents and any applicable provision of law, including without limitation, the Ohio Building Code, the Bidder shall submit a written request to the Architect, through the Construction Manager, for an interpretation or clarification.

### **2.10 COPIES OF THE DRAWINGS AND SPECIFICATIONS**

2.10.1 The Construction Manager shall maintain at the Project site the general building permits and one (1) complete set of Drawings and Specifications approved by the Department of Commerce, Division of Industrial Compliance, or such local building department as determined pursuant to Section 4101:2-1-49 of the Ohio Administrative Code.

## ***ARTICLE 3 - BID OPENING AND CONSIDERATION OF BIDS***

### **3.5 BID EVALUATION PROCEDURE**

3.5.3 The Construction Manager shall obtain from the lowest Bidder and such other Bidders as the Construction Manager determines to be appropriate any information appropriate to the consideration of factors showing responsibility, including without limitation the following:

3.5.3.1 Overall experience of the Bidder, including number of years in business under present and former business names;

- 3.5.3.2 Complete listing of all ongoing and completed public and private construction projects of the Bidder in the last three years, including the nature and value of each contract and a name/address/phone number for each owner;
- 3.5.3.3 Complete listing of any public or private construction projects for which the Bidder has been declared in default; also, any EPA, OSHA or other regulating entity issues or citations in the last ten (10) years;
- 3.5.3.4 Certified financial statement and bank references;
- 3.5.3.5 Description of relevant facilities of the Bidder;
- 3.5.3.6 Description of the management experience of the Bidder's project manager(s) and superintendent(s);
- 3.5.3.7 Complete list of major subcontractors with an estimated contract value of \$250,000 or more, which the Bidder proposes to employ on the Project;
- 3.5.3.8 To support a Bond, a current and signed Certificate of Compliance required under Section 9.311, ORC, issued by the Department of Insurance, showing the Surety is licensed to do business in Ohio;
- 3.5.3.9 Current Ohio Workers' Compensation Certificate;
- 3.5.3.10 If the Bidder is a foreign corporation, i.e., not incorporated under the laws of Ohio, a Certificate of Good Standing from the Secretary of State showing the right of the Bidder to do business in the State; or, if the Bidder is a person or partnership, the Bidder has filed with the Secretary of State a Power of Attorney designating the Secretary of State as the Bidder's agent for the purpose of accepting service of summons in any action brought under Section 153.05, ORC, or under Sections 4123.01 to 4123.94, inclusive, ORC.

## ***ARTICLE 5 - BID ESTIMATE***

### **5.2 SUBSTANTIALLY LOW BID**

- 5.2.1 No Bidder shall be responsible if the Bidder's bid is more than 20 percent below the median of all higher bids received for a Contract where the estimate is \$100,000 or more, and no Bidder shall be responsible if the Bidder's bid is more than 25 percent below the median of all higher bids received for a Contract where the estimate is less than \$100,000, unless the following procedures are followed.
  - 5.2.1.1 The Construction Manager and the Architect conduct an interview with the Bidder to determine what, if anything, has been overlooked in the bid, and to analyze the process planned by the Bidder to complete the Work. The Construction Manager and the Architect shall submit a written summary of the interview to the School District Board and the Commission.
  - 5.2.1.2 The School District Board reviews and approves the Bidder's responsibility pursuant to paragraph IB 3.5.3.

5.2.1.3 The Construction Manager notifies the Bidder's Surety in writing that the Bidder with whom the School District Board intends to enter a Contract submitted a bid determined to be substantially lower than the median of all higher bids.

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Ohio School Facilities Commission

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**GENERAL CONDITIONS**

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[SELECTED SECTIONS RELATING TO THE CONSTRUCTION MANAGER]

***ARTICLE 4 - CONSTRUCTION PHASE COORDINATION***

**4.2 RESPONSIBILITY AND AUTHORITY OF THE CONSTRUCTION MANAGER**

4.2.1 The Construction Manager shall consult with the Architect, the School District Board, the Commission and any governmental authority having jurisdiction over the Project to obtain full knowledge of all rules, regulations or requirements affecting the Project. The Construction Manager shall establish the regular working hours, subject to approval by the Architect and the School District Board.

4.2.2 The Construction Manager shall schedule the Project and coordinate the Work of all Contractors with each other and with the activities and responsibilities of the School District Board, the Architect and the Commission to complete the Project in accordance with the Contract Documents.

4.2.2.1 If the Contractor fails to prosecute the Work in accordance with the Construction Schedule, the provisions of paragraph GC 5.3 may be invoked.

