GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL SERVICES

CONSTRUCTION MANAGEMENT AT-RISK SERVICES
BENNING STODDERT RECREATION CENTER

Solicitation #: DCAM-15-CS-0096

Addendum No. 2
Issued: February 23, 2015

This Addendum Number 02 is issued by e-mail on February 23, 2015. Except as modified hereby, the Request for Proposals ("RFP") remains unmodified.

Item #1

Budget Clarification: The Project Budget is $5.35 million.

Item #2

Form of Contract: Attached to this Addendum is the Form of Contract. THE TERMS OF THE FORM OF CONTRACT SHALL PREVAIL OVER THE RFP. TO THE EXTENT THERE IS AN INCONSISTENCY BETWEEN THE FORM OF CONTRACT ISSUED HEREWITH AND THE RFP, THE FORM OF CONTRACT SHALL GOVERN.

Item #3

The bid date remains unchanged. Proposals are due by **March 5, 2015 at 2:00 pm EST**. Proposals that are hand-delivered should be delivered to the attention of: Alicia Norris, Contract Specialist, at **Frank D. Reeves Center, 2000 14th Street, NW, 8th floor, Washington, DC 20009**.

- End of Addendum No. 2 -

CONSTRUCTION MANAGEMENT AT RISK AGREEMENT
BENNING STODDERT RECREATION CENTER

BY AND BETWEEN

THE DEPARTMENT OF GENERAL SERVICES
AND

[CONTRACTOR]

CONSTRUCTION MANAGEMENT AT RISK AGREEMENT
FOR BENNING STODDER RECREATION CENTER
DCAM-15-CS-0096

THIS AGREEMENT ("Agreement") is made by and between the **DISTRICT OF COLUMBIA GOVERNMENT**, acting by and through its **DEPARTMENT OF GENERAL SERVICES** (the "Department" or "DGS") and **[CONTRACTOR]**, duly organized under the laws of [STATE], and with a place of business at [ADDRESS] (the "Construction Manager", and together with the Department, the "Parties").

WITNESSETH:

WHEREAS, the Department desires to modernize the Benning Stoddert Recreation Center, located at 100 Stoddert Place, SE, Washington, DC, 20019 (the "Project");

WHEREAS, the Department has retained Sorg & Associates, P.C., (hereinafter referred to as the "Architect/Engineer") to develop a design for the Project and to provide Construction Administration Services;

WHEREAS, the Department issued a Request for Proposals dated February 12, 2015 (the "RFP") to engage a construction manager to work with the Architect/Engineer as it advances the design and to construct the approved design for the Project;

WHEREAS, the Construction Manager submitted a proposal entitled "[TITLE]" dated [DATE] to complete the Project;

WHEREAS, the Department wishes to retain the Construction Manager to provide construction management services for the Project;

WHEREAS, the Construction Manager wishes to provide the construction and related services necessary to complete the Project, subject to the terms and conditions set forth in the Contract;

WHEREAS, the Department anticipates that it will assign its contract with the Architect/Engineer (the "Design Contract") to the Construction Manager once a permit set of construction documents have been developed and a Guaranteed Maximum Price ("GMP") is established, and that from that point forward the Construction Manager shall be responsible for both the completion of the design and for the construction of the Project;

WHEREAS, the Department desires that the Project be completed no later than May 1, 2016 (the "Substantial Completion Date");

WHEREAS, the Department has retained the services of a Program Manager (the "Program Manager") to advise it concerning the Project; and

WHEREAS, the Department and the Construction Manager entered into a letter contract dated [DATE] (the "Letter Contract") pursuant to which the Construction Manager was authorized to proceed with certain preconstruction services in furtherance of the Project.

NOW, THEREFORE, the Department and Construction Manager, for the consideration set forth herein, mutually agree as follows.

ARTICLE 1
GENERAL PROVISIONS

Section 1.1 **Relationship of Parties.** The Construction Manager accepts the relationship of trust and confidence established with the Department by this Agreement, and covenants with the Department to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect/Engineer and the Program Manager in furthering the interests of the Department. The Construction Manager shall use its best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Department. The Department shall endeavor to promote harmony and cooperation among the Department, Architect/Engineer, Construction Manager, Program Manager, and other persons or entities employed by the Department for the Project. In performing its duties under this Contract, the Construction Manager shall at all times use the standard of care used by Construction Managers that construct state-of-the-art recreation centers in large, urban areas. Whenever the term "competent" is used herein to describe the Construction Manager's actions or duties, that term shall refer to the level of competence customarily possessed by those Construction Managers that construct state-of-the-art recreation centers in large, urban areas.

Section 1.2 **Project Description.** As a general description, the Project consists of Preconstruction, Construction, Abatement, and Demolition Services necessary to renovate the existing Benning Stoddert gymnasium building and construct a new, single story addition to the building, as depicted in the design documents listed on **Exhibit [ ]** no later than May 1, 2016 (the "Project"). It is anticipated that the gymnasium of the existing building will be renovated while the existing recreation block containing offices, restrooms, and multi-purpose rooms will be razed; that area will be excavated so that the new addition will be built at the same grade as the existing to remain gymnasium. The new facility will include large multi-purpose activity rooms, a demonstration kitchen, computer room, fitness area, lounge area, storage, locker rooms, restrooms, and a high-school competition sized gymnasium. In addition, the Construction Manager will be required to construct a new playground for all ages; furnish and install various site amenities (including benches, trash cans, and signage); construct new walkways and a new parking area; remediate stormwater run-off; and perform miscellaneous landscaping. The Department anticipates that the Benning Stoddert building will be closed to the general public once construction activities commence. The Project must achieve a minimum level of LEED Gold certification.

Section 1.3 **Program Manager.** The Department has engaged a Program Manager (or "PM") to provide certain program management functions on its behalf. Such Program Manager shall, at all times, be acting solely for the benefit of the Department, not the Construction Manager. **The Program Manager shall not be authorized to modify any of the rights or obligations of the Department or the Construction Manager pursuant to this Contract, or to issue Change Orders or Change Directives. The Construction Manager hereby acknowledges and agrees that only a duly authorized contracting officer shall have the authority to issue Change Orders or Change Directives on the Department's behalf. As of the date that this Agreement is signed, the Department's duly authorizing contracting officers are Jonathan Kayne and JW Lanum.**

Section 1.4 **General Description of Construction Manager's Duties.** The Construction Manager shall perform the services described in Articles 2 through 4. The Construction Manager shall supply and furnish at the location where the Work is to be performed all labor, materials, equipment, tools, services, and supervision, and shall bear all items of expense, necessary to complete and satisfactorily perform this Contract, except such items that the Department, in this Contract, specifically agrees to supply or furnish to or for the use of Construction Manager. Any labor, materials, equipment, tools, services or supervision not specifically described in this Contract, but which may be fairly implied as required thereby or necessary to properly complete the Contract Work, shall be deemed within the scope of the Contract Work and shall be provided by Construction Manager at Construction Manager's sole expense.

The services to be provided under Article 2 constitute the preconstruction phase services to be performed by the Construction Manager (the "Preconstruction Phase Services"). Article 3 provides for the process by which the Construction Manager and the Department shall agree upon a GMP for this Project. Article 4 constitutes the construction phase during which the Construction Manager shall carry-out the bulk of the construction and manage the completion of the design (the "Construction Phase Services").

Section 1.5 **Conformance with Laws.** It shall be the responsibility of the Construction Manager to perform the Contract in conformance with the Department's Procurement Regulations (27 DCMR § 4700 *et seq.*) and all statutes, laws, codes, ordinances, regulations, rules, requirements and orders of governmental bodies, including, without limitation, the U.S. Government and the District of Columbia government; and it is the sole responsibility of the Construction Manager to determine the Procurement Regulations, statutes, laws, codes, ordinances, regulations, rules, requirements and orders that apply and their effect on the Construction Manager's obligations thereunder. This Section 1.5 shall apply during both the Preconstruction Phase and the Construction Phase.

Section 1.6 **Warranties and Representations**

Section 1.6.1 All disclosures, representations, warranties, and certifications the Construction Manager makes in its proposal in response to the RFP shall remain binding and in

effect throughout the term of the Contract. The Construction Manager reaffirms that all such disclosures, representations, warranties, and certifications are true and correct.

Section 1.6.2 If any disclosure, representation, warranty or certification the Construction Manager has made or makes pursuant to the RFP or the Contract, including, without limitation, representations concerning the Construction Manager's construction or design experience and qualifications, claims or litigation history or financial condition, is materially inaccurate, that shall constitute a material breach of the Contract, entitling the Department to all available remedies.

Section 1.6.3 The terms and conditions of Section 1.6 shall apply during both the Preconstruction Phase and the Construction Phase.

Section 1.7 **Responsibility for Agents and Contractors.** At all times and during both the Preconstruction and Construction Phases, the Construction Manager shall be responsible to the Department for any and all acts and omissions of the Construction Manager's agents, employees, Subcontractors, Sub-Subcontractors, material suppliers, and laborers, and the agents and employees of the Subcontractors, Sub-Subcontractors, material suppliers, and laborers performing or supplying Work in connection with the Project.

ARTICLE 2
CONTRACTOR'S PRECONSTRUCTION PHASE SERVICES

Section 2.1 **Consultation and Analysis; Preconstruction Services.** During the Preconstruction Phase, the Construction Manager shall provide such preconstruction services as are necessary to properly advance the Project. These services shall include, but are not necessarily limited to, scheduling, estimating, and the ordering of long-lead materials. Throughout the Preconstruction Phase, the Construction Manager shall schedule and attend regular meetings with the Department, the Program Manager and the Architect/Engineer. In cooperation with the Department, the Program Manager and the Architect/Engineer, the Construction Manager shall conduct value engineering and constructability reviews, and provide scheduling and cost analysis for each phase of design with the goal of developing an acceptable Guaranteed Maximum Price proposal, as is defined more fully in this Article. Without limiting the generality of the foregoing, the Construction Manager shall prepare and submit the following:

.1 A preliminary schedule for the Project, including both the preconstruction phase activities as well as the construction phase activities. This schedule shall be prepared in a critical path method ("CPM") and be developed in a sufficient level of detail so as to permit the affected parties (i.e. the Department, the Architect/Engineer and the Construction Manager) to properly plan the Project and shall show: (w) key design milestones and bid packages; (x) release dates for long lead items; (y) release dates for key subcontractors; and (z) substantial and final completion dates.

.2 A preliminary cost estimate of current design documents and an outline of any issues identified during the Construction Manager's constructability review. The preliminary cost estimate shall be broken down in standard 16 division Construction Specifications Institute (CSI) format. The outline of constructability issues shall identify, among other things, any potential long lead items that could adversely impact the project schedule; such review shall be coordinate with the preliminary project schedule.

.3 A schedule of long lead items. This schedule shall be submitted no later than one (1) week after the date the Letter Contract becomes effective. The Construction Manager shall also prepare and submit to the Department written recommendations for procurement of long-lead time items which will constitute part of the Work as required to meet the Project Schedule. If the Department so determines, it may direct the Construction Manager to purchase such long items prior to commencement of the Construction Phase.

.4 A list of proposed value engineering strategies for the Project.

No later than [DATE] the Construction Manager shall provide to the Department the deliverables set forth in this Section 2.1. If the Construction Manager fails to submit in a timely manner any such deliverable, the Construction Manager shall forfeit the Preconstruction Fee. In addition, the Construction Manager shall consult with the Department, the Architect/Engineer and the Program Manager regarding site improvements, and the selection of materials, building systems and equipment with respect to such issues as maintainability and initial versus life-cycle costs. The Construction Manager shall also provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction costs including estimates of alternative designs or materials, preliminary budgets and possible economies.

Section 2.2 **Initial Project Schedule.** The Construction Manager has developed a schedule for the Project, a copy of which is attached hereto as **Exhibit [ ]**. The Construction Manager shall monitor the Project's progress and promptly notify the Department of any delays, regardless of their cause, the causes of such delays, and the Construction Manager's best projection of the effect of such delays on the Substantial Completion, and Final Completion of the Project. The Department's receipt of, and lack of objection to, any schedule update showing Substantial or Final Completion later than the scheduled Substantial or Final Completion Date shall not be regarded as the Department's agreement that the Construction Manager may have an extension of time, or as a waiver of any of the Department's rights, but merely as the Construction Manager's representation that, as a matter of fact, the Project may not be completed by the applicable Substantial or Final Completion Date. The Project Schedule shall be maintained and updated during the Preconstruction and Construction Phases.

Section 2.3 **Construction Administration Plan**. During the Preconstruction Phase and prior to the commencement of any trade work, the Construction Manager shall meet with the Department and the Architect/Engineer, and collectively, they shall develop a plan for the manner in which Construction Administration Services will be provided (the "Construction Administration Plan"). Among other things, The Construction Administration Plan shall include provisions addressing: (i) where construction administration services will be provided (i.e. on or off site); (ii) the staffing level that will be devoted to construction administration services; (iii) timelines for reviewing shop drawings, RFIs, etc.; and (iv) the process by which shop drawings, submittals, RFIs, etc. will be handled. Once agreed upon by the three parties, the Architect/Engineer shall provide construction administration services in accordance with the Construction Administration Plan.

As part of the Construction Administration Plan, the Construction Manager and the Architect/Engineer shall develop a mutually agreeable, written submittal schedule for each package. The Construction Manager acknowledges that Architect/Engineer will rely on such submittal schedule to develop its staffing plan. The Construction Manager shall receive submittals from trade subcontractors and will manage the submittal process, including, but not limited to, reviewing each request for information and submittal to determine that it is in the appropriate form and that it contains the appropriate information so as to allow the Architect/Engineer to efficiently review it, monitoring adherence to the submittal schedule and keeping a log, numbering each document, and tracking the status of each submittal. The Construction Manager shall promptly forward such submittals to the Architect/Engineer. Provided that submittals are submitted in accordance with the applicable submittal schedule, the Architect/Engineer shall review and respond to each submittal within the time agreed on such schedule. The Architect/Engineer shall review and respond to requests for information (RFIs and submittals) on average within seven (7) calendar days for RFIs and fourteen (14) calendar days for submittals, of initial receipt; provided, however, that the Architect/Engineer agrees that certain documents will require quicker processing and the Architect/Engineer shall use its reasonable best efforts to accommodate shorter timelines. Construction Manager agrees that certain documents will not be able to be processed in this timeframe and will work with the Architect/Engineer to accommodate such longer timeframe when possible. The Architect/Engineer shall review and approve or take other appropriate action upon the Construction Manager's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Architect/Engineer's action shall be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Department, Construction Manager or separate contractors, while allowing sufficient time in the Architect/Engineer's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Construction Manager as required by the Contract Documents. The Architect/Engineer's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect/Engineer, of any construction means, methods, techniques, sequences or procedures.

The Architect/Engineer's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

Section 2.4 Trade Bids.

Section 2.4.1 Subcontractors and Suppliers; Bidding Procedures. During the Preconstruction Phase, the Construction Manager shall seek to develop subcontractor interest in the Project. No later than [DATE] the Construction Manager shall provide to the Department a written submission on the proposed bidding procedures for the Department's review and approval. Such procedures shall include: (i) a list of proposed trades packages; (ii) a list of trade subcontractors that will be invited to bid on each such package; and (iii) a narrative description of the process.

Section 2.4.2 Bidding. Following the Department's approval of the design development documents, the Construction Manager shall solicit bids from trade subcontractors and suppliers based on the design development documents. **The Construction Manager shall solicit a minimum of three (3) bids for each trade package unless such package has an expected value of less than One Hundred Thousand Dollars ($100,000) or the Department approves otherwise.** In addition to the information normally required in such bids, the Construction Manager shall also require subcontractors to provide an estimate of the percentage of labor hours performed in completing the subcontracted work which will be performed by District residents.