4.2.2.2 Coordination of the Work of the Contractors by the Construction Manager shall not relieve the Contractor from the Contractor's duty to supervise, direct and perform the Contractor's Work in accordance with the Contract Documents.

4.2.3 The Construction Manager shall develop the Construction Schedule for the Project in accordance with paragraph GC 4.3 and shall prepare and keep current, for the Architect's approval, a schedule of submittals which is coordinated with the Construction Schedule.

4.2.3.1 The Construction Schedule shall not exceed the time limit specified in the Notice to Proceed, shall provide for reasonable, efficient and economical performance of the Work and shall be related to the entire Project to the extent required by the Contract Documents.

4.2.3.2 The Construction Schedule shall be used to plan, organize and perform the Work, record and report actual performance and progress and show how the Contractor plans to complete the remaining Work by Contract Completion.

- 4.2.4 The Construction Manager shall monitor, update, coordinate and seek conformance to the Construction Schedule and shall initiate and coordinate revisions of the Construction Schedule as required by the Contract Documents.
- 4.2.5 The Construction Manager shall have the authority to disapprove or reject any item of Work which is Defective, or that the Construction Manager believes will not produce a Project that conforms to the Contract Documents. The Construction Manager shall immediately notify the Contractor, the Architect, the School District Board and the Commission whenever Work has been disapproved or rejected.
- 4.2.6 The Construction Manager shall render decisions in connection with the Contractor's responsibilities under the Contract Documents, and submit recommendations to the School District Board and the Commission for enforcement of the Contract as necessary.
- 4.2.7 The Construction Manager shall have the authority to approve the Contractor's Application for Payment and may recommend to the School District Board and the Commission that payments be withheld from, or Liquidated Damages be assessed against, a Contractor's Application for Payment, stating the reasons for such recommendation.
- 4.2.8 The Construction Manager shall attend and conduct any and all progress and coordination meetings. The Construction Manager shall prepare an agenda and a written report of each progress and coordination meeting and distribute the report to the Architect, the School District Board, the Commission and the Contractors. The Construction Manager shall not delegate the duty to prepare the agenda and written reports of any progress or coordination meeting.
- 4.2.9 In the event of default by any Contractor, the Construction Manager shall cooperate with the Architect, the School District Board and the Commission and the defaulting Contractor's Surety to Contract Completion.
- 4.2.10 The Construction Manager shall keep a daily log containing a record of weather, number of workers on site for each Contractor, identification of equipment, Work accomplished, problems encountered and other similar relevant data.
- 4.2.11 The Construction Manager, with the assistance of the Architect, shall render written recommendations, within the time specified, on any matter in question involving the Contractor and shall provide information or services to the School District Board and the Commission until final disposition of any dispute.
- 4.2.12 The Construction Manager shall not be responsible for construction means, methods, techniques, sequences, procedures, safety precautions and programs in connection with the Work. The services provided by the Construction Manager and the existence of schedules or services prepared or performed by the Construction Manager shall in no way relieve the Contractor from responsibility for complying with all the requirements of the Contract Documents.

### **4.3 CONSTRUCTION SCHEDULE**

- 4.3.1 Based upon information from the Contractors, the Construction Manager shall prepare the Construction Schedule for the Project.
  - 4.3.1.1 Within ten (10) days of the date of the Notice to Proceed, the Construction Manager shall furnish each Contractor a proposed schedule for the prosecution of Work on the Project.
  - 4.3.1.2 The Contractor shall, within ten (10) days of receipt of the Construction Manager's proposed schedule, prepare a proposed Construction Schedule to coordinate the Contractor's Work with the Work of all other Contractors and submit such proposed Construction Schedule to the Construction Manager together with all information requested and required by the Construction Manager to prepare the Construction Schedule. Failure of the Contractor to provide the proposed Construction Schedule shall constitute acceptance of the Construction Schedule as prepared by the Construction Manager and all other Contractors.
  - 4.3.1.3 The Construction Manager shall provide comments to the Contractor on the Contractor's proposed Construction Schedule. The Contractor shall revise the proposed Construction Schedule to incorporate those comments and submit four (4) copies of the revised Construction Schedule to the Construction Manager within ten (10) days of receipt of the comments.
- 4.3.2 The Contractor shall cooperate with the Construction Manager to prepare a Construction Schedule which shall include, without limitation, the following information.
  - 4.3.2.1 A graphic presentation of the sequence of the Work for the Project which includes, without limitation, the Contractor's manpower, material and financial resource loading curve;
  - 4.3.2.2 Shop Drawing review and approval, product procurement, fabrication, shop inspection, and delivery dates including lead times;
  - 4.3.2.3 Each phase of the Work, including Punch List, Project close-out requirements, Contract Completion and occupancy;
  - 4.3.2.4 Milestone dates that are required by the Contract Documents;
  - 4.3.2.5 The critical path of the Work;
  - 4.3.2.6 Disruptions and shutdowns due to other operations, facilities and functions, if any;
  - 4.3.2.7 The Contractor's signature;
  - 4.3.2.8 The Construction Manager's signature.

- 4.3.3 Immediately after the Contractors and the Construction Manager have signed the Construction Schedule, the Construction Manager shall submit a copy of the Construction Schedule and a schedule of submittals to the Architect.
- 4.3.3.1 The Architect shall review the Construction Schedule and schedule of submittals within ten (10) days of receipt, and approve them and submit them to the School District Board for approval or disapprove them and return them to the Construction Manager with recommendations for revisions.
  - 4.3.3.2 The Construction Manager and Architect may recommend to the School District Board and the Commission that no payment be made to Contractors without a Construction Schedule approved by the Construction Manager, the Contractors, the Architect, the School District Board and the Commission.
- 4.3.4 Unless otherwise specified by the Contract Documents, the Contractor shall, on a weekly basis, prepare and submit to the Construction Manager a written report describing activities begun or finished during the preceding week, Work in progress, expected completion of the Work, a projection of all activities to be started or finished in the following two (2) weeks, including without limitation, the Contractor's resource loading curve associated with such Work and any other information requested by the Construction Manager. The aforementioned information shall be included in the minutes of progress meetings on a timely basis.
- 4.3.5 Unless otherwise specified in the Contract Documents, the Construction Manager shall provide monthly progress reports to the Commission, the Architect and the School District Board which shall include recommendations for adjusting the Construction Schedule to meet milestone completion and Contract Completion dates.
- 4.3.5.1 When it is apparent to the Construction Manager or the Architect that critical path activities, scheduled milestone completion dates, or Contract Completion dates will not be met, the Construction Manager shall propose an affirmative plan to the School District Board and the Commission to avoid or minimize any delay. The Contractor shall cooperate with the Construction Manager to prepare an affirmative plan to avoid or minimize delay.
  - 4.3.5.2 Such a plan may include, without limitation, increasing the Contractor's workforce in such quantities as will eliminate the backlog of Work; increasing the number of working hours per shift, shifts per workday, workdays per week, the amount of construction equipment, or any combination thereof; rescheduling of activities to achieve maximum practical concurrency of Work efforts and, if appropriate, time extensions.
  - 4.3.5.3 The Construction Manager, with the assistance of the Architect, shall submit the plan to the Contractor for review and approval.

- 4.3.5.4 If all the Contractors approve the plan, a revised Construction Schedule shall be prepared by the Construction Manager and signed and approved in accordance with paragraphs GC 4.3.2 and 4.3.3.
- 4.3.6 Unless otherwise specified in the Contract Documents, the Construction Manager shall update the Construction Schedule on a monthly basis and upon any approval of all Contractors in accordance with subparagraph GC 4.3.5.4.
  - 4.3.6.1 The updated Construction Schedule shall be signed by the Contractor and the Construction Manager and shall serve as an affirmation that the Contractor can meet the requirements of the updated Construction Schedule.
  - 4.3.6.2 Once all Contractors have signed the updated Construction Schedule, the updated Construction Schedule shall be submitted by the Construction Manager to the Architect in accordance with paragraph GC 4.3.3.
  - 4.3.6.3 The School District Board and the Commission may withhold payment from the Contractors until the Contractor submits an updated Construction Schedule which is acceptable to the Construction Manager, the Architect, the School District Board and the Commission.