Section 2.4.3 Bid Tab. As part of the negotiations leading up to the GMP, the Construction Manager shall provide to the Department tabulations of the trade bids solicited as well as copies of all such bids. Such bid tabulation shall include LSDBE and Workforce utilization information in addition to price and other information and specifically identify any levelling of the bids. Such bid tabulations as well as copied of the bids shall be submitted to the Department's Program Manager no later than [DATE]. The Construction Manager represents and warrants that the bid tabs so submitted shall fairly represent the results of the subcontractor bidding process and that the Construction Manager shall not misrepresent any such data to the Department or its Program Manager.

Section 2.4.4 Workforce Utilization. The Department has established a minimum requirement of the percentage labor hours for the Project which must be performed by District of Columbia residents (such requirement, the "Workforce Utilization Goal") which is set forth in Section 11.2.3 of this Agreement. As part of the subcontractors' bids for the work, the Construction Manager shall require that each subcontractor submit an estimate of the total number of the hours that will be required to complete the subcontracted work, and the estimated number of hours of such work that will be performed by District residents (the "Workforce Utilization Estimate"). The Construction Manager shall submit with the bid tabulations required by Section 2.4.3 of this Agreement the Workforce Utilization Estimate provided by each subcontractor. The Construction Manager shall ensure that the Workforce Utilization Estimate is considered as part of its subcontractor selection process.

Section 2.4.5 The Construction Manager shall forfeit the Preconstruction Fee in the event it fails (i) to timely provide the bid procedure submission as required by Section 2.4.1 of this Agreement; (ii) to solicit bids as required by Section 2.4.2 of this Agreement; or (iii) to provide bid tabulations as required by Section 2.4.3 of this Agreement.

Section 2.5 **Value Engineering.** Based on the trade bids received, the Construction Manager shall undertake a value engineering analysis and develop strategies necessary to reconcile the costs of constructing the Project with the Department's budget and schedule requirements. The Construction Manager shall meet with the Department's representatives to discuss any value engineering and changes in scope necessary to ensure that the programmatic and aesthetic requirements for the Project are met; the costs of constructing the Project are consistent with the Department's budget, and that the construction will be Substantially Complete no later than the Substantial Completion Date. Based on any approved value engineering strategies, the Construction Manager shall complete any revisions to the design documents and prepare any additional drawings necessary to complete the Project.

Section 2.6 **GMP Proposal.** Based on the trade bids received and any approved value engineering, the Construction Manager shall propose a Guaranteed Maximum Price (referred to as the "GMP Proposal"). The Construction Manager acknowledges and understands that the GMP Drawings & Specifications may be incomplete at the time it submits its GMP Proposal, but that the Guaranteed Maximum Price proposed therein is intended to represent the Construction Manager's offer to Fully Complete the Project. The Construction Manager shall meet with the Department to review the GMP Proposal and the written statement of its basis and to negotiate over its terms. In the event that the Department discovers any inconsistencies or inaccuracies in the information presented, such party shall promptly notify the Construction Manager, who shall make appropriate adjustments to the GMP Proposal, its basis or both. Unless the Department accepts the GMP Proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the GMP Proposal shall not be deemed accepted by the Department.

Section 2.7 **Failure To Agree Upon GMP.** In the event the Department and the Construction Manager are unable to agree upon a GMP and a project schedule for any reason, the Agreement will be terminated and the Department will only be obligated to pay the Construction Manager fifty percent (50%) of the Preconstruction Fee less any adjustments or deductions that result from the Construction Manager's failure to make any required submittal. In the event the Contract is terminated pursuant to this Section 2.7, the Department shall be free to use any of the information developed during the Preconstruction Phase to retain a new contractor to complete the Project.

Section 2.8 **Letter Contract.** The Parties acknowledge that certain of the preconstruction activities described in Article 2 of this Agreement were performed pursuant to the Letter Contract between the Parties dated [DATE]. Pursuant to the terms of the Letter Contract, upon the effectiveness of this Agreement, the Letter Contract shall automatically terminate and shall merge into and be superseded by this Agreement.

ARTICLE 3
FORMATION OF GUARANTEED MAXIMUM PRICE PROPOSAL

Section 3.1 General. During the Preconstruction Phase, the Department shall cause the Architect/Engineer to prepare the GMP Drawings & Specifications. Based upon the GMP Drawings & Specifications, the Construction Manager shall propose a Guaranteed Maximum Price (referred to as the "GMP Proposal"). The GMP Proposal shall be submitted in accordance with this Article. The Construction Manager acknowledges and understands that the GMP Drawings & Specifications will be incomplete at the time it submits its GMP Proposal, but that the Guaranteed Maximum Price proposed therein is intended to represent the Construction Manager's offer to Fully Complete the Project. If the Construction Manager's GMP Proposal is accepted by the Department, it shall be memorialized in form of an amendment to this Contract (such amendment, the GMP Amendment"). Such amendment shall be in the form of **Exhibit A** attached hereto. As part of the GMP Amendment, the Construction Manager shall certify that the GMP established thereby (i) contains sufficient amounts to perform all Work necessary to Fully Complete the Project; and (ii) contains sufficient amounts to provide and construct any items or facilities that are not contained in the GMP Drawings & Specifications but which are necessary for a fully functioning, state-of-the-art recreation center facility incorporating sustainable design initiatives (LEED Gold). The Construction Manager will further covenant and agree in the GMP Amendment that it will perform all of the construction work necessary to Fully Complete the Project, including, without limitation, aspects of the Work that are not shown on the GMP Drawings and Specifications but which are a logical development of the design intent reflected in the GMP Drawings and Specifications, for an amount not to exceed the Guaranteed Maximum Price.

Section 3.2 Review of GMP Drawings & Specifications. The Department has selected the Construction Manager because of its special expertise in constructing similar projects. Before submitting its GMP, the Construction Manager shall review the GMP Drawings & Specifications for accuracy, constructability and completeness and shall bring such deficiencies to the attention of the Department. To the extent that any such deficiencies in the GMP Drawings & Specifications could have been identified by such review by a competent Construction Manager, such deficiencies shall not be the basis for a change in the GMP or delaying the Project Schedule. To the extent that a competent Construction Manager could not have identified such deficiencies, the Department shall make an equitable adjustment in the Guaranteed Maximum Price, provided that the Construction Manager has given timely notice of the deficiencies and has taken all reasonable steps to mitigate the cost of such deficiency.

Section 3.3 Contingency. The Cost of the Work shall include a Contingency, a sum established by the Construction Manager to cover, among other things costs necessary to address scope expansion that is a logical development of the design, issues arising under Section 3.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order, such as costs that were not reasonably foreseeable as of the effective date of this

Agreement, including such items as emergencies, unforeseeable changes in market conditions for materials or labor, or subsurface, soils or site conditions that were neither known nor reasonably discoverable as of the effective date of the Contract. The Construction Manager may draw on the Contingency by making a written request to the Department, identifying the amount requested and the reason for the request, and by obtaining the Department's written approval, which shall not be unreasonably withheld. If the Department approves a draw against the Contingency, the Construction Manager shall, in subsequent required monthly reports, show an increase in the relevant line item by the amount drawn and a decrease in the line item for the Contingency. The Construction Manager shall keep records reasonably acceptable to the Department reflecting all draws against the Contingency.

Section 3.4 **Basis of Guaranteed Maximum Price.** The Construction Manager shall include with the GMP Proposal a written statement of its basis, which shall include:

.1 A list of the Drawings and Specifications, including all addenda thereto, that were used in preparation of the GMP Proposal.

.2 A list of allowances and a statement of their bases; provided, however, that only such allowances as are agreed to by the Department shall be included.

.3 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the GMP Proposal to supplement the information contained in the Drawings and Specifications. These clarifications will include specific reference to any exclusions from the building components, systems, and furniture, fixtures & equipment (FF&E) typically required for the operation of a state of the art recreation center facility. Such clarifications and assumptions must have been brought to the attention of Architect/Engineer, the Program Manager and the Department prior to submission of the proposal in sufficient time for any discrepancies to be reconciled.

.4 The proposed GMP, including a statement of the detailed cost estimate organized by trade categories, allowances, Contingency, and other items and the fee that comprise the GMP.

.5 A proposed Construction Phase Schedule which shall include, but not be limited to, the Substantial and Final Completion Dates, upon which the proposed GMP is based, and a schedule of the Construction Documents issuance dates upon which the Substantial and Final Completion Dates are based (the "Project Schedule").

.6 An LSDBE Utilization Plan setting forth the estimated dollar volume of the work that will be perform by small, local and disadvantaged business enterprises, as certified by the Department of Small and Local Business Development, upon which the GMP is based.

.7 A Workforce Utilization Plan setting forth, by subcontractor, the percentage participation of District residents in performing the labor necessary for the Project upon which the proposed GMP is based.

Section 3.5 **Department Review of GMP Proposal.** The Construction Manager shall meet with the Department to review the GMP Proposal and the written statement of its basis. In the event that the Department discovers any inconsistencies or inaccuracies in the information presented, the Department shall notify the Construction Manager, who shall make appropriate adjustments to the GMP Proposal, its basis or both.

Section 3.6 **Department Acceptance of GMP Proposal.** The Department and the Construction Manager shall meet to negotiate over the terms of the GMP Proposal. Unless the Department accepts the GMP Proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the GMP Proposal shall not be deemed accepted by the Department.

Section 3.7 **GMP Amendment.** Upon acceptance by the Department of the GMP Proposal, the Guaranteed Maximum Price and its basis shall be set forth in the GMP Amendment. The GMP Amendment shall be in substantially the form of Exhibit [ ] hereto. In the event the Department and the Construction Manager are unable to agree upon a GMP and a Project Schedule for any reason, the Contract will be terminated and the provision of Section 14.2 shall apply. In such an event, the Construction Manager shall forfeit Fifty Percent (50%) of the Preconstruction Fee. In the event the Contract is terminated pursuant to this Section 3.7, the Department shall be free to use any of the information developed during the Preconstruction Phase to retain a new contractor to complete the Project.

Section 3.8 **Assignment of Design Contract; Design Services.** It is contemplated that concurrent with the execution of the GMP Amendment, the Design Contract will be assigned to the Construction Manager. Once the Design Contract is assigned, the Construction Manager shall be required to manage the design and the activities of the Architect/Engineer. The Department, in its sole and absolute judgment, will determine the exact point at which the Architect/Engineer Contract will be assigned to the Construction Manager.

.1 The Construction Manager's duties in managing the Architect/Engineer contract shall include but are not limited to: (i) managing and coordinating the design work of the Architect/Engineer to ensure that the work is done in a timely manner and on schedule; (ii) directly coordinating all requests for information (RFI's) and resolving in the field where possible; (iii) ensuring that all shop drawings and submittals are coordinated; and (iv) maintaining a timely and accurate review and return of shop drawings and submittals by the Architect/Engineer.

.2 Notwithstanding the above, the Construction Manager shall not be responsible for performing the work of the Architect/Engineer or the aesthetic elements of the Architect/Engineer's contract; provided, however, that the Construction Manager shall ensure that the design evolves in a manner consistent with the approved design documents, the GMP and the Department's schedule and programmatic

requirements for the Project. In the event of a conflict in the approved design documents, the more expensive requirement shall govern.

The Parties expect that the Architect/Engineer will advance the design to a Permit Set of design documents which will serve as the basis for the Construction Manager's GMP for the Project. Once the Design Contract is assigned to the Construction Manager, the Construction Manager shall cause the Architect/Engineer to advance the approved design for the Project as necessary to complete the Project, including providing construction administration services.

Section 3.9 **Tax Exempt Status.** The Department expects that the Project will qualify as tax-exempt under the applicable laws, and such tax exemption is reflected in the GMP.

Section 3.10 **Extent of Responsibility and Site Conditions**

Section 3.10.1 The Construction Manager does not warrant or guarantee estimates and schedules except those that are included as part of the GMP proposal, and incorporated herein. The recommendations and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Department and the Department's professional consultants.

Section 3.10.2 During the Preconstruction Phase, the Construction Manager shall carefully examine all information the Department has provided concerning site conditions, including, but not limited to, soils and subsurface conditions, and shall carry out any further examinations, investigations, tests, borings, analyses and/or other studies of site conditions (including, but not limited to, surface, water, subsurface and soils conditions) that the Construction Manager deems necessary.

Section 3.10.3 The Construction Manager will be held to have satisfied itself as to transportation, facilities, the kind of facilities required before and during construction of the Project, access, working space and to have become acquainted with the labor conditions, the ecological and environmental conditions to be followed in performing this Contract.

Section 3.10.4 The Department expressly disclaims any representation or warranty that any information it has provided about the site is either accurate or complete. This disclaimer applies, without limitation, to any boring logs, geotechnical studies, or other data relating to site conditions, including, without limitation, soils or subsurface conditions. The Construction Manager, by entering into the Contract, agrees to assume all risks arising from site conditions, at or above the surface, foreseeable or unforeseeable, naturally occurring or man-made. The Construction Manager, however, shall be entitled to request an adjustment for Differing Site Conditions and Hazardous Materials Remediation Costs beyond those contemplated by the Contract Documents in accordance with Section 7.4 of this Agreement. (The terms "Differing Site Conditions" and "Hazardous Materials Remediation Costs" are defined in Article 16 of this Agreement.) Except as regards to Differing Site Conditions and Hazardous Materials Remediation Costs, the Construction Manager shall not be entitled to

adjustments to the Substantial or Final Completion Date, the GMP, the Preconstruction Fee, or the Construction Management Fee due to site conditions of any kind, whether known or unknown at the time this Agreement is entered into, and whether foreseeable at that time or not.

Section 3.11 Unsafe Materials and Hazardous Materials

Section 3.11.1 The Construction Manager shall not bring, spill or release onto the site asbestos, PCBs, or any other Hazardous Material that is not customarily used in a facility of the type and similar to the Project, and shall bring to the Department's attention any specification of such Hazardous Materials in the design documents. If the Construction Manager believes that anything in the Contract would require that it use or bring onto the site asbestos, PCBs, or any Hazardous Material that is not customarily used in a facility of the type and similar to the Project, it shall immediately inform the Department and seek direction before proceeding.

Section 3.11.2 The Construction Manager shall abate Hazardous Materials on the site as necessary to complete the Work contemplated by this Agreement. The Construction Manager shall comply with all laws, including, without limitation, the requirements of the EPA and all jurisdictional agencies as well as all laws relating to safety, health welfare, and protection of the environment, in removing, treating, encapsulating, passivating, and/or disposing of Hazardous Materials, including, but not limited to, removal, treatment, encapsulation, passivation, and/or disposal of the Hazardous Materials. If any notices to governmental authorities are required, the Construction Manager shall also give those notices at the appropriate times. **The Construction Manager shall ensure abatement subcontractors and disposal sites are appropriately licensed and qualified. In addition, the Construction Manager shall ensure that any subcontractors involved in the abatement of hazardous materials maintain a contractor's pollution legal liability insurance policy of at least Two Million Dollars ($2,000,000) for the duration of the Project and a period of three (3) years after Substantial Completion of the Project, and that any disposal site to which hazardous materials are taken carries environmental impairment liability insurance for the duration of the Project and a period of three (3) years after Substantial Completion of the Project.**

Section 3.13.3 The Construction Manager shall be entitled to submit a Change Request in accordance with Section 7.4 of this Agreement in the event the Construction Manager encounters Hazardous Materials beyond those contemplated in the GMP Drawings & Specifications.

Section 3.13.4 The Construction Manager shall keep detailed records documenting Work done so that the Department may independently verify compliance with all laws, the number of units actually removed, treated, and/or disposed of, and the appropriate unit price(s) applicable to the Work.