#### **4.4 PARTNERING**

- 4.4.1 In order to most effectively and efficiently accomplish the construction of the Project, the School District Board and the Commission encourage the formation of a cohesive, mutually beneficial partnering arrangement among all Contractors, the School District Board, the Commission, the Architect and the Construction Manager. Such an arrangement will strive to draw on the strengths, skills, and knowledge of each of the entities in an effort to achieve a quality Project, within budget, and on schedule.
- 4.4.2 The purpose of the partnering arrangement is to build cooperative relationships between such persons and avoid or minimize disputes and to nurture a more collaborative ethic characterized by trust, cooperation and teamwork. It is intended that this arrangement be a voluntary, non-binding, but formally structured arrangement among the entities, leading to an attitude that fosters risk sharing.
- 4.4.3 To create and implement the partnering arrangement, all such persons shall meet for the purpose of developing a partnering agreement. The agreement shall identify common goals and objectives, develop a problem solution and dispute resolution strategy, and an implementation plan.
- 4.4.4 Formal contractual relations, responsibilities and liabilities shall not be affected by any partnering agreement. Any cost associated with effectuating partnering or the partnering arrangement will be agreed to among such persons and will be shared equally with no change in Contract price.

## **4.5 PROGRESS MEETINGS**

- 4.5.1 Unless otherwise specified in the Contract Documents, the Construction Manager shall schedule a weekly progress meeting for all Contractors and other persons involved in the Project. The purpose of the progress meeting is to review progress in the Work during the previous week, discuss anticipated progress during the following weeks, and review critical operations and existing and potential problems.
- 4.5.2 The Contractor, the Construction Manager and the Architect shall be represented at every progress meeting by a person authorized with signature authority to make decisions regarding possible modification of the Contract Documents.
  - 4.5.2.1 The Construction Manager shall notify the Architect and the Contractors of the time and place of the progress meeting which shall thereafter be the same day and hour of the week for the duration of the Project, unless the Construction Manager shall notify the Contractors of a different day and hour at least two (2) days in advance.
  - 4.5.2.2 The Contractor shall have any of the Contractor's Subcontractors and Material Suppliers attend the progress meeting as deemed advisable by the Contractor or as requested by the Construction Manager or the Architect.
- 4.5.3 The Construction Manager shall prepare a written report of each progress meeting and distribute such report to the Architect, the Commission, the School District Board and the Contractor. The Construction Manager shall not delegate the duty to prepare a written report of each progress meeting.
  - 4.5.3.1 If any person in attendance objects to anything in a report of a progress meeting, the person shall notify the Construction Manager in writing explaining the objection.
  - 4.5.3.2 The report of each progress meeting shall reflect any objection made to the report of the previous progress meeting and any response thereto.

## **4.6 COORDINATION MEETINGS**

- 4.6.1 Unless otherwise specified in the Contract Documents, the Construction Manager shall schedule a weekly coordination meeting for all Contractors and appropriate Subcontractors and Material Suppliers. The Architect shall attend coordination meetings when requested by the Construction Manager.
  - 4.6.1.1 The purpose of the coordination meeting is to establish the exact location of each piece of equipment, pipe, duct, conduit, or other component of the Project; to discuss the sequence of construction consistent with the Construction Schedule, and to appropriately share available construction and storage space.

- 4.6.1.2 Unless otherwise specified in the Contract Documents, the Construction Manager shall prepare a written report of each coordination meeting and distribute the report to the Architect and the Contractors. The Construction Manager shall not delegate the duty to prepare a written report of each coordination meeting.
- 4.6.2 Unless otherwise specified in the Contract Documents, the HVAC Contractor shall, within 45 days of the date of the Notice to Proceed or such other period of time as mutually agreed by the HVAC Contractor and the Construction Manager, prepare one-fourth inch equals one foot scale drawings of all sheet metal work with plan and elevation dimensions to specifically locate all duct work, equipment and HVAC pipe work, either on the same or separate drawings.
  - 4.6.2.1 The HVAC Contractor will provide the drawings to the other Contractors for use in preparing drawings of the Contractor's Work, to specifically locate equipment, piping, conduit and other Work.
  - 4.6.2.2 The Contractor shall resubmit the drawings to the HVAC Contractor showing the location of the Contractor's equipment, piping, conduit, and other Work for preparation of detailed coordination drawings by the HVAC Contractor.
- 4.6.3 The Contractor shall be represented at every coordination meeting by a person authorized with signature authority to make decisions regarding possible modification of the Contract Documents. The Contractor shall have any of the Contractor's Subcontractors and Material Suppliers attend the coordination meeting as deemed advisable by the Contractor or as requested by the Construction Manager.