ARTICLE 4
CONSTRUCTION PHASE SERVICES

Section 4.1 **General.** The Construction Phase shall commence upon execution of the GMP Amendment by the Parties. The Construction Manager shall, through Subcontractors or, with the written consent of the Department, with its own forces, perform all of the Work necessary to construct the Project so that it is complete, safe, and properly built in strict accordance with the GMP Drawings and Specifications and the other requirements of the Contract. Without limitation, the Construction Manager shall provide all of the labor, materials, tools, equipment, temporary services, and facilities necessary to complete the construction and installation of the Project. The Work shall be carried out in a good and workmanlike, first-class manner, and in timely fashion. All materials and equipment to be incorporated into the Project shall be new and previously unused, unless otherwise specified, and shall be free of manufacturing or other defects.

Section 4.2 **Unrenovated Portions of the Structure.** In constructing the Project, the Construction Manager shall ensure that the unrenovated portions of the facility, including, but not limited to, building systems, are not adversely affected. All unrenovated portions of the school should function, at a minimum, at the level of functionality that existed immediately prior to the construction of the Project. If any unrenovated portion of the school functions at a lower level of functionality as a result of the Construction Manager's construction of the Project, the Construction Manager shall be back-charged the costs incurred by the Department in addressing the decreased functionality.

Section 4.3 **Design and Approval Process.** The Construction Manager shall complete the design of the Project so that it conforms to, and is a logical development of, the GMP Drawings and Specifications. The Construction Manager shall forward copies of all construction document packages and any material change thereto to the Department for approval. The Department shall have seven (7) days to approve the design construction document packages, and if the Department takes no action within seven (7) days, the design construction document packages shall be deemed approved. The Department can disapprove the design construction document packages or change thereto for any reason; provided, however, the Construction Manager may submit a request an adjustment to the GMP and/or the Substantial Completion Date pursuant to Section 7.4 if the Department disapproves a package unless such a package departs from the Scope of Work fairly reflected in the GMP Drawings and Specifications and in such an event the Construction Manager shall be required to cause to be prepared a revised design that satisfies the Minimum Design Requirements and without any entitlement to an increase in the GMP or an adjustment of the Substantial Completion Date.

Section 4.4 **Bidding/Subcontracting and Administration**

Section 4.4.1 It is contemplated that all or substantially all of the construction of the Project will be carried out by trade Subcontractors and that those trade subcontracts will be awarded through the competitive bid process contemplated in Section 2.4 of this Agreement. The trade subcontractors will be under written contracts with the Construction Manager. All subcontracts and agreements for the supply of equipment or materials awarded for the Project

shall be fixed-price contracts unless otherwise expressly authorized by the Department, in writing; provided, however, that such subcontracts shall include unit prices or other appropriate contractual provisions designed to address coordination and similar issues. The Construction Manager and its affiliates may not carry out trade work with its own forces without the Department's written permission, which permission may be withheld or conditioned by the Department in its sole and absolute judgment. The Construction Manager shall structure the bidding process and award subcontracts in a manner that is most advantageous to the Project taking into account all factors, including, but not limited to, project cost, the local, small and disadvantaged business subcontracting goals, workforce utilization goals, and any other goals or objectives established by the Department for the Project.

Section 4.4.2 The Construction Manager shall be responsible for dividing the Work into suitable bid packages, so that all of the bid packages taken together provide for complete performance of the Contract, without omissions or gaps, and so that obtaining bids from suitable potential trade Subcontractors and material suppliers is facilitated. The Construction Manager shall develop and discuss with the Department lists of suitable bidders which should be invited to bid on each package; shall administer actual solicitation of bids from potential trade Subcontractors and suppliers in accordance with the Project Schedule; and, unless the Department agrees otherwise, in writing, shall comply with or meet affirmative action requirements or objectives, shall obtain bids from at least three (3) contractors for trade packages or supply agreements, where the budgeted amount for the trade package or supply contract is in excess of One Hundred Thousand Dollars ($100,000). In addition to the open book reporting requirements set forth in Section 4.11, the Construction Manager shall provide to the Department a copy of all quotes or proposals submitted by potential Subcontractors as well as a tabulation of such quotes or proposals.

Section 4.4.3 Before awarding any subcontract, the Construction Manager shall review the Construction Documents including, but not limited to, all Drawings and Specifications provided by the Architect/Engineer, for accuracy, constructability and completeness (collectively, such matters are referred to as "Design Review Issues"). The Construction Manager shall promptly inform the Department of any such Design Review Issue and shall cause the Architect/Engineer to rectify any such Design Review Issue. The Construction Manager shall not be entitled to an extension of the Contract Time or in increase in the Guaranteed Maximum Price that are the result of the time lost while the Architect/Engineer is correcting any such Design Review Issue.

Section 4.4.4 The Construction Manager shall carefully document its procedures for making available bid packages to potential bidders, the contents of each bid package, discussions with bidders at any pre-bid meetings, bidders' compliance with bid requirements, all bids received, the Construction Manager's evaluations of all bids, and the basis for the Construction Manager's recommendation as to which bidders should be chosen. The Department shall be afforded access to all such records at all reasonable times so that, among other things, it may independently confirm the Construction Manager's adherence to all Contract requirements including, without limitation, affirmative action requirements and subcontracting requirements.

Section 4.4.5 The Department may, in its sole discretion, reject any or all bids and proposals received for any bid package, and may require the Construction Manager to obtain new or revised bids or proposals.

Section 4.4.6 The Department may, in its sole discretion, direct the Construction Manager to accept a bid from a qualified bidder other than the bidder to whom the Construction Manager recommends award of a subcontract or supply agreement. If the Department chooses this option, the Construction Manager may submit a Change Request in accordance with Section 7.4 of this Agreement for the difference between the cost of the subcontract or supply agreement awarded and the bid price of the Subcontractor or supplier recommended by the Construction Manager, but without any adjustment to the Construction Management Fee.

Section 4.4.7 The Department must approve all Subcontractors and suppliers. The Department may elect to review the form of any subcontract or agreement with a material supplier to ensure that such contract incorporates the contractual provisions required by this Agreement. The Construction Manager shall not substitute or replace any Subcontractor or supplier approved by the Department without the Department's prior written consent.

Section 4.4.8 The Construction Manager must contract for provision of all services and materials for the Project (other than Self-Performed Work which must be authorized in advance and in writing by the Department) via written subcontracts or, for contracts requiring provision of materials or equipment only, and not labor, via written supply agreements. All subcontracts and supply agreements shall include the following provisions:

.1 that, to the extent of the Work or supply within the agreement's scope, the Subcontractor or supplier is bound to the Construction Manager for the performance of all obligations which the Construction Manager owes the Department under the Contract;

.2 that the Subcontractor or supplier is not in privity with the Department and shall not seek compensation directly from the Department on any third-party beneficiary, quantum meruit, or unjust enrichment claim, or otherwise, except as may be permitted by any applicable mechanic's lien law;

.3 that the Department is a third-party beneficiary of the subcontract or supply agreement, entitled to enforce any rights thereunder for its benefit;

.4 that the Subcontractor or supplier consents to assignment of its agreement to the Department, at the Department's sole option, if the Construction Manager is terminated for default;

.5 that the Subcontractor or supplier shall comply immediately with a written order from the Department to the Construction Manager to suspend or stop work;

.6 that the Subcontractor or supplier shall maintain records of all Work it is requested or authorized to do on a time and material or cost-plus basis, or with respect to claims that it has asserted on a time and materials or cost-plus basis, during the Project and for at least three (3) years after the Project is Substantially Complete and requiring the Subcontractor or supplier to make those records available for review or audit by the Department during that time;

.7 that the Subcontractor and Sub-subcontractors, at all tiers, have reviewed the Construction Documents including, but not limited to, all Drawings and Specifications provided by the Architect/Engineer, for accuracy, constructability and completeness and will bring any deficiency to the attention of the Department before the Subcontractor enters into a subcontract with the Construction Manager;

.8 that the Subcontractor shall obtain and maintain, throughout the Project, workers' compensation insurance in accordance with the laws of the District of Columbia (This provision is not applicable to supply agreements.);

.9 that, if the Department terminates the Contract for convenience, the Construction Manager may similarly terminate the subcontract or supply agreement for convenience, upon seven (7) days' written notice to the Subcontractor or supplier, and that the Subcontractor or supplier shall, in such a case, be entitled only to the costs set forth in the Termination for Convenience provisions of this Agreement;

.10 that the Department shall have the right to enter into a contract with the Subcontractor or supplier for the same price as its subcontract or supply agreement price less amounts already paid, if the Construction Manager files a voluntary petition in bankruptcy or has an involuntary petition in bankruptcy filed against it;

.11 that, if it comes to the Department's attention that a Subcontractor or supplier has not been paid in timely fashion (other than for disputed amounts), and if the Construction Manager fails to cure the problem within ten (10) calendar days after the Department gives it written notice of the problem, the Department may make payments to the Subcontractor or supplier and Construction Manager by joint check;

.12 that the Subcontractor or supplier shall not be entitled to payment for defective or non-conforming work, materials or equipment, and shall be obligated promptly to repair or replace non-conforming work, materials or equipment at its own cost;

.13 a provision substantially similar to Section 4.4.9 of this Agreement, requiring that Subcontractors and suppliers promptly pay Subcontractors and suppliers at lower tiers, imposing upon the Subcontractors and suppliers a duty to pay interest on

late payments, and barring reimbursement for interest paid to lower tier Subcontractors or suppliers due to a Subcontractor's or supplier's failure to pay them in timely fashion;

.14 a provision requiring that all Subcontractors at all tiers comply with the provisions of Article 11 (Economic Inclusion Goals); provided, however, that the Construction Manager may, in its reasonable discretion impose a different LSDBE subcontracting goal on some or all of its Subcontractors; provided, further, however, that nothing in this provision shall be deemed to excuse the Construction Manager from using its best efforts to achieve the LSDBE subcontracting goal on an aggregate basis for the Project;

.15 a provision which allows the Construction Manager to withhold payment from the Subcontractor if the Subcontractor does not meet the requirements of the Subcontract;

.16 lien and claim release and waiver provisions substantially identical to those in this Agreement.

Section 4.4.9 Within seven (7) days of receiving any payment from the Department that includes amounts attributable to Work performed, or materials or equipment supplied, by a Subcontractor or supplier, the Construction Manager shall either pay the Subcontractor or supplier for its proportionate share of the amount paid to the Construction Manager for the Subcontractor's or supplier's Work or materials or equipment, or notify the Department and the Subcontractor or supplier, in writing, of the Construction Manager's intention to withhold all or part of the payment and state the reason for the withholding. All monies paid to the Construction Manager under the Contract shall be used first to pay amounts due to Subcontractors or suppliers supplying labor or materials for the Project and only money remaining after such payments are made may be used for other items such as the Cost of the General Conditions or the Construction Management Fee. Monies paid by joint check shall be deemed to have been paid fully to the Subcontractor or supplier named as a joint payee, unless the Department agrees otherwise in writing. Any interest paid to Subcontractors or suppliers because the Construction Manager has failed to pay them in timely fashion shall not be reimbursable as part of the Cost of the Work.

Section 4.4.10 The Construction Manager shall not enter into any profit sharing, rebate, or similar arrangement with any Subcontractor or supplier at any tier with respect to the Project or the Work to be carried out for the Project.

Section 4.4.11 The Construction Manager shall not substitute or replace any Subcontractor or supplier approved by the Department without the Department's prior written consent.

Section 4.4.12 The Department has the right to contact Subcontractors or suppliers at all tiers or material or equipment suppliers directly to confirm amounts due and owing to them or

amounts paid to them for Work on the Project, and to ascertain from the Subcontractors or suppliers at all tiers their projections of the cost to complete their Work or to supply their material or equipment, or the existence of any claims or disputes. In doing so the Department shall not issue any directions to Subcontractors or Suppliers at any tier.

Section 4.4.13 If it comes to the Department's attention that a Subcontractor or supplier has not been paid in timely fashion (other than for disputed amounts), and if the Construction Manager fails to cure the problem within ten (10) calendar days after the Department gives it written notice of the failure to pay, the Department may make payments to the Subcontractor or supplier and Construction Manager by joint check.

Section 4.5 **Progress Meetings.** The Construction Manager shall schedule and conduct at a minimum bi-weekly progress meetings at which the Department, the Architect/Engineer, the Program Manager, the Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

Section 4.6 **Written Reports.** The Construction Managers shall provide monthly written reports to the Department's Program Manager on the progress of the entire Work in accordance with Section 4.10. The Construction Manager shall also maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, major equipment on the site, Work accomplished, problems encountered and other similar relevant data as the Department may reasonably require. The log shall be available to the Department, the Architect/Engineer and the Program Manager.

Section 4.7 **Cost Control System.** The Construction Manager shall develop a system of cost control for the Work in a format consistent with the GMP Drawings & Specifications and approved by the Department, which shall include, without limitation, regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Department, the Architect/Engineer and the Program Manager at regular intervals.

Section 4.8 **Key Personnel.**

Section 4.8.1 To carry out its duties, the Construction Manager shall provide at least the key personnel identified in **Exhibit C** to this Agreement, who shall carry out the functions identified in the Exhibit. Among other things, the Key Personnel shall include the project managers that will be responsible for managing the Work related to the Project's structural, mechanical, electrical and special systems. It is contemplated that these project managers will work from the design stage, purchasing and throughout the bulk of the field work. The Construction Manager's obligation to provide adequate staffing is not limited to providing the key personnel, but is determined by the needs of the Project. The Construction Manager shall not replace any of the key personnel without the Department's prior written approval, which shall

not be unreasonably withheld. If any of the key personnel become unavailable to perform services in connection with the Contract due to death, illness, discharge or resignation, then the Construction Manager shall promptly appoint a replacement acceptable to the Department. The Department shall be entitled to complete information on each such replacement, including a current resume of his or her qualifications and experience.

Section 4.8.2 Certain members of the Construction Manager's Key Personnel shall be subject to liquidated damages for their removal or reassignment by the Construction Manager. Those members of the Construction Manager's Key Personnel subject to the liquidated damages provisions of this Agreement shall be identified in **Exhibit C** as subject to the liquidated damages provisions. In the event there is no delineation in **Exhibit C** of those members of the Construction Manager's Key Personnel subject to the liquidated damages provisions of this Agreement, then all of the Key Personnel shall be subject to the liquidated damages provisions of this Agreement. In each instance where the Construction Manager removes or reassigns one of the key personnel listed in **Exhibit C** as being subject to liquidated damages (but excluding instances where such personnel become unavailable due to death, disability or separation from the employment of the Construction Manager or any affiliate of the Construction Manager) without the prior written consent of the Department's Designated Representative, the Construction Manager shall pay to the Department the sum of Fifty Thousand Dollars ($50,000) as liquidated damages and not a penalty, to reimburse the Department for its administrative costs arising from the Construction Manager's failure to provide the Key Personnel. The foregoing liquidated damage amount shall not bar recovery of any other damages, costs or expenses other than the Department's internal administrative costs. In addition, the Department shall have the right, to be exercised in its sole discretion, to remove, replace or to reduce the scope of services of the Construction Manager in the event that a member of the Key Personnel has been removed or replaced by the Construction Manager without the consent of the Department. In the event the Department exercises the right to remove, replace or to reduce the scope of services of the Construction Manager, the Department shall have the right to enforce the terms of this Agreement and to keep-in-place those members of the Construction Manager's team not removed or replaced and the remaining members shall complete the services required under this Agreement in conjunction with the new members of the Construction Manager's team approved by the Department.