***ARTICLE 5 - RIGHTS AND RESPONSIBILITIES OF THE COMMISSION AND THE  
SCHOOL DISTRICT BOARD***

**5.3 RIGHT TO PROSECUTE WORK AND BACKCHARGE CONTRACTOR**

- 5.3.1 If the Contractor provides Defective Work or fails or neglects to prosecute the Work with the necessary diligence so as to complete the Work within the time specified in the Contract Documents or any portion of the Work by the applicable milestone date as set forth in the Construction Schedule, the Construction Manager shall notify the Contractor in writing of such Defective Work, failure, or neglect.
- 5.3.2 If the Contractor fails or refuses to cure such Defective Work or failure or neglect within three (3) working days after receipt of the written notice, the Construction Manager and the Architect shall recommend enforcement of the Contract to the School District Board and the Commission pursuant to paragraphs GC 3.1.2, 3.2.1.5, 4.2.5 and 4.2.6. Without prejudice to any other remedy the School District Board or Commission may have, the School District Board or Commission, or both, may employ upon the Work the additional force, or supply the materials or such

part of either as is appropriate, to correct the deficiency in the Contractor's Work, as determined by the School District Board and the Commission.

5.3.2.1 In such case, a Change Order shall be issued deducting from payments then or thereafter due the Contractor the costs of correcting such deficiency.

5.3.2.2 If the payments then or thereafter due the Contractor are not sufficient to cover such costs, the Contractor and the Contractor's Surety shall pay the amount of the insufficiency to the School District Board and the Commission.

5.3.2.3 The decision of the School District Board or the Commission, or both, to backcharge the Contractor shall be final.

#### ***ARTICLE 7 - CHANGES IN THE WORK***

### **7.3 CHANGE ORDER PROCEDURE**

7.3.2 The Construction Manager, with the assistance of the Architect, has responsibility for:

7.3.2.1 Preparing, reviewing, recommending, coordinating, monitoring and processing a Change Order and related documents.

7.3.2.2 Reviewing the Contractor's pricing within the stated time period, verifying the pricing complies with the Pricing Guidelines set forth in paragraph GC 7.4 and negotiating pricing, if necessary, to an equitable amount.

7.3.2.3 If the change is to have a not-to-exceed price based on performing the Work on a time and material basis, monitoring the Work and signing daily time tickets. If the changed Work should cost less than the maximum amount noted on the Change Order, preparing a deduct Change Order for the cost difference.

7.3.2.4 Reviewing and resolving the Contractor's request for an extension of time related to a Change Order.

7.3.2.5 Confirming that the Commission concurs with the change and has available funds or a written commitment for funding the Change Order.

7.3.2.6 Monitoring the overall Change Order process for timeliness and follow up.

#### ***ARTICLE 9 - CONTRACTOR PAYMENT***

## **9.2 APPLICATION FOR PAYMENT**

- 9.2.1 The Contractor shall submit monthly to the Construction Manager an itemized Application for Payment for Work performed based upon the Contract Cost Breakdown.
- 9.2.1.1 The Application for Payment shall be supported by data substantiating the Contractor's right to payment. The Contractor shall supply such additional documentation as the Construction Manager or the Architect may request in connection with each Application for Payment.
- 9.2.1.2 The Contractor shall list on the Application for Payment any approved Change Orders processed and performed during the time covered by the Application for Payment.

### ***ARTICLE 10 - FINAL INSPECTION AND ACCEPTANCE***

#### **10.1 CONTRACTOR'S PUNCH LIST**

- 10.1.1 When the Work, or designated portion thereof, is near completion, the Contractor shall prepare a list of all deficient items remaining on the Work or the designated portion thereof (the "Contractor's Punch List").
- 10.1.2 The Contractor shall proceed to correct all items listed on the Contractor's Punch List and verify that the deficient items have been corrected by signing said Punch List.
- 10.1.3 The Contractor shall submit the signed Contractor's Punch list to the Construction Manager and the Architect, together with a request for a Final Inspection of the Work.

#### **10.2 ARCHITECT'S PUNCH LIST**

- 10.2.1 The Architect and the Construction Manager shall, within seven (7) days of receipt of the request for Final Inspection, notify the Contractor of acceptance or rejection of the request for Final Inspection, stating reasons for any rejection.
- 10.2.2 Upon acceptance of the Contractor's request, the Architect and the Construction Manager shall conduct the Final Inspection to determine whether the Work, or designated portion thereof, is in conformity with the Contract Documents. The Construction Manager shall notify the Contractor, the Architect and the School District Board of the scheduled time of the Final Inspection.
- 10.2.3 Within three (3) days of the Final Inspection, the Construction Manager shall notify the Contractor of any items remaining in a deficient or unacceptable condition. The list of such items shall be known as the Architect's Punch List.

### ***ARTICLE 11 - CONTRACT COMPLETION***

## **11.1 PROJECT RECORD DOCUMENT SUBMITTALS**

- 11.1.1 The Contractor, as a condition precedent to execution of the certificate of Contract Completion, release of retainage and final payment, shall provide all Project record documents to the Construction Manager for review for conformity with the requirements of the Contract Documents, then transmittal to the Architect for approval, which may include, without limitation:
- 11.1.1.1 Certificate of Occupancy issued by the Department of Commerce, Division of Industrial Compliance, or such local building department as determined pursuant to Section 4101:2-1-49 of the Ohio Administrative Code;
  - 11.1.1.2 Inspection Certificates required and issued by the Department of Commerce, such as Pressure Piping, Elevator, Boiler, Electrical, etc.;
  - 11.1.1.3 Inspection Certificates required and issued by the Department of Commerce such as Plumbing or Piping Purification, etc.;
  - 11.1.1.4 Letter of Approval from the Fire Marshal for fire suppression system;
  - 11.1.1.5 Operating and Maintenance Manuals, which shall be organized into suitable sets of manageable size. Indexed data shall be bound in individual binders, with pocket folders for folded sheet information and appropriate identification shall be marked on the front and the spine of each binder;
  - 11.1.1.6 Neatly and accurately marked sets of As-Built Drawings and other Contract Documents reflecting the actual construction of the Project;
  - 11.1.1.7 Reproducible detailed Drawings reflecting the exact location of any concealed utilities, mechanical or electrical systems and components;
  - 11.1.1.8 Assignment to the School District Board of all Warranties and Guarantees, including the most recent address and telephone number of any Subcontractors, Material Suppliers, or manufacturers;
  - 11.1.1.9 An affidavit to certify that the Contractor has paid all Subcontractors, Material Suppliers and laborers in full for all Work performed or materials furnished for the Project.

## **11.2 RECORD DRAWINGS**

- 11.2.1 Upon completion of the Work, the Contractor shall organize the As-Built Drawings into manageable sets, bind the sets with durable paper cover sheets, certify to the accuracy of the As-Built Drawings by signature thereon, and deliver the As-Built Drawings to the Architect, through the Construction Manager. The Construction Manager shall review the As-Built Drawings and verify that, to the best of the Construction Manager's knowledge based upon the Construction Manager's

observations during the progress of the Work, the As-Built Drawings detail the actual construction of the Project.

- 11.2.2 The Architect shall revise the original Drawing tracings and computer files with the information contained on the As-Built Drawings provided by the Contractor. The revised original Drawing tracings or computer files shall be labeled "Drawings of Record" and reflect the date of the Architect's revision of the As-Built Drawings.
- 11.2.3 The School District Board may thereafter use the Record Drawings for any purpose relating to the Project including, without limitation, additions to or completion of the Project.

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<sup>i</sup> To the extent the “agency” designation is perceived as an indicator that the construction manager has inherent broad authority to bind the owner, it is a misnomer.

<sup>ii</sup> These documents are revised from time to time. For example, the 2007 version of the AIA owner-architect agreement will be significantly different from the 1997 version.

<sup>iii</sup> *See, e.g.*, AIA Document B352, “Duties, Responsibilities, and Limitations of Authority of the Architect’s Project Representative.”

<sup>iv</sup> *See, e.g.*, AIA Document 144/ARCH-CM, “Standard Form of Amendment to the Agreement Between Owner and Architect Where the Architect Provides Construction Management Services as Adviser to the Owner.”

<sup>v</sup> *See Sagamore Group, Inc. v. Comm’r of Transp.*, 614 A.2d 1255 (Conn. App. Ct. 1992).

<sup>vi</sup> *See, e.g.*, AIA Document B801/CMA, “Standard Form of Agreement Between Owner and Construction Manager Where the Construction Manager Is Not a Constructor,” and the related AIA Document A201/CMA, “General Conditions of the Contract for Construction - Construction Manager-Adviser Edition,” and CMAA Document A-1, “Standard Form of Agreement Between Owner and Construction Manager (for Agency).”

<sup>vii</sup> *See, e.g.*, AIA Document B144/ARCH-CM, “Standard Form of Amendment to the Agreement Between Owner and Architect Where the Architect Provides Construction Management Services as Adviser to the Owner.”

<sup>viii</sup> *Compare Nicholson v. Turner/Cargile*, 669 N.E.2d 529 (Ohio Ct. App. 1995), *with Campbell v. The Daimler Group, Inc.*, 686 N.E.2d 337 (Ohio Ct. App. 1996).