Section 4.9 **Qualified Personnel/Cooperation.** The Construction Manager shall employ on the Project only those employees and Subcontractors who will work together in harmony and who will cooperate with one another on the Project. The Construction Manager shall enforce strict discipline, good order and harmony among its employees and its Subcontractors and shall remove from the site any person who is unfit for the work or fails to conduct himself in a proper and cooperative manner. If the Department requests removal of any person as unfit or as having behaved inappropriately, the Construction Manager shall promptly comply.

Section 4.10 **Monthly Reports.** On the fifth (5th) day of each month, from Notice to Proceed until Final Completion of the Project, the Construction Manager shall deliver to the Department and the Program Manager a written report including the following elements:

.1 **Schedule Update.** Each monthly update shall reflect actual conditions of Project progress as of the date of the update. The update shall reflect the actual progress of construction, identify developing delays, regardless of their cause, and reflect the Construction Manager's best projection of the actual date by which Substantial Completion and Final Completion of the Project will be achieved. Via a narrative statement (not merely a critical path method schedule), the Construction Manager shall identify the causes of any potential delay and state what, in the Construction Manager's judgment, must be done to avoid or reduce that delay. The Construction Manager shall point out, in its narrative, changes that have occurred since the last update, including those related to major changes in the scope of work, activities modified since the last update, revised projections of durations, progress and completion, revisions to the schedule logic or assumptions, and other relevant changes. Any significant variance from the previous schedule or update shall also be identified in a narrative, together with the reasons for the variance and its impact on Project completion. All schedule updates shall be in a form reasonably acceptable to the Department. The Department may make reasonable requests during the Project for changes to the format or for further explanation of information provided. Submission of updates showing that Substantial Completion or Final Completion of the Project will be achieved later than the applicable scheduled completion date shall not constitute requests for extension of time and shall not operate to change the scheduled completion date. The Department's receipt of, and lack of objection to, any schedule update showing Substantial Completion or Final Completion later than the dates agreed upon in the Project Schedule shall not be regarded as the Department's agreement that the Construction Manager may have an extension of time, or as a waiver of any of the Department's rights, but merely as the Construction Manager's representation that, as a matter of fact, Substantial Completion or Final Completion of the Project may not be completed by the agreed upon date in the Project Schedule. Changes to the scheduled completion dates may be made only in the circumstances and only by the methods set forth in this Agreement.

.2 **Cost Update.** The monthly update shall reflect, by Guaranteed Maximum Price line item, the original line item amount, approved, pending, and projected Change Order amounts, the cost incurred to date, the projected cost to complete the Work of the line item, and any variance between the actually approved budgeted balance of the line item and the projected cost to complete. A clear distinction must be made between approved Change Orders and those merely requested or anticipated. The report shall explain all variances including "buy-outs" or final actual costs including those below their respective Guaranteed Maximum Price line item. In addition, the report must disclose any instances in which the

Construction Manager has transferred amounts from one line item to another, or from the Contingency to any other line item. Neither submission of, nor the Department's failure to reject, an update reflecting that the projected cost to complete the Project will exceed the Guaranteed Maximum Price will operate to increase the Guaranteed Maximum Price or waive the Department's right to enforce the Guaranteed Maximum Price; nor shall such submission or failure to reject by the Department constitute approval of the expenditure of contingency funds or the transfer of funds from one line item to another. If the report reflects budget overruns, it must also include a recovery plan.

.3 **Economic Inclusion Report.** The monthly report shall include a detailed summary of the Construction Manager's efforts and results with respect to the economic inclusion goals set forth in this Agreement. Such report shall be in a format acceptable to the Department and shall include, at a minimum (i) the Construction Manager's overall performance with respect to the goals; (ii) a listing of subcontracts and agreements with material suppliers let by the Construction Manager and its Subcontractors during the month and the percentage of those subcontracts and agreements with material suppliers awarded to LSDBEs; (iii) a listing of subcontracts let by the Construction Manager and its Subcontractors during the month and the estimated percentage of the labor hours to be worked by District of Columbia residents pursuant to those subcontracts; and (iv) a description of the major subcontracting and supply opportunities that will be solicited during the next three (3) months and the actions being undertaken to meet the subcontracting goals.

.4 **Cash Flow Update.** If there have been any changes to the anticipated cash flow for the Project, they shall be disclosed and explained in the monthly report. If there are no such changes, the report shall so state.

.5 **Quality Assurance Report.** The monthly report shall include a detailed summary of the steps that are being employed in order to ensure quality construction and workmanship. Each report should specifically address issues that were raised by the Department and/or its Program Manager during the prior month and outline the steps that are being taken to address such issues.

.6 **Progress Photos.** The monthly report shall include updated progress photos that shall detail changes in the Work during the month.

Section 4.11 **Open Book Reporting.** The Construction Manager shall maintain an open book reporting system with the Department, allowing the Department or its consultants access to the Construction Manager's Subcontractors and material suppliers, invoices, purchase orders, Change Order estimates, records for Self-Performed Work, and other relevant documentation and sources of information concerning the Work or costs. The Department shall

not use its access to the Subcontractors to give instructions or directions to them. All instructions or directions shall be given only to the Construction Manager.

Section 4.12 Claims for Additional Time

Section 4.12.1 Time is of the essence of this Contract. The Construction Manager shall achieve Substantial Completion of the Project no later than May 1, 2016.

Section 4.12.2 The Construction Manager will perform the Work so that it shall achieve Substantial Completion by the Substantial Completion Date. Unless the failure to achieve Substantial Completion by the Substantial Completion Date is a result of an Excusable Delay, as defined in Section 4.12.3, the delay shall be deemed Non-Excusable and the Construction Manager shall not be entitled to an extension of time. Without limiting the generality of the foregoing, delays for the following reasons shall be regarded as Non-Excusable and shall not entitle the Construction Manager to an extension of time:

.1 Delays due to job site labor disputes, work stoppages, or suspensions of work;

.2 Delays due to adverse weather, unless the Construction Manager establishes that the adverse weather was of a nature and duration in excess of averages established by data from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration for the Project locale for the ten (10) years preceding the effective date of the Contract. For purposes of this clause, weather shall only be deemed "adverse" if the weather in question was more severe than that encountered at the Project site over the last ten (10) years for the month in question. Such determinations shall be made based on the number of rain/snow days or the cumulative precipitation total for the month in question. Notwithstanding the foregoing, named storms shall conclusively be deemed "adverse";

.3 Delays due to the failure of the Construction Manager or Subcontractors or material suppliers at any tier to perform in timely or proper fashion, without regard to concepts of negligence or fault; or

.4 Delays due to Site conditions whether known or unknown as of the effective date of the Contract, foreseeable or unforeseeable at that time, naturally occurring or man-made; provided, however, that delays due to Differing Site Conditions or Hazardous Materials Remediation shall be deemed an Excusable Delay.

Section 4.12.3 The Construction Manager shall be entitled to an adjustment in the Substantial Completion Date due to an Excusable Delay. The term "Excusable Delay" shall mean:

.1 Delays due to adverse weather other than those that are classified as a Non-Excusable delay in accordance with Section 4.12.2.2 of this Agreement;

.2 Delays due to acts of God, war, unavoidable casualties, civil unrest, and other similar causes of delay that are beyond the control of the Construction Manager; provided, however, that in no event shall a Non-Excusable delay or the action of the Construction Manager, or any of its employees, agents, Subcontractors or material suppliers be deemed an Excusable Delay; or

.3 Delays caused by Differing Site Conditions or Hazardous Materials Remediation

In addition to the forgoing, a delay shall be deemed to be an Excusable Delay only to the extent that such delay (i) warrants an extension in the Substantial or Final Completion Date; (ii) has not been caused by the Construction Manager or any of its employees, agents, Subcontractors or material suppliers; (iii) is of a duration of not less than three (3) days; (iv) is on Project's critical path; and (v) is in addition to any time contingency periods set forth in the critical path.

Section 4.12.4 If the Construction Manager wishes to make a claim for an increase in the Contract time, written notice as provided herein shall be given. The Construction Manager's claim shall include an estimate of the cost and of the probable effect of delay on the progress of the Work. In the case of continuing delay, only one claim is necessary.

Section 4.12.5 In no event shall the Construction Manager be entitled to an increase in the GMP or the Construction Management Fee as a result of either an Excusable or Non-Excusable Delay.

Section 4.13 Site Safety and Clean-Up.

Section 4.13.1 The Construction Manager will be required to provide a safe and efficient site, with controlled access. Prior to the start of the Construction Phase, the Construction Manager shall prepare a safety plan for the Construction Phase conforming to OSHA 29 CFR 1926. The Construction Manager shall abide by such safety plan during the Construction Phase.

Section 4.13.2 The Construction Manager shall be required to provide wheel washing stations on site so as to prevent the accumulation of dirt and other refuse on the streets surrounding the Project site.

Section 4.13.3 The Construction Manager shall be responsible for site security and shall be required to provide such watchman as are necessary to protect the site from unwanted intrusion.

Section 4.13.4 The Construction Manager shall be responsible for the cost of temporary power used during the construction of the Project, including, but not limited to, the cost of installing such temporary wiring as may be required to bring power to the site. The Construction Manager shall also be responsible for the cost of all temporary construction necessary on the site.

Section 4.14 **Close-out & FF&E.**

Section 4.14.1 The Construction Manager shall be responsible for purchasing and providing FF&E. A detailed list of FF&E requirements will be developed during the preconstruction phase.

Section 4.14.2 The Construction Manager shall be required to prepare and submit at close-out a complete set of product manuals, warranties, etc. The Construction Manager shall also provide the Department with a complete set of its Project files, including, but not limited to, shop drawings, etc., at close out so as to assist the Department and/or the District of Columbia Department of Parks and Recreation in operating the building. The Construction Manager shall prepare and submit all documents and materials contemplated by this Section 4.14.2 in accordance with "DGS Projects Turnover Protocol Manual" dated May 2013 Revision 0.0. In addition, at the beginning of the first heating and cooling season following turnover of the Project, the Construction Manager shall be available to assist with, and train the building engineers and staff in the start-up of the building systems for the new weather cycle.

Section 4.14.3 An allowance for cleaning and other move-in services as directed by the Department shall be included in the GMP. Such allowance is in addition to cleaning services that would otherwise be required by the Construction Manager, including, but not limited to, the obligation to deliver a broom clean building at the end of construction.

Section 4.15 **Control of the Site.** The Construction Manager shall take control of the site immediately after being provided notice to proceed with Construction services and shall install the necessary construction fences and other devices to properly secure the site.

Section 4.16 **Salvaged and Stored Items.** The Construction Manager shall be responsible for salvaging and storing all items as identified by the Department.

Section 4.17 **Sediment and Erosion Control.** The Construction Manager shall be responsible for installing sediment and erosion control measures, inclusive of, but not limited to: silt fencing, inlet protection, stabilized construction entrances, and other control measures.

Section 4.18 **Quality Control.** The Construction Manager shall be responsible for all activities necessary to manage, control, and document work to ensure compliance with Contract Documents. The Construction Manager's responsibility includes ensuring adequate quality control services are provided by the Construction Manager's employees and its subcontractors at all levels. The work activities shall include safety, submittal management, document reviews, reporting, and all other functions related to quality construction.

The Construction Manager shall implement a Quality Control Plan for the Project. A draft of such plan shall be submitted to the Department no later than fifteen (15) days prior to the commencement of work in the field, and a final plan shall be agreed upon and approved by the Department's Program Manager prior to commencing of the Work in the field. The Quality

Control Plan shall be tailored to the specific products/type of construction activities contemplated by the GMP Drawings & Specifications, and in general, shall include a table of contents, quality control team organization, duties/responsibilities of quality control personnel, submittal procedures, inspection procedures, deficiency correction procedures, documentation process, and a list of any other specific actions or procedures that will be required for key elements of the Work.

During the construction phase, the Construction Manager shall perform daily quality control inspections and create reports based on such inspections. The daily quality control reports shall be provided to the Department electronically on a weekly basis. The Construction Manager shall incorporate a quality control section in the progress meetings to discuss outstanding deficiencies, testing/inspections, and upcoming Work. The monthly report shall include a detailed summary of the steps that are being employed to provide quality construction and workmanship. The monthly report should specifically address issues raised during the month and outline the steps that are being used to address such issues.

Section 4.19 **Prolog.** The Construction Manager shall utilize the Department's Prolog system to submit any and all documentation required to be provided by the Construction Manager for the Project, including, but not limited to, (i) requests for information; (ii) submittals; (iii) meeting minutes; (iv) proposed Changes; and (v) applications for payment.

Section 4.20 **Acceleration.** Subject to the terms of this Section 4.20, the Department shall have the right to direct the Construction Manager to accelerate the Work if, in the reasonable judgment of Department, the Construction Manager fails to: (i) supply a sufficiency of workers or to deliver the materials or equipment with such promptness as to prevent the delay in the progress of the Work; or (ii) the progress of the Work materially falls behind the projections contained in the then currently approved Project Schedule. In the event that the Department or its Program Manager determine that either of the events specified in the preceding sentence have occurred, the Department shall provide the Construction Manager with written notice of such event and the Construction Manager shall be required to provide the Department with a corrective action plan that is reasonably designed to address the concerns raised in such notice within three (3) days after receipt of such notice. If the Department and the Construction Manager are unable to agree on the terms of such corrective action plan within five (5) days after the issuance of the notice (i.e. with forty eight (48) hours after the receipt of the proposed corrective action plan), the Department shall have the right to direct such acceleration as the Department, in its reasonable judgment, deems necessary. Provided the notice provisions of this Section are complied with, the cost of any acceleration directed under this Section shall not justify an adjustment to the GMP on the Substantial Completion Date. The Construction Manager hereby acknowledges that this provision is a material inducement upon which the Department has relied in entering into this Agreement; and represents and warrants that it has included sufficient funding in its GMP in order to comply with the requirements of this Section.

Section 4.21 **Corrective Action Plan.** Subject to the terms of this Section 4.21, the Department shall have the right direct the Construction Manager to revise the provisions of its Quality Control Plan if, in the reasonable judgment of the Department, the craftsmanship of

the Work being installed fails to comply with generally applicable industry standards, requirements set forth in the Specifications that are reasonably related to the quality of craftsmanship quality, or any provisions set forth in this Agreement. In the event that the Department or its Program Manager determine that any of the events specified in the preceding sentence have occurred, the Department shall provide the Construction Manager with written notice of such event and the Construction Manager shall be required to provide the Department with a corrective action plan that is reasonably designed to address the concerns raised in such notice within three (3) days after receipt of such notice. If the Department and the Construction Manager are unable to agree on the terms of such corrective action plan within five (5) days after the issuance of the notice (i.e. within forty eight (48) hours after the receipt of the proposed corrective action plan), the Department shall have the right to direct such corrective action measures as the Department, in its reasonable judgment, deems necessary. Such directive may include adjustments to the procedural provisions set forth in the Quality Control Plan and/or impose additional requirements on the manner in which Work is being installed. Provided the notice provisions of this Section are complied with, the cost of any such corrective action directed under this Section shall not justify an adjustment to the GMP on the Substantial Completion Date.

Section 4.22 **Construction Manager Warranty of the Construction Work.** The Construction Manager warrants to the Department that materials and equipment furnished under the Contract Documents will be of good quality and new unless otherwise required or permitted by the Contract Documents, that for the one (1) year period following the Substantial Completion Date the construction work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. The Construction Manager's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Construction Manager, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. The Construction Manager and a representative of the Department shall walk the Project together eleven (11) months after the Substantial Completion Date to identify any necessary warranty work. In the event the Construction Manager fails schedule such a walk, the Warranty period shall be extended until such time as the Construction Manger schedules such walk.