<sup>ix</sup> *Murdock Constr. Mgmt., Inc. v. E. Star Missionary Baptist Church, Inc.*, 766 N.E.2d 759 (Ind. Ct. App. 2002) (construction manager not able to file mechanic’s lien for supervisory services).

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<sup>x</sup> *Ratcliff Architects v. Vanir Constr. Mgmt., Inc.*, 106 Cal. Rptr. 2d 1 (Ct. App. 2001) (architect more like third-party beneficiary than agent); *Alliance Constr. Solutions, Inc. v. Dep't of Corrections*, 54 P.3d 861 (Colo. 2002) (construction manager within owner's attorney-client privilege despite being independent contractor).

<sup>xi</sup> *Menard, Inc. v. U.S. Equities Dev., Inc.*, No. 01 C 7142, 2002 U.S. Dist. LEXIS 17210 (N.D. Ill. Sept. 13, 2002).

<sup>xii</sup> See, e.g., section 4.2.1 of AIA Document A201/CMA describing the Architect and construction manager as "representatives" of the owner "only to the extent provided in the Contract Documents."

<sup>xiii</sup> See, e.g., *Poley Paving Co. v. United Cerebral Palsy Ass'n of Sullivan County*, 660 N.Y.S.2d 493 (App. Div. 1997); *Tharp v. Keeter/Schaefer Invs., L.P.*, 943 S.W.2d 811 (Mo. Ct. App. 1997); *Gateway Erectors Div. of Imoco-Gateway Corp. v. Lutheran Gen. Hosp.*, 430 N.E.2d 20 (Ill. App. Ct. 1981); *Martech Constr. Co. v. Ogden Envtl. Servs., Inc.*, 852 P.2d 1146 (Alaska 1993); *Attlin Constr., Inc. v. Muncie Cmty. Schs.*, 413 N.E.2d 281 (Ind. Ct. App. 1980).

<sup>xiv</sup> *Tonking v. Port Auth. of N.Y. & N.J.*, 821 N.E.2d 133 (N.Y. 2004).

<sup>xv</sup> See *John W. Goodwin, Inc. v. Fox*, 725 A.2d 541 (Me. 1999) (architect was owner's "agent" who "consented" to contractor's work for purposes of lien statute); *Fox v. Jenny Eng'g Corp.*, 505 N.Y.S.2d 270 (App. Div. 1986) (architect was not owner's agent for purposes of New York's Labor Law because architect did not "supervise or control" work where injury occurred).

<sup>xvi</sup> See *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 678 N.E.2d 519 (Ohio 1997); *F. Garofalo Elec. Co. v. N.Y. Univ.*, 705 N.Y.S.2d 327 (App. Div. 2000).

<sup>xvii</sup> *Kinetic Sys. v. R.I. Indus. Facilities Corp.*, No. KM 02-0616, 2003 R.I. Super. LEXIS 113 (R.I. Super. Ct. Aug. 4, 2003) (unpublished).

<sup>xviii</sup> See *Delahaye v. Saint Anns Sch.*, 836 N.Y.S.2d 233 (App. Div. 2007) (CM may be "agent of owner" for purposes of liability under New York labor law if it has supervisory control and authority over work being done when plaintiff is injured; general supervisory authority over project as whole is not enough; CM was not agent here); *Sheridan v. Albion Cent. Sch. Dist.*, 838 N.Y.S.2d 296 (App. Div. 2007) (CM directed particular work to proceed when injury occurred; this created genuine issue of fact about whether CM was owner's agent for purposes of New York labor law); *Paolangeli v. Cornell Univ.*, 723 N.Y.S.2d 835 (Sup. Ct. 2001) (owner and CM treated as one for claim based on nondelegable duty to comply with specific safety requirements of New York's labor law).

<sup>xix</sup> See *Creedon Controls, Inc. v. Banc One Bldg. Corp.*, 470 F. Supp. 2d 457 (D. Del. 2007) (CM at risk was not owner's agent but rather independent contractor, so owner could not be liable to electrical contractor for acts or omissions of CM at risk).

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<sup>xx</sup> See, e.g., *Stevenson v. HH&N/Turner*, No. 01-CV-71705-DT, 2002 U.S. Dist. LEXIS 26831 (E.D. Mich. Apr. 22, 2002); *Jones v. Parsons Transp. Group, Inc.*, No. JFM-03-526, 2004 U.S. Dist. LEXIS 10650 (D. Md. May 20, 2004). But cf. *Farabaugh v. Pa. Turnpike Comm'n*, 911 A.2d 1264 (Pa. 2006) (issue of fact whether construction manager breached contractual duty to owner, exposing CM to tort liability to injured worker).