ARTICLE 5
DEPARTMENT'S RESPONSIBILITIES

Section 5.1 **Information and Services**. The Department shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Department's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

Section 5.2 **Department's Designated Representative.** The Department designates Jonathan Kayne, Interim Director, Department of General Services, as its representative with express authority to bind the Department with respect to all matters requiring the Department's

approval or authorization; provided, however, the Department's Associate Director, Contracts & Procurement Division, shall have the express authority to bind the Department for matters that are administrative in nature or of a value no greater than One Hundred Thousand Dollars ($100,000). Subject to the limitations on their authority specified in this Section 5.2, these representative(s) shall have the exclusive authority to make decisions on behalf of the Department concerning estimates and schedules, construction budgets, changes in the Work, and execution of Change Orders or Change Directives, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. In order for the Department to effectively manage the Project and assure that the Construction Manger does not receive conflicting instructions regarding the Work, the Construction Manger shall promptly notify the Department's representative upon receiving any instructions or other communication in connection with the Construction Manger's Work from any employee of the Department or other purported agent of the Department other than the Department's representative.

Section 5.3 **Construction Manager's Designated Representative.** The Construction Manager designates the individual(s) identified in **Exhibit E** as its representative with express authority to bind the Construction Manager with respect to all matters requiring the Construction Manager's approval or authorization. In addition, the Department retains the right to approve candidates for key on-site personnel in accordance with their experience with similar projects and local marketplace conditions. Once approved, individuals cannot be changed without the Department's prior approval. During the entire term, it is agreed that the Construction Manager's designated representative will devote his time exclusively to the Project, unless the Department consents to a reduction in time. All services provided by the Construction Manager shall be performed in accordance with the highest professional standards recognized and adhered to by Construction Managers that construct recreation centers in large, urban areas.

ARTICLE 6
COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

Section 6.1 **Compensation**

Section 6.1.1 The Department shall compensate and make payments to the Construction Manager for Preconstruction Phase Services in accordance with this Article 6 and Article 9. For Preconstruction Phase Services, the Construction Manager's compensation shall be [AMOUNT] (the "Preconstruction Fee").

Section 6.1.2 The Preconstruction Fee shall be the Construction Manager's sole compensation for Preconstruction Phase Services. The Preconstruction Fee shall include, but not be limited to, amounts necessary to compensate the Construction Manager for:

- Profit
- Home Office Overhead

- Cost of preconstruction staff
- Fringe Benefits associated with staff costs
- Payroll taxes associated with staff costs
- Staff costs associated with obtaining permits and approvals during the Preconstruction Phase
- Out-of-house consultants
- Travel, Living and Relocation expenses
- Job vehicles
- Office equipment including but not limited to:
    - Computer hardware and software
    - Fax machines
    - Copying machines
- Office supplies
- Telephone
- Local delivery and overnight delivery costs

Section 6.2 **Payments**

Section 6.2.1 Payments for Preconstruction Phase Services shall be made monthly following presentation of the Construction Manager's invoice and shall be in proportion to services performed. In no event, however, will the aggregate of the Construction Manager's monthly invoices for Preconstruction Phase Services exceed the Preconstruction Fee.

Section 6.2.2. Payments are due and payable in accordance with Article 9 of this Agreement. Amounts unpaid after the date of which payments due shall bear interest in accordance with the Prompt Payment Act.

ARTICLE 7
COMPENSATION FOR CONSTRUCTION PHASE SERVICES

Section 7.1 **Compensation**

Section 7.1.1 The Department shall compensate and make payments to the Construction Manager for Construction Phase Services in accordance with this Article 7 and Article 9. For Construction Phase Services, the Construction Manager's compensation shall be [AMOUNT] (the "Construction Management Fee").

Section 7.1.2 Subject to the terms and conditions of this Agreement, the Construction Management Fee shall be increased by Ten Percent (10%) if both of the objectives set forth below are met and shall be decreased by Ten Percent (10%) if either or both of the objectives set forth below are not met. The objectives are as follows:

.1 **On-Time Completion.** Substantial Completion of the Project is achieved no later

than May 1, 2016.

.2 **Cost Control.** The total amount paid to the Construction Manager for Work performed under this Contract is less than or equal to the GMP as established in the GMP Amendment, regardless of any increases authorized by subsequent Change Order, plus $300,000.

In determining whether these objectives have been met, the Department will evaluate whether the stated objectives have, in fact, been achieved. This decision shall be made regardless of the reason why the objectives have or have not been met, and the Construction Manager acknowledges and agrees that Five Percent (5%) of the Construction Management Fee is put at-risk by virtue of this provision and that the Construction Manager can lose entitlement to such portion of the Construction Management Fee even if objectives are not met due to the fault of the Department, the Architect/Engineer, the Code Official, events of force majeure or otherwise. In addition, the Construction Management Fee shall be increased by Five Percent (5%) if the Construction Manager achieves the Workforce Utilization Goal established herein ("the "Workforce Utilization Incentive"). In addition to the Workforce Utilization Incentive, the Department shall also pay each subcontractor an incentive payment equal to Ten Percent (10%) of the payroll that is paid by the subcontractor to District residents who are employed on the Project. These calculations would be based the certified payrolls required to be submitted under the Davis-Bacon Act as set forth in Section 13.17 of this Agreement. The GMP includes allowances for the incentive payments contemplated by this Section 7.1.2.

Section 7.1.3 The Construction Management Fee, as adjusted in accordance with Section 7.1.2 shall be the Construction Manager's sole compensation for Construction Services. The Construction Management Fee shall include, but not be limited to, amounts necessary to compensate the Construction Manager for:

- Profit
- Home office overhead
- Home office staff

Section 7.2 **Target GMP**. The Department has established a Target GMP of Five Million Three Hundred Fifty Thousand Dollars ($5,350,000) for the Project. Unless and until the Department and the Construction Manager enter into a GMP Amendment for the Project, this Agreement shall have a not-to-exceed amount equal to the Target GMP. The Construction Manager shall not expend or commit any portion of the Target GMP without the prior written approval of the Department. Such Target GMP includes any and all amounts which may be due to the Construction Manager pursuant to this Agreement, and in no event shall the Construction Manager be entitled to recover more than the Target GMP unless the Construction Manager is authorized to exceed such amount by the Department in advance and in writing. In the event the Parties do not agree upon a GMP for the Project by July 10, 2015 and regardless of the reason for such failure, the Design-Builder shall forfeit 50% of the Construction Management Fee.

Section 7.3 **Maximum Cost of General Conditions.** The Construction Manager shall not be entitled to recover more than [AMOUNT] for the Cost of General Conditions (such amount, the "Maximum Cost of General Conditions"). The Construction Manager understands and agrees that the Maximum Cost of General Conditions shall not be increased or decreased as a result of Change Orders or Change Directive unless such Changes (i) extend the duration for the Construction Phase beyond June 1, 2016; and (ii) the Construction Manager can demonstrate to the satisfaction of the Department that such additional Cost of General Conditions are reasonable. To the extent the Construction Manager incurs General Conditions costs in excess of the Maximum Cost of General Conditions, the Construction Manager shall not be entitled to reimbursement for such amounts unless the Department authorizes, in writing, an increase to the Maximum Cost of General Conditions. Nonetheless, in such an event, the Construction Manager exceeds the Maximum Cost of General Conditions, the Construction Manager shall be required to adequately staff the Project.

Section 7.4 **Changes in The Work**

Section 7.4.1 **Changes Authorized.** The Department may, without invalidating the Contract, and without notice to or approval of any surety, order changes in the Work, including additions, deletions or modifications. Any such change must be conveyed by the Department to the Construction Manager via written Change Directive or Change Order.

Section 7.4.2 **Executed Change Directive/Change Order Required.** Only a written Change Directive or Change Order, executed by the Department, may make changes to the Contract. In particular, but without limitation, a written Change Directive or Change Order executed by the Department is the only means by which changes may be made to the Substantial or Final Completion Date, the Preconstruction Fee, the Construction Management Fee or the Guaranteed Maximum Price.

Section 7.4.3 **Department-Initiated Changes**

.1 If the Department wishes to make a change in the Work or to accelerate the Work, it will execute and issue to the Construction Manager a written Change Directive, either directing the Construction Manager to proceed at once with the changed Work or directing it to not to proceed, but to inform the Department, in writing, of the amount, if any, by which the Construction Manager believes that Substantial or Final Completion Date and/or the Guaranteed Maximum Price should be adjusted to take the Change Order or Change Directive into account.

.2 Within ten (10) days of receiving a Change Directive, the Construction Manager shall provide the Department with a written statement of all changes in the Contract, including, without limitation, any changes to the Substantial or Final Completion Date or the Guaranteed Maximum Price to which it believes it is entitled as a result of the Change Directive. If additional time is sought, a schedule analysis supporting the requested extension should be included. The

schedule analysis should include a written narrative explanation. If a change in the Guaranteed Maximum Price is sought (or if the Department has requested a deduct change), the statement should include a breakdown, by line item, of the estimated cost changes attributable to the proposed change. The Department may request, and the Construction Manager shall provide, further cost breakdowns, clarifications, documentation or back-up if the Department reasonably believes such additional information is needed to understand and evaluate the request. The additional information required may include cost and pricing data in accordance with the Department's regulations. Any requested adjustment to the Guaranteed Maximum Price shall be limited to increased Cost of the Work due to the Change Directive. The Construction Manager is not entitled to any markup on any kind of change orders. All deductive Change Orders shall include a corresponding reduction in the Construction Management Fee.

.3 If the Department has not yet directed the Construction Manager to proceed with the Change described by a Change Directive, the Department may rescind it. If the Department wishes to proceed, or has already directed the Construction Manager to proceed, the Construction Manager shall immediately proceed with the changed Work and, the Department and the Construction Manager shall use their good faith best efforts to reach an agreement upon the modifications to the Substantial or Final Completion Date, and/or the Guaranteed Maximum Price that are justified by the Change Directive. If they reach agreement, the agreement shall be set forth in a Change Order and the Construction Manager shall also execute it, at which point it will become binding on both parties.

.4 If the parties fail to reach an agreement within sixty (60) days after the Department receives the Construction Manager's detailed statement pursuant to Subsection 7.4.3.2, and such other documentation as the Department may request, the Construction Manager may assert a claim in accordance with this Agreement. In such a case, and subject to adjustment via the claims and disputes process, the Department may unilaterally grant the Construction Manager such adjustments, if any, to the Substantial or Final Completion Date, the Guaranteed Maximum Price, and/or the Preconstruction or Construction Management Fee as the Department has judged to be appropriate.

Section 7.4.4 <u>Notice of Change Event.</u> The Construction Manager must give the Department written notice of any Change Event within ten (10) calendar days of the date on which the Construction Manager knew, or reasonably should have known, of the Change Event. To the extent available, the notice must state the nature of the Change Event and describe, generally, all changes in the Contract to which the Construction Manager believes it is entitled. Such notice is an express condition precedent to any claim or request for adjustment to the Substantial or Final Completion Date, or the Guaranteed Maximum Price arising from the Change Event and, if the notice is not given within the required time, the Construction Manager

will have waived the right to any adjustment to the Substantial or Final Completion Date, or the Guaranteed Maximum Price arising from the Change Event.

Section 7.4.5 **Detailed Change Request.** Within twenty (20) days after giving notice of a change event, the Construction Manager shall submit a written change request describing, in reasonable detail, all adjustments it seeks to the Substantial or Final Completion Date or the Guaranteed Maximum Price as a result of the Change Event. The change request shall include the same information as described in Subparagraph 7.4.3 with respect to any Contract changes the Construction Manager seeks due to the Change Event, and the amount of any requested adjustment to the Guaranteed Maximum Price shall be limited in accordance with that Subparagraph.

Section 7.4.6 **Changes to GMP.** Subject to the condition precedent that the Construction Manager have complied with the notice and documentation provisions of this Article, and subject to the limitations stated in this Agreement, the Construction Manager is entitled to an adjustment to the Guaranteed Maximum Price in the following cases:

.1 If the Department issues a Change Directive or Change Order that directs the Construction Manager to proceed with work which is beyond the scope of Work included within the Guaranteed Maximum Price Amendment; or

.2 The Construction Manager encounters Differing Soil Conditions or Hazardous Materials not identified in the Preconstruction Phase.

Section 7.4.7 **Deductive Change Orders.** The Department is likewise entitled to issue deductive Change Orders (reducing the Guaranteed Maximum Price or the Substantial or Final Completion Date) when changes are effected, by Change Directive or otherwise, which will decrease the cost of completing the Work or the time within which it can be completed.

Section 7.4.8 **No Adjustments to Fee.** The Construction Manager understands and agrees that the Preconstruction Fee and Construction Management Fee shall not be increased or decreased as a result of any such Change Orders or Change Directive. In furtherance of this understanding, the Construction Manager agrees that it shall not be entitled to an increase in the Preconstruction Fee, or the Construction Management Fee by virtue of changes authorized by the Department unless such changes fall outside the general scope of work contemplated by this Agreement. The term general scope of work shall mean the design and construction of a state-of-the-art recreation center that is consistent with the Program of Requirements and incorporates sustainable design initiatives (LEED Gold). Without limiting the generality of the foregoing, it is understood and agreed that changes that, individually or in the aggregate, are less than ten percent (10%) of the GMP shall conclusively be deemed to be within the Project's general scope, and thus, shall not entitle the Construction Manager to an increase in the Preconstruction Fee or the Construction Management Fee.

Section 7.4.9 **Executed Change Orders Final.** The Construction Manager agrees that any Change Order executed by the Department and Construction Manager constitutes its full and final adjustment for all costs, delays, disruptions, inefficiencies, accelerations, schedule impacts, or other consequences arising from the change in question, whether a Change Directive, or a Change Event, or from any claimed cumulative effect of changes made to the date of the Change Order, and that no further adjustments in compensation or time shall be sought or made with respect to the Change Directive or the Change Event giving rise to the Change Order. Although the Parties anticipate that most Change Orders will not require an adjustment to the Cost of General Conditions, if the Work described in a Change Order requires an increase or decrease in the Maximum Cost of General Conditions established in Section 7.3 (i.e. because such a Change requires additional field staff or other equipment that would be classified as a General Conditions Cost), the Change Order shall contain a separate line item adjusting such amount. The cost of processing a Change Order shall not, normally, be considered an event that will require an increase in the Maximum Cost of General Conditions.

Section 7.4.10 **Failure to Agree.** If the Construction Manager claims entitlement to a change in the Contract, and the Department does not agree that any action or event has occurred to justify any change in time or compensation, or if the parties fail to agree upon the appropriate amount of the adjustment in time or compensation, the Department will unilaterally make such changes, if any, to the Contract, as it determines are appropriate pursuant to the Contract. The Construction Manager shall proceed with the Work and the Department's directives, without interruption or delay, and shall make a claim as provided in Article 12. Failure to proceed due to a dispute over a change request shall constitute a material breach of the Contract and entitle the Department to all available remedies for such breach, including, without limitation, termination for default.

Section 7.4.11 **Mark-Up on Trade Work.** The maximum mark up for change order work shall be as follows:

.1 For Work performed by a Subcontractor with its own forces, the Subcontractor shall be entitled to a mark-up of not more than fifteen percent (15%) (covering home office overhead, the cost of insurance and bonds, field supervision, general conditions and profit) on the Direct Costs of the Work. For Work that the Department permits the Construction Manager to self-perform, the Construction Manager shall also be entitled to a mark-up of not more than fifteen percent (15%) of the Direct Cost of the Work. With regard to any such Work that is self-performed by the Construction Manager, the markup contemplated in this Section 7.4.11.1 shall be the Construction Manager's exclusive compensation and it shall not be entitled to the markup contemplated in Section 7.4.11.3;

.2 Intervening tier Subcontractors shall be entitled to a mark-up of five percent (5%) (covering home office overhead, the cost of insurance and bonds, field supervision, general conditions and profit) on Work Performed by lower-tier Subcontractors;

.3 To the extent permitted by Section 7.4.8, the Construction Manager shall be entitled to an increase in its Construction Management Fee at a rate of [FEE AS PERCENTAGE OF PROJECT BUDGET IN RFP] on work perform by Subcontractors. Such markup shall cover the same cost elements that were included in the Construction Management Fee; and

.4 In no event shall the maximum mark-up on the Direct Cost of the Work exceed twenty five percent (25%).

Direct Cost of the Work shall mean labor, material and other costs reasonably and necessarily incurred in the proper performance of the Work as approved by the Department. Such costs do not include, however, home office overhead, field supervision, general conditions or profit of either the Subcontractor or the Construction Manager. No personnel above the level of a working foreman shall be considered a Direct Cost of the Work.

ARTICLE 8
COST OF THE WORK FOR CONSTRUCTION PHASE

Section 8.1 **Cost of the Work.** The term "Cost of the Work" shall mean the costs necessarily incurred by the Construction Manager in the proper performance of the Work and shall include only the following:

.1 Payments made by the Construction Manager to Subcontractors and suppliers, but only in accordance with the subcontracts and supply agreements ("Subcontractor Costs");

.2 The Cost of General Conditions, subject however to the Maximum Cost of General Conditions;

.3 All amounts due to the Construction Manager under the terms of the Department's written authorization for the Construction Manager to perform any portion of the Work as Self-Performed Work. If an authorization for the Construction Manager to engage in Self-Performed Work is not on a fixed-price basis, then, as to that Work, the following costs shall be within the Cost of the Work:

(a) **Labor.** Properly documented wages actually paid to Project superintendents, foremen, construction workers, and other personnel in the direct employ of the Construction Manager, while engaged in approved Self-Performed Work, together with contributions, assessments, payroll taxes, or fringe benefits required by the laws or applicable collective bargaining agreements, charged at the rates agreed upon by the parties in writing for such Self-Performed Work.

(b) **Incorporated Materials.** The cost, net of trade discounts, of all materials, products, supplies and equipment incorporated into the Self-Performed Work, including, without limitation, costs of transportation and handling.

(c) **Unincorporated Materials.** The cost of materials, products, supplies and equipment not actually installed or incorporated into the Self-Performed Work, but required to provide a reasonable allowance for waste or spoilage, subject to the Construction Manager's agreement to turn unused excess materials over to the Department at the completion of the Project or, at the Department's option, to sell the material and pay the proceeds to the Department or give the Department a credit in the amount of the proceeds against the Cost of the Work.

.4 Royalty and license fees paid for use of a design, process or product, if its use is required by this Contract or has been approved in advance by the Department;

.5 Fees for obtaining all required approvals or permits associated with the abatement, demolition, utilities abandonment, and utility relocation, as well as all trade permit fees. The Department shall be responsible for the building permit fees;

.6 Cost of the Design Contract assigned to the Construction Manager, reimbursed at cost and without markup; provided, however, that such costs shall not exceed [DESIGN FEE]. Design costs in excess of such amount shall not be reimbursed as a Cost of the Work;

.7 All fees and other costs necessarily incurred to carry out testing and inspection required by the Contract or applicable laws, or otherwise to maintain proper quality assurance. The costs the Construction Manager incurs to schedule and coordinate any additional testing and inspections the Department may decide to conduct itself shall be within Cost of the Work unless the additional testing establishes that the Work tested was defective or otherwise failed to satisfy Contract requirements, in which case the Construction Manager shall pay the costs, without reimbursement;

.8 All bonds to jurisdictional agencies (utilities, storm water management, land disturbance, and grading); and

.9 All performance and payment bonds and general liability insurance.

Section 8.2 **Cost of General Conditions.** Items included in the Cost of General Conditions are all items necessary to perform Construction Phase Services described herein including, but not limited to:

.1 Cost of construction primary staff (only staff stationed in the field is reimbursable; however, exceptions will be made for project executive personnel, purchasing, scheduling, cost estimating, local participation oversight and reporting, and accounting services if such functions are normally provided by the Construction Manager's regional and/or home office personnel and/or if the Construction Manager deems such functions are more efficiently performed at the regional and/or home office(s)).

.2 Fringe Benefits associated with field staff costs

.3 Payroll taxes and payroll insurance associated with field staff costs

.4 Staff costs associated with obtaining permits and approvals

.5 Out-of-house consultants

.6 Travel, Living and Relocation expenses

.7 Job vehicles

.8 Field office for CM including but not limited to: (i) trailer purchase and/or rent; (ii) field office installation, relocation and removal; (iii) utility connections and charges during the Construction Services Phase; (iv) furniture: (v) office supplies;

.9 Office equipment including but not limited to: (i) computer hardware and software; (ii) fax machines; (iii) copying machines; (iv) telephone installation, system and use charges: (v) job radios

.10 Local delivery and overnight delivery costs

.11 Field computer network

.12 First aid facility

.13 Progress photos

Section 8.3 **Costs Not to Be Reimbursed.** All costs not specifically listed in Section 8.1 as being within the Cost of the Work are excluded from the Cost of the Work. In particular, but without limitation, the Cost of the Work does not include any of the following:

.1 Any personnel or labor costs other than those set forth in Section 8.1.3(a) or Section 8.2.1 of this Agreement.

.2 Fees for any permits or licenses the Construction Manager requires to conduct its general business operations.

.3 Capital expenses and interest on capital employed for the Work.

.4 Direct or indirect costs of any kind, except those expressly included in Paragraph 8.1.

.5 Sales or use taxes, unless the Construction Manager establishes that applicable law required payment of such taxes and the Department provides a District of Columbia tax exempt certificate for the Project for the use of the Construction Manager, Subcontractors and Suppliers.

.6 Costs due to the errors or omissions of the Construction Manager or its Subcontractors or suppliers at all tiers, negligent or otherwise.

.7 Costs due to breach of Contract by the Construction Manager or its Subcontractors or material suppliers at all tiers, including, without limitation, costs arising from defective or damaged Work or its correction, disposal of materials or equipment erroneously supplied, and repairs to property damaged by the Construction Manager or its Subcontractors or material suppliers at all tiers.

.8 Any costs incurred in performing work of any kind before Notice to Proceed, unless specifically authorized by the Department.

Section 8.4 **Discounts, Rebates And Refunds**

Section 8.4.1 Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Department, and the Construction Manager shall make provisions so that they can be secured.

Section 8.4.2 Amounts that accrue to the Department in accordance with the provisions of Subparagraph 8.4.1 shall be credited to the Department as a deduction from the Cost of the Work.

Section 8.5 **Facilitating Tax Exempt Purchases.** The Department expects that the Project will qualify as tax-exempt under applicable laws. The Department will provide the Construction Manager with the necessary information relating to the tax exemption. In the event any savings are attributable to the tax-exempt status of the Project, the Construction Manager shall not be entitled to share in such savings.

Section 8.6 **Accounting Records.** The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under the Contract, the accounting and control systems shall be satisfactory to the

Department. The Department, its representatives, and the Department's accountants shall be afforded access to the Construction Manager's records, books, correspondence, instruction, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Project, and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

ARTICLE 9
CONSTRUCTION PHASE PAYMENTS

Section 9.1 **Progress Payments.** The Construction Manager shall be paid its compensation in a series of progress payments and a final payment, for Work completed in accordance with the Contract, and for which proper Applications for Payment have been submitted and approved. The amount of each progress payment shall be as follows:

The Costs of Work Completed to Date

Plus $\frac{\text{Cost of Work for Pay Period}}{\text{Current approved estimated Cost of Work through completion}}$ x Construction Management Fee

Minus Applicable Retainage

Minus Amounts previously paid by the Department

Section 9.2 **Retention.** The Department shall withhold from each progress payment an amount equal to ten percent (10%) of the payment related to: (i) each Subcontract and supply agreement, (ii) the Construction Management Fee, (iii) the Cost of General Conditions, and (iv) the Cost of the Work related to each item of Self-Performed Work, until such time as fifty percent (50%) of the then currently budgeted cost associated with each such an item has been invoiced at which point the Department may cease retaining against such item. The Department may elect to increase the retention on any trade subcontractor up to ten percent (10%) in the event the Department determines that the situation so warrants. The Department, in its sole and absolute discretion, may elect to reduce the retainage relating to a particular trade Subcontractor, the Cost of General Conditions, or the Cost of the Work related to a specific item of Self-Performed Work to zero upon: (x) satisfactory completion of such Work; (y) submission of all required warranties, certifications, and operating or maintenance instructions with respect to that Work; and (z) execution of appropriate waivers of lien and releases of claims. However, in no event shall the total retainage held by the Department be reduced to an amount that is less than two and one-half percent (2.5%) of the GMP.

Section 9.3 **Documents Required with Application for Payment.** Each Application for Payment shall be accompanied by the Construction Manager's job cost ledgers in a form satisfactory to the Department, the Subcontractors' and Suppliers' Applications for Payment on AIA Documents G702 and G703 or other form acceptable to the Department, and such other

supporting documentation as the Department may reasonably request. Each Application for Payment shall include detailed documentation of costs as a condition to approving progress payments, but the Construction Manager shall nevertheless maintain complete documentation of the costs.

Section 9.4 **Stored Materials.** The Department shall not be required to pay for materials stored at the site or stored at other locations, absent its express agreement to do so, which may be withheld at the Department's sole discretion. If the Department expressly agrees to pay for materials stored at the site but not yet incorporated into the Work, the Application for Payment may also include a request for payment of the cost of such materials, if the materials have been delivered to the site, and suitably stored. Such requests shall be documented by appropriate invoices and bills of sale. Payment for stored materials shall be conditioned also on the Construction Manager's representation that it has inspected the material and found it to be free from defect and otherwise in conformity with this Contract, and on satisfactory evidence that the materials are insured under the builder's risk policy. Further, if the Construction Manager requests the Department to allow payments for storage of materials offsite, the Construction Manager shall be required, inter alia, to agree to execution of proper documentation to afford the Department a secured interest in the materials upon payment.

Section 9.5 **Construction Manager's Certification.** Each Application for Payment shall be accompanied by the Construction Manager's signed certification that all amounts paid to the Construction Manager on the previous Application for Payment that were attributable to Subcontractor Work or to materials or equipment being supplied by any supplier has been paid over to the appropriate Subcontractors and suppliers; that all amounts currently sought for Subcontractor Work or supply of materials or equipment are currently due and owing to the Subcontractors and material or equipment suppliers; and that all Work, materials or equipment for which payment is sought is, to the best of the Construction Manager's knowledge, free from defect and meets all of the Contract requirements. The Construction Manager shall not include in an Application Payment amounts for Work for which the Construction Manager does not intend to pay.

Section 9.6 **Lien Waivers.** Each Application for Payment shall be accompanied by written waivers of the right to file a mechanic's lien and all other claims, in a form substantially similar to **Exhibit [ ]** for the Construction Manager and all Subcontractors and material suppliers at all tiers who have supplied labor or material or both for which payment is requested, subject only to receipt of payment. If the Department so requests, the Construction Manager shall also submit unconditional waivers of liens for itself and all Subcontractors and material suppliers at all tiers with respect to Work or materials or equipment for which payment has been previously made, and additional forms of waiver acknowledging receipt of final payment under the Contract, and providing final release of such liens.

Section 9.7 **Warranty of Title.** By submitting an Application for Payment, the Construction Manager warrants to the Department that title to all Work for which payment is sought will pass to the Department, without liens, claims, or other encumbrances, upon the

receipt of payment by the Construction Manager. The Department may require execution of appropriate documents to confirm passage of clear title. Passage of title shall not operate to pass the risk of loss with respect to the Work in question. Risk of loss remains with the Construction Manager until Substantial Completion, unless otherwise agreed by the Department, in writing.

Section 9.8 **Submission.** On the twenty-fifth day of each month the Construction Manager shall submit to the Department (with a copy to the Program Manager) an Application for Payment, which Application for Payment shall cover the entire month during which the Application for Payment is submitted. All amounts formally submitted via Application for Payment and not disputed by the Department shall be due and payable on the last day of the month following submission or, if that is not a business day, on the following business day. If the Construction Manager and Department are unable to agree on the amounts properly due and owing, the Department shall pay in accordance with its good faith determination and the Construction Manager may protest and pursue a claim as provided in this Agreement.

Section 9.9 **Right to Withhold Payments.** The Department will notify the Construction Manager within fifteen (15) days after receiving any Application for Payment of any defect in the Application for Payment or the Construction Manager's performance which may result in the Department's declining to pay all or a part of the requested amount. The Department may withhold payment from the Construction Manager, in whole or part, as appropriate, if:

.1 the Work is defective and such defects have not been remedied; or

.2 the Department has determined that the Construction Manager's progress has fallen behind the Project Schedule, and the Construction Manager fails, within ten (10) calendar days of the Department's written demand, to provide the Department with a realistic and acceptable plan to recover the delays; or

.3 the Construction Manager's monthly schedule update reflects that the Construction Manager has fallen behind the Project Schedule, and the Construction Manager fails to include, in the same monthly report, a realistic and acceptable plan to recover the delays; or

.4 the Construction Manager has failed to provide the monthly report in full compliance with Section 4.10 of this Agreement; or

.5 the Construction Manager has failed to pay Subcontractors or suppliers promptly or has made false or inaccurate certifications that payments to Subcontractors or suppliers are due or have been made; or

.6 any mechanic's lien has been filed against the Department, the site or any portion thereof or interest therein, or any improvements on the site, even though the Department has paid all undisputed amounts due to the Construction Manager,

and the Construction Manager, upon notice, has failed to remove the lien, by bonding it off or otherwise, within ten (10) calendar days; or

.7 the Department has reasonable evidence that the Work will not be completed by the Substantial Completion Date, as required, that the unpaid balance of the Guaranteed Maximum Price would not be adequate to cover actual or liquidated damages arising from the anticipated delay; or

.8 the Department has reasonable evidence that the Work cannot be completed for the unpaid balance of the Guaranteed Maximum Price; or

.9 the Construction Manager is otherwise in substantial breach of this Contract (including, without limitation, failures to comply with LSDBE requirements in Article 11).

Section 9.10 **Payment Not Acceptance.** Payment of any progress payment or final payment shall not constitute acceptance of Work that is defective or otherwise fails to conform to the Contract, or a waiver of any rights or remedies the Department may have with respect to defective or nonconforming Work.

Section 9.11 **Department Not Obligated to Others.** The Department shall have no obligation to pay or be responsible in any way for payments to a consultant or subcontractor performing portions of the Work. The Department shall have no obligation, after assignment of the Design Contract to the Construction Manager, to pay or be responsible in any way for payments to the Architect/Engineer.

Section 9.12 **Final Payment.** Final payment shall be made by the Department to the Construction Manager when (i) Final Completion has been achieved; and (ii) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Department's accountants. The Department shall make such final payment not more than thirty (30) days after the Department receives such report from its accountants.

Section 9.12.1 The amount of the final payment shall be calculated as follows:

.1 Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Preconstruction Fee and the Construction Management Fee as adjusted to reflect whether the goals established in Section 7.1.2 have been met; but not more than the Guaranteed Maximum Price.

.2 Subtract amounts, if any, for which the Department withholds pursuant to the Contract.

.3 Subtract the aggregate of previous payments made by the Department. If the aggregate of previous payments made by the Department exceeds the amount due the Construction Manager, the Construction Manager shall promptly reimburse the difference to the Department.

.4 The final payment shall take into account any savings accruing to the Department or the Construction Manager.

Section 9.12.2 The Department's accountants will review and report in writing on the Construction Manager's final accounting within thirty (30) days after delivery of the final accounting to the Department by the Construction Manager. Based upon such Cost of the Work as the Department's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Subparagraph 9.12.1 have been met, the Department will, within seven days after receipt of the written report of the Department's accountants, shall notify the Construction Manager of any amount that the Department will withhold and the reasons therefor. The time periods stated in this Section 9.12 supersede those for typical progress payments.

Section 9.12.3 If the Department's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 12 without a further decision of the Department. Unless agreed to otherwise, the Construction Manager shall make a demand for mediation or arbitration pursuant to Article 12 of the disputed amounts within sixty (60) days after the Construction Manager's receipt of the Department's final payment. Failure to make such demand within this sixty (60) day period shall result in the substantiated amount reported by the Department's accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Department shall pay the Construction Manager the amount that the Department determines to be appropriate.

Section 9.13 **Liquidated Damages.** If the Construction Manager fails to achieve Substantial Completion by the Substantial Completion Date, the parties acknowledge and agree that the actual damage to the Department for the delay will be impossible to determine, and in lieu thereof, the Construction Manager shall pay to the Department, as fixed, agreed and liquidated delay damages in the amount of Five Thousand Dollars ($5,000) per day for each calendar day of delay for failure to meet the Substantial Completion Date. The Construction Manager and the Department agree that the liquidated damages set forth in this Section 9.13 do not constitute, and shall not be deemed, a penalty but represent a reasonable approximation of the damages to the Department associated with a delay in the Project. Notwithstanding anything to the contrary in this Agreement, in no event shall the liquidated damages, or the amount be assessed against the Construction Manager for late delivery, exceed Two Hundred Fifty Thousand Dollars ($250,000).

ARTICLE 10

INSURANCE AND BONDS

Section 10.1 Insurance Required by the Project

Section 10.1.1 The Construction Manager will be required to maintain the following types of insurance throughout the life of the contract. In the event that a claim for or related to the Project is made on any such policy or any other Construction Manager's subcontractor and/or supplier policy, the Construction Manager shall be responsible for the payment of any applicable deductible and shall not be entitled to an increase in the GMP for the costs of paying such deductible.

.1 Commercial general public liability insurance ("Liability Insurance") against liability for bodily injury and death and property damage, such Liability Insurance to be in an amount not less than Five Million Dollars ($5,000,000) for liability for bodily injury, death and property damage arising from any one occurrence and Five Million Dollars ($5,000,000) from the aggregate of all occurrences within each policy year. The policy shall include completed operations coverage. The Construction Manager shall ensure that such coverage remains in place for at least three (3) years after Substantial Completion of the Project is achieved.

.2 Workers' compensation and Employers Liability coverage providing statutory benefits for all persons employed by the Construction Manager, or its contractors and subcontractors at or in connection with the Work.

.3 Automobile Liability, including Hired and Non-Owned Auto Liability in the amount of at least One Million Dollars ($1,000,000) for each occurrence for bodily injury and property damage.

.4 Excess umbrella liability coverage (on at least a follow form basis) having an aggregate limit of at least Ten Million dollars ($10,000,000).

.5 Builder's risk insurance written on an "all risk" basis and covering the value of the improvements being constructed. This coverage does not need to be maintained until such time as construction operations begin.

.6 With respect to the Architect/Engineer, errors and omissions coverage written on a claims made basis and having an aggregate policy limit of at least Five Million Dollars ($5,000,000). This coverage shall remain in place for at least three (3) years after Substantial Completion of the Project is achieved.

.7 Contractor's Pollution Liability coverage in the amount of at least Two Million Dollars ($2,000,000) for each occurrence. Such coverage shall be maintain for the duration of the Project as well as three (3) years after Substantial Completion of the Project is achieved.

Section 10.1.2 Each insurance policy shall be issued in the name of the Construction Manager and shall name as additional insured parties the Department and the District of Columbia, and the officers, agents and employees of each. Such insurance policies shall not be cancelable or reduced without thirty (30) days prior written notice to the Department.

Section 10.1.3 All such insurance policies shall contain a waiver of subrogation against the Department and the District of Columbia, and their respective agents.

Section 10.1.4 All such insurance policies shall be written by a company that is rated at least A- by A.M. Best and having a surplus size rating of at least XV.

Section 10.2 **Performance Bond and Payment Bond.** The Construction Manager shall, before commencing the Construction Phase, provide to the Department a payment bond and performance bond, each with a penal sum equal to the full value of the GMP. Such bond shall remain in full force and effect until Final Completion is achieved and the Department shall be able to draw upon such bond regardless of the amount paid by the Department to the Construction Manager, even if such amount exceeds the penal value of such bond. Unless otherwise directed by the Department, the Construction Manager shall require all Subcontractors whose Subcontract prices exceed One Hundred Thousand Dollars ($100,000) to provide payment and performance bonds, with a penal sum equal to one hundred percent (100%) of the subcontract price. The Construction Manager shall reserve the right to enroll pre-qualified subcontractors in to the Construction Manager's Subcontractor Default Insurance Program ("SDI") in lieu of providing payment and performance bonds for such subcontractors. All bonds must be in a form acceptable to the Department, its lenders or bond trustee, and issued by a surety authorized to do business in the District of Columbia and bonding company listed on the United State Department of Treasury's Listing of Approved Sureties, authorized to do business in the District of Columbia and reasonably acceptable to the Department. All subcontractors' bonds must include a dual obligee rider, naming the Construction Manager and the Department as dual obligees. If the Guaranteed Maximum Price is increased pursuant to the terms of the Contract, the Department may require that the amount of the bonds be increased in the amount of one hundred percent (100%) of the increase, and the Construction Manager shall promptly comply. The Construction Manager shall furnish a copy of its bonds to any potential beneficiary of the bonds, or permit that person or company to make a copy. If the bonds provided become unacceptable to the Department, the Construction Manager shall promptly provide substitute security acceptable to the Department. If the Construction Manager intends to exercise its rights as dual obligee under any trade Subcontractor's bond, it shall first give the Department twenty (20) days written notice, so that the Department may lodge any objection it may reasonably have to the proposed action.

Section 10.3 The Construction Manager shall ensure abatement subcontractors and disposal sites are appropriately licensed and qualified. In addition, the Construction Manager shall ensure that any subcontractors involved in the abatement of hazardous materials maintain a contractor's pollution legal liability insurance policy of at least Two Million Dollars

($2,000,000) for the duration of the Project and a period of three (3) years after Substantial Completion of the Project, and that any disposal site to which hazardous materials are taken carries environmental impairment liability insurance for the duration of the Project and a period of three (3) years after Substantial Completion of the Project.

ARTICLE 11
ECONOMIC INCLUSION REQUIREMENTS

Section 11.1 LSDBE Utilization

Section 11.1.1 The Construction Manager shall ensure that Local, Small and Disadvantages Business Enterprises will participate in at least Fifty Percent (50%) of the Contract. Thirty Five Percent (35%) of the Contract Work must be awarded to entities that are certified as either Small or Disadvantaged Business Enterprises by the District of Columbia Department of Small and Local Business Development and Twenty Percent (20%) of the Contract Work to entities that are certified as Disadvantaged Business Enterprises. The LSDBE certification shall be, in each case, as of the effective date of the subcontract. Supply agreements with material suppliers shall be counted toward meeting this goal.

Section 11.1.2 The Construction Manager has developed a Preliminary LSDBE Utilization Plan that is attached hereto as **Exhibit [ ]**. A detailed LSDBE Utilization plan shall be included with the GMP Amendment. The Construction Manager shall comply with the terms of the LSDBE Utilization Plan in making purchases and administering its Subcontractors and Supply Agreements.

Section 11.1.3 Neither the Construction Manager or a Subcontractor may remove a Subcontractor or tier-Subcontractor if such Subcontractor or tier-Subcontractor is certified as an LSDBE company unless the Department approves of such removal. The Department may condition its approval upon the Construction Manager developing a plan that is, in the Department's sole and absolute judgment, adequate to maintain the level of LSDBE participation on the Project.

Section 11.2 Equal Employment Opportunity and Hiring of District Residents

Section 11.2.1 The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

Section 11.2.2 The Construction Manager shall ensure that at least fifty-one percent (51%) of the Construction Manager's Team and every subconsultant's and subcontractor's employees hired after the effective date of the Contract, or after such subconsultant or subcontractor enters into a contract with the Construction Manager, to work on the Project shall be residents of the District of Columbia. This percentage shall be applied in the aggregate, and not trade by trade. In addition, the Contractor shall use commercially reasonable best efforts to

comply with the workforce percentage goals established by the recently adopted amendments to the First Source Employment Agreement Act of 1984 (D.C. Code §§ 2-219.01 *et seq.*) and any implementing regulations, including, but not limited to the following requirements:

(i) At least 20% of journey worker hours by trade shall be performed by District residents;

(ii) At least 60% of apprentice hours by trade shall be performed by District residents;

(iii) At least 51% of the skilled laborer hours by trade shall be performed by District residents; and

(iv) At least 70% of common laborer hours shall be performed by District residents.

Section 11.2.3 **Workforce Incentive Program.** In addition to the requirement imposed by applicable law, the Department has established a Workforce Utilization Goal for the performance of labor hours on the Project. The Construction Manager shall ensure that the Workforce Utilization Goal is met. The Construction Manager has developed a Preliminary Workforce Utilization Plan that is attached hereto as **Exhibit [ ]**. A detailed Workforce Utilization shall be included with the GMP Amendment. It is understood and agreed that: (i) the Construction Manager shall be entitled to an incentive payment as described in Section 11.2.3.2 if the Project's Workforce Goal is met; and (ii) each Trade Subcontractor shall receive an incentive payment as described in Section 11.2.3.1.

.1 Each Trade Subcontractor shall be paid an amount equal to Ten Percent (10%) of the Bare Salary paid to employees who are (i) a bona fide resident of the District of Columbia; and (ii) working on the Project. Bare Salary shall mean wages paid to employees for work performed on the job site and excludes the cost of benefits or taxes associated with such employees. Only those employees who are directly employed on the job site shall count toward this calculation. Employees who work in home or regional offices and who support multiple projects shall not be eligible for this incentive. In calculating this incentive payment, the certified payrolls collected and maintained as part of the Davis-Bacon Act shall be used.

.2 The Department has established a goal that at least forty percent (40%) of all labor hours worked on the Project be worked by District residents (such goal, the "Workforce Utilization Goal"). In the event the Project's Workforce Utilization Goal is met or exceeded, the Construction Manager's Construction Management Fee, as set forth in this Agreement, shall be increased as set forth in Section 7.1.2.

.3 The GMP includes an allowance to fund payments required under Section 11.2.3.1. Such allowance shall only be used to pay the incentive fees established by that Section.

Section 11.3 **Economic Inclusion Reporting Requirements**

Section 11.3.1 Upon execution of the Contract, the Construction Manager and all its member firms, if any, and each of its Subcontractors shall submit to the Department a list of current employees and apprentices that will be assigned to the Contract, the date they were hired and whether or not they live in the District of Columbia.

Section 11.3.2 The Construction Manager and its constituent entities shall comply with subchapter X of Chapter II of Title 2 of the D.C. Code, and all successor acts thereto, and any implementing regulations, as the same may be amended from time to time. Without limiting the generality of the foregoing, the Construction Manager shall use commercially reasonable best efforts to comply with the recently adopted amendments to such law, including, but not limited to, the workforce percentage goals set forth in such amendments. The Construction Manager and all member firms and Subcontractors shall execute a First Source Agreement with the District of Columbia Department of Employment Services ("DOES") prior to beginning Work at the Project site.

Section 11.3.3 The Construction Manager shall maintain detailed records relating to the general hiring of District of Columbia and community residents.

Section 11.3.4 The Construction Manager shall be responsible for: (i) including the provisions of Section 11.3 in all subcontracts; (ii) collecting the information required in this Section 11.3 from its Subcontractors; and (iii) providing the information collected from its Subcontractors in the reports required to be submitted by the Construction Manager pursuant to Section 11.3.

Section 11.4 **Compliance with the Apprenticeship Act.** The Construction Manager agrees to comply with the requirements of the Apprenticeship Act of 1946, D.C. Code §§ 32-1401, *et seq*. It is understood and agreed that thirty five percent (35%) of all apprentice hours for the Project must be District residents. If the Construction Manager or any of its subcontractors fail to use its best efforts to meet this goal, the Construction Manager or the subcontractor shall be subject to a penalty of five percent (5%) of the labor costs associated with the Contract.

ARTICLE 12
CLAIMS & DISPUTE RESOLUTION

Section 12.1 **Notice of Claim.** If the Construction Manager has complied with all provisions in Section 7.4 regarding changes, and the Department has denied the changes requested in a written Change Proposal, or has failed to respond to a written Change Proposal within thirty (30) days, and the Construction Manager wishes to pursue a claim over the disputed item, or if the Construction Manager wishes to assert a claim over a contract dispute not arising from matters related to a Change Event, Change Order or Change Directive, then the written notice of claim must be submitted to the Department pursuant to procedures set forth in section 4733 of the Department's procurement rules and section 908 of the District's Procurement Practices Reform Act of 2010 ("PPRA").

Section 12.2 **Contents of Notice of Claim.** The notice of claim shall state the nature of the claim, the events or circumstances giving rise to the claim, the type of relief requested, and the amount of time or additional compensation, or other damages sought. If the amount of time, compensation, or other damages sought is not reasonably ascertainable at the time, the Construction Manager shall so state, explain why, and provide whatever estimates it can reasonably provide. The notice shall state clearly that the Construction Manager intends to assert a claim against the Department.

Section 12.3 **Appeal Procedures.** All claims arising under or in connection with the Contract or its breach, or relating to the Project, whether framed in contract, tort or otherwise, and which are not resolved via the claims process may be resolved by filing an appeal with the District of Columbia Board of Contract Appeals in accordance with the Title X of the PPRA. However, if a third party brings any claim against the Department for the actions of the Construction Manager or the Construction Manager's subcontractors and/or suppliers, including, without limitation, claims of infringement of patents, copyrights or other intellectual property rights, the Department may bring an action for defense or indemnification against the Construction Manager in the court in which such claim is being litigated.

ARTICLE 13
MISCELLANEOUS PROVISIONS

Section 13.1 **Extent of Contract.** The Contract, which includes this Agreement, the exhibits attached hereto, and other documents incorporated herein by reference, represents the entire and integrated agreement between the Department and Construction Manager and supersedes all prior negotiations representations or agreements, either written or oral. The Contract may be amended only by written instrument signed by both the Department and Construction Manager. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

Section 13.2 **Ownership And Use of Documents.** The design documents and other documents prepared by the Architect/Engineer, and copies thereof furnished to the Construction Manager, are for use solely with respect to this Project. They are not to be used by the Construction Manager, Subcontractors, Sub-subcontractors or suppliers on other projects, or for additions to this Project outside the scope of the Work, without the specific written consent of the Department, and the Architect/Engineer. The design documents and other documents prepared by the Architect/Engineer shall become the property of the Department.

Section 13.3 **Governing Law.** The Contract shall be governed by and construed in accordance with the laws of the District of Columbia, without regard to its conflict of laws principles.

Section 13.4 **Assignment.** The Department and Construction Manager respectively bind themselves, their partners, members, joint venturers, constituent entities, successors, assigns

and legal representative to the other party hereto and to partners, members, joint venturers, constituent entities, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contact Documents. Neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

Section 13.5 **Retention of Records and Inspections and Audits**

Section 13.5.1 The Construction Manager shall maintain books, records, documents and other evidence directly pertinent to performance under the Contract in accordance with generally accepted professional practice and appropriate accounting procedures and practices consistently applied in effect on the date of execution of the Contract.

Section 13.5.2 The Construction Manager shall also maintain the financial information and data used in the preparation and support of the costing and cost summary submitted to the Department and the required cost submissions in effect on the date of execution of the Department.

Section 13.5.3 The Department, the District of Columbia government, the District of Columbia Financial Responsibility and Management Assistance Office, the Comptroller General of the United States, the U.S. Department of Labor and any of their authorized representatives shall have access to the books, records, documents and other evidence held, owned or maintained by the Construction Manager for the purpose of inspection, audit and copying during normal business hours and upon advance written notice to the Construction Manager. The Construction Manager shall provide proper facilities for such access and inspection.

Section 13.5.4 The Construction Manager agrees to include the wording of this Section in all its subcontracts in excess of five thousand dollars ($5,000.00) that directly relate to Project performance.

Section 13.5.5 Audits conducted pursuant to this Section will be in accordance with generally acceptable auditing principles and established procedures and guidelines of the applicable reviewing or audit agency.

Section 13.5.6 The Construction Manager agrees to the disclosure of all information and reports, resulting from access to records, to any authorized representative of the Department. Where the audit concerns the Construction Manager, the auditing agency will afford the Construction Manager an opportunity for an audit exit conference and an opportunity to comment on the pertinent portions of the draft audit report. The final audit report will include the written comments, if any, of the audited parties.

Section 13.5.7 The Construction Manager shall preserve all records described herein from the effective date of the Contract completion and for a period of seven (7) years after a final

settlement. In addition, those records which relate to any dispute, appeal or litigation, or the settlement of claims arising out of such performance, or costs or items to which an audit exception has been taken, shall be maintained and made available until seven (7) years after the date of resolution of such dispute, appeal, litigation, claim or exception.

Section 13.6 Inspection For Supplies And Services

Section 13.6.1 To the extent applicable or appropriate, the Department may, in its sole discretion, enter the place of business of the Construction Manager or the place of business of any Subcontractor in order to inspect or test supplies or services for acceptance by the Department. If inspections and tests are performed at the place of business of the Construction Manager or any Subcontractor, the inspections and tests shall be performed in a manner so as to not unduly delay the Work. Inspections and tests by the Department shall not relieve the Construction Manager or any Subcontractor of responsibility for defects or other failures to meet Contract requirements, and shall not constitute or imply acceptance.

Section 13.6.2 Notwithstanding the Department's acceptance of or payment for any product or service delivered by Construction Manager, the Construction Manager shall remain liable for latent defects, fraud, gross mistakes amounting to fraud and the Department's rights under any warranty or guarantee.

Section 13.6.3 The Department shall have the right to enter the place of business of the Construction Manager or the place of business of any Subcontractor in order to investigate any contractor or offeror with respect to a debarment or suspension of the Construction Manager or any such Subcontractor.

Section 13.7 Laws And Regulations Incorporated by Reference. All federal and District of Columbia laws and regulations, and all Department procedures now or hereafter in effect, whether or not expressly provided for or referred to in the Contract, are incorporated by reference herein and shall be binding upon the Construction Manager and the Department. It shall be the responsibility of the Construction Manager to perform the Contract in conformance with the Department's procurement regulations and all statutes, laws, codes, ordinances, regulations, rules, requirements, and orders of governmental bodies, including, without limitation, the U.S. Government and the District of Columbia government; and it is the sole responsibility of the Construction Manager to determine the procurement regulations, statutes, laws, codes, ordinances, regulations, rules, requirements, and orders that apply and their effect on the Construction Manager's obligations thereunder. However, if the application of a future law or regulation requires the Construction Manager to undertake additional work that is materially different in scope than that presently contemplated or required, the Construction Manager shall be entitled to an equitable adjustment for such additional work.

Section 13.8 Tax Exemption Provision. Any tax exemptions applicable to the District of Columbia, including the gross receipts sales tax exemption for the sale of tangible personal

property to the District, codified in D.C. Code § 47-2005, shall apply to the performance of the Contract.

Section 13.9 <u>Anti-Competitive Practices and Anti-kickback Provisions</u>

Section 13.9.1 The Construction Manager recognizes the need for markets to operate competitively and shall observe and shall comply with all applicable law, rules, and regulations prohibiting anti-competitive practices. The Construction Manager shall not engage, directly or indirectly, in collusion or other anti-competitive practices that reduces or eliminates competition or restrains trade. The Department shall report to the appropriate authority any activity that evidences a violation of the antitrust laws, and take such other further action to which it is entitled or obligated under the law.

Section 13.9.2 The Construction Manager shall observe and comply with all applicable law, rules, and regulations prohibiting kickbacks and, without limiting the foregoing, Construction Manager shall not (i) provide or attempt to provide or offer to provide any kickback; (ii) solicit, accept, or attempt to accept any kickback; or (iii) include, directly or indirectly, the amount of any kickback in the contract price charged by Construction Manager or a Subcontractor of the Construction Manager to the Department. The Construction Manager shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in this subparagraph in its own operations and direct business relationships. The Department may take any recourse available to it under the law for violations of this anti-kickback provision.

Section 13.9.3 The Construction Manager represents and warrants that it did not, directly or indirectly, engage in any collusive or other anti-competitive behavior in connection with the bid, negotiation or award of the Contract.

Section 13.10 [Intentionally Omitted]

Section 13.11 <u>Ethical Standards For Department's Employees And Former Employees.</u> The Department expects the Construction Manager to observe the highest ethical standards and to comply with all applicable law, rules, and regulations governing ethical conduct or conflicts of interest. Neither the Construction Manager, nor any person associated with the Construction Manager, shall provide (or seek reimbursement for) any gift, gratuity, favor, entertainment, loan or other thing of value to any employee of the District or the Department not in conformity with applicable law, rules or regulations. The Construction Manager shall not engage the services of any person or persons in the employment of the Department or the District for any Work required, contemplated or performed under the Contract. The Construction Manager may not assign to any former Department or District employee or agent who has joined the Construction Manager's firm any matter on which the former employee, while in the employ of the Department, had material or substantial involvement in the matter. The Construction Manager may request a waiver to permit the assignment of such matters to former Department personnel on a case-by-case basis. The Construction Manager shall include in every subcontract

a provision substantially similar to this section so that such provisions shall be binding upon each Subcontractor or vendor.

Section 13.12 <u>Gratuities and Officers Not to Benefit Provisions</u>

Section 13.12.1 If it is found, after notice and hearing, by the Department that gratuities (in the form of entertainment, gifts, payment, offers of employment or otherwise) were offered or given by the Construction Manager, or any agent or representative of the Construction Manager, to any official, employee or agent of the Department or the District with a view toward securing the Contract or any other contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performance of the Contract, the Department may, by written notice to the Construction Manager, terminate the right of the Construction Manager to proceed under the Contract and may pursue such other rights and remedies provided by law and under the Contract.

Section 13.12.2 In the event the Contract is terminated as provided in Section 13.12.1, the Department shall be entitled:

.1 to pursue the same remedies against the Construction Manager as it could pursue in the event of a breach of the Contract by the Construction Manager; and

.2 as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Department) which shall be not less than ten times the costs incurred by the Construction Manager in providing any such gratuities to any such officer or employee.

Section 13.12.3 No member of, nor delegate to Congress, Mayor or City Council Member, nor officer nor employee of the District, nor officer nor employee of the Department shall be admitted to any share or part of the Contract or to any benefit that may arise therefrom, and all agreements entered into by the authorized representative of the Department in which he or any officer or employee of the Department shall be personally interested as well as all agreements made by the Department in which the Mayor or City Council Member or officer or employee of the District shall be personally interested shall be void and no payments shall be made on any such contracts by the Department or by any officer thereof; but this provision shall not be construed or extend to the agreement if the share of or benefit to the member of, or delegate to Congress, Mayor or City Council Member, or officer or employee of the District is de minimus.

Section 13.13 <u>Covenant Against Contingent Fees Provisions.</u> The Construction Manager warrants that no person or selling agency has been employed or retained to solicit or secure the Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Construction Manager for the purpose of securing business. For breach or violation of this warranty, the Department shall have the right to terminate the

Contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of the commission, percentage, brokerage of contingent fee.

Section 13.14 <u>Non-Discrimination in Employment Provisions</u>

Section 13.14.1 The Construction Manager agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, or physical handicap. The affirmative action shall include, but not be limited to, the following:

.1 Employment, upgrading, or transfer;

.2 Recruitment or recruitment advertising;

.3 Demotion, layoff, or termination;

.4 Rates of pay, or other forms of compensation; and

.5 Selection for training and apprenticeship.

Section 13.14.2 Unless otherwise permitted by law and directed by the Department, the Construction Manager agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Department setting forth the provisions of this Section concerning non-discrimination and affirmative action.

Section 13.14.3 The Construction Manager shall, in all solicitations or advertisements for employees placed by or on behalf of the Construction Manager, state that all qualified applicants will receive consideration for employment pursuant to the non-discrimination requirements set forth in this Section.

Section 13.14.4 The Construction Manager agrees to send to each labor union or representative of workers with which it has a collective bargaining agreement, or other contract or understanding, a notice to be provided by the Department, advising each labor union or workers' representative of the Construction Manager's commitments under this Section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

Section 13.14.5 The Construction Manager agrees to permit access by the Department to all books, records and accounts pertaining to its employment practices for purposes of investigation to ascertain compliance with this Section, and shall post copies of the notices in conspicuous places available to employees and applicants for employment.

Section 13.14.6 The Construction Manager shall include in every subcontract the equal opportunity clauses of this Section so that such provisions shall be binding upon each Subcontractor or vendor.

Section 13.14.7 The Construction Manager shall take such action with respect to any Subcontractor as the Contracting Officer may direct as a means of enforcing these provisions, including sanctions for non-compliance.

Section 13.15 Buy American Act Provision. The Construction Manager shall comply with the provisions of the Buy American Act (41 U.S.C. § 10a), including, but not limited to, the purchase of steel.

Section 13.16 Contract Work Hours And Safety Standards Act Provision. The Construction Manager agrees that the construction work performed under this Contract shall be subject to the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333).

Section 13.17 Davis-Bacon Act Provision. The Construction Manager agrees that the construction work performed under this Contract shall be subject to the Davis-Bacon Act (40 U.S.C. §§ 276a-276a-7). The wage rates applicable to this Project are attached as **Exhibit [ ]**. The Construction Manager further agrees that it and all of its subcontractors shall comply with the regulations implementing the Davis-Bacon Act and such regulations are hereby incorporated by reference.

Section 13.18 False Claims Act. Construction Manager shall be governed by all laws and regulations prohibiting false or fraudulent statements and claims made to the government, including the prescriptions set forth in District of Columbia Code § 2-381.02.

Section 13.19 Interpretation of Contract. All of the documents comprising the Contract should be read as complementary, so that what is called for by one is called for by all. Ambiguities should be construed in favor of a broader scope of work for the Construction Manager, as the intent of the Contract is, with specific identified exceptions, to require the Construction Manager to assume entire responsibility for construction of the Project. If there is any inconsistency among the documents comprising the Contract, the order of precedence among them is as follows, with the first listed document having the highest priority: this Agreement as defined herein and excluding its Exhibits; the GMP Amendment; any Change Directives or Change Orders that have been executed by the Department; Exhibits to this Agreement; and the Construction Documents released by the Department. Any Change Order issued and executed by the Department shall supersede those portions of earlier dated contract documents to which it pertains.

Section 13.20 Independent Contractor. In carrying out all its obligations under the Contract, the Construction Manager shall be acting as an independent contractor, and not as an employee or agent of the Department, or joint venturer or partner with the Department. The Construction Manager shall have exclusive authority to manage, direct, and control the Work,

and shall be responsible for all construction means, methods, techniques, sequences, and procedures, as well as for Project safety.

Section 13.21 Confidential Information. In the course of the Construction Manager's performance of the Work, the Department may make available to the Construction Manager information that the Department designates as trade secrets or other confidential engineering, technical and business information. As long as, and to the extent that, such information remains confidential and available to others only with the consent of the Department, or is not generally available to the public from other sources, the Construction Manager shall maintain such information in strict confidence and shall not disclose any such information to others (including its employees or Subcontractors), except to the extent necessary to enable the Construction Manager to carry out the Project. The Construction Manager shall similarly obligate any and all persons to whom such information is necessarily disclosed to maintain the information in strict confidence. The Construction Manager agrees that, in the event of any breach of this confidentiality obligation, the Department shall be entitled to equitable relief, including injunctive relief or specific performance, in addition to all other rights or remedies otherwise available.

Section 13.22 No Third-Party Beneficiary Rights. Nothing in this Agreement shall be construed as creating third-party beneficiary rights in any person or entity, except as otherwise expressly provided in this Agreement.

Section 13.23 Media Releases. Neither the Construction Manager, its employees, agents or Subcontractors or material suppliers shall make any press release or similar media release related to the Project unless such press release have been discussed with the Department prior to its issuance.

Section 13.24 Construction. This Agreement shall be construed fairly as to all parties and not in favor of or against any party, regardless of which party prepared the Agreement.

Section 13.25 Notices. All notices or communications required or permitted under the Contract shall be in writing and shall be hand delivered or sent by telecopier or by recognized overnight carrier to the intended recipient at the address stated below, or to such other address as the recipient may have designated in writing. Any such notice or communication shall be deemed delivered as follows: if hand delivered, on the day so delivered, if sent by telecopier, on confirmation of successful transmission, and if sent by recognized overnight carrier, the next business day.

If to the Department:	If to the Construction Manager:
Mr. Jonathan Kayne	[NAME]
Interim Director & Chief Contracting Officer	[TITLE]
Department of General Services	[COMPANY]
2000 14th Street, NW	[ADDRESS]

Washington, DC 20009 [ADDRESS]

This Paragraph shall be read as imposing minimum requirements for distribution of required notices, and not as displacing distribution requirements with regard to design documents, construction submittals, periodic reports, and other documents.

Section 13.26 Limitations. The Construction Manager agrees that any statute of limitations applicable to any claim or suit by the Department arising from this Contract or its breach shall be controlled by applicable District of Columbia law.

Section 13.27 Binding Effect; Assignment. The Contract shall inure to the benefit of, and be binding upon and enforceable by, the parties and their respective successors and permitted assigns. The Construction Manager acknowledges that, in entering into the Contract, the Department is relying on the particular qualifications of the Construction Manager, and the Construction Manager therefore shall not delegate or assign any of its duties or obligations under the Contract, except in accordance with the Contract's provisions relating to subcontracting, or pursuant to the Department's prior written consent. The Construction Manager shall not assign its rights under the Contract, including the right to all or a portion of its compensation, without the Department's prior written consent. Any delegation or assignment made contrary to the provisions of this Paragraph shall be null and void.

Section 13.28 Survival. All agreements warranties, and representations of the Construction Manager contained in the Contract or in any certificate or document furnished pursuant to the Contract shall survive termination or expiration of the Contract.

Section 13.29 No Waiver. If the Department waives any power, right, or remedy arising from the Contract or any applicable law, the waiver shall not be deemed to be a waiver of the power, right, or remedy on the later recurrence of any similar events. No act, delay, or course of conduct by the Department shall be deemed to constitute the Department's waiver, which may be effected only by an express written waiver signed by the Department.

Section 13.30 Remedies Cumulative. Unless specifically provided to the contrary in the Contract, all remedies set forth in the Contract are cumulative and not exclusive of any other remedy the Department may have, including, without limitation, at law or in equity. The Department's rights and remedies will be exercised at its sole discretion, and shall not be regarded as conferring any obligation on the Department's to exercise those rights or remedies for the benefit of the Construction Manager or any other person or entity.

Section 13.31 Headings/Captions. The headings or captions used in this Agreement or its table of contents are for convenience only and shall not be deemed to constitute a part of the Contract, nor shall they be used in interpreting