<sup>xxi</sup> See, e.g., *CH2M Hill, Inc. v. Herman*, 192 F.3d 711 (7th Cir. 1999).

<sup>xxii</sup> *Wausau Bus. Ins. Co. v. Turner Constr. Co.*, 143 F. Supp. 2d 336 (S.D.N.Y. 2001).

<sup>xxiii</sup> 644 S.E.2d 440 (Ga. Ct. App. 2007).

<sup>xxiv</sup> *Kourafas v. Basic Food Flavors Inc.*, 88 P.3d 822 (Nev. 2004).

<sup>xxv</sup> See, e.g., *Baddeley v. Seek*, 156 P.3d 959 (Wash. Ct. App. 2007) (engineer hired by contractor to help obtain building permit had no duty to owner and therefore could not be liable to owner for misrepresentation, even if economic loss rule does not bar claim of fraud); cf. *Everman's Elec. Co. v. Evan Johnson & Sons Constr., Inc.*, 955 So. 2d 979 (Miss. Ct. App. 2007) (contractor was third-party beneficiary of agency CM's contract with owner, and could sue for breach of that contract).

<sup>xxvi</sup> *Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487 (Minn. Ct. App. 2002) (architect and construction manager not liable when action was filed after statutory period).

<sup>xxvii</sup> *Centex-Rooney Constr. Co. v. Martin County*, 706 So. 2d 20 (Fla. Dist. Ct. App. 1997).

<sup>xxviii</sup> See *Brown v. McBro Planning & Dev. Co.*, 660 F. Supp. 1333 (D.V.I. 1987) (CM was liable in negligence to person who slipped and fell in building).

<sup>xxix</sup> See, e.g., *Travelers Indem. Co. of Ill. v. 28 E. 70th St. Constr. Co.*, 296 F. Supp. 2d 476 (S.D.N.Y. 2003) (under New York law, CM, by analogy with architect, can be sued in contract or in tort for negligent performance of contractual duties); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986 (Wash. 1994) (economic loss rule accepted; contract principles override tort principles when parties have allocated risk; owner may not sue contractor in tort); *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 799 P.2d 250 (Wash. 1990) (Washington does not recognize cause of action for negligent design); *Ratcliff Architects*, 106 Cal. Rptr. 2d 1 (CM liable to owner but not architect for economic loss).

<sup>xxx</sup> *Presnell Constr. Managers, Inc. v. EH Constr. LLC*, 134 S.W.3d 575 (Ky. 2004); *Barnett v. Coppell N. Tex. Ct., Ltd.*, 123 S.W.3d 804 (Tex. Ct. App. 2003); *A.I.G. Constr. Co. v. Thomson*, No. 14-03-00021-CV, 2004 Tex. App. LEXIS 8178 (Ct. App. Sept. 9, 2004).

<sup>xxxi</sup> See *Oursler v. Women's Interart Ctr., Inc.*, 566 N.Y.S.2d 295 (App. Div. 1991); *Ritchie Capital Mgmt., L.L.C. v. Coventry First, LLC*, No. 07 Civ. 3494(DLC), 2007 U.S. Dist. LEXIS 51081 (S.D.N.Y. July 17, 2007).

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<sup>xxxii</sup> See CMAA Document 1-A, § 1.1.2.

<sup>xxxiii</sup> See, e.g., *Balch Enters. v. Ins. Co. of Pa.*, No. 03-01783, 2004 U.S. Dist. LEXIS 4222 (N.D. Cal. Mar. 12, 2004) (filing of notices by construction manager not professional services).

<sup>xxxiv</sup> See *Turner Constr. Co. v. Am. Mfrs. Mut. Ins. Co.*, 485 F. Supp. 2d 480 (S.D.N.Y. 2007) (construction manager, as additional insured under contractor's liability policy, was entitled to coverage even though contractor was not negligent); see also *Paolangeli*, 723 N.Y.S.2d 835.

<sup>xxxv</sup> *TDX Constr. Corp. v. Dormitory Auth.*, 759 N.Y.S.2d 878 (App. Div. 2003) (although construction manager had no cause of action against owner it could directly enforce insurance and indemnity provisions as third-party beneficiary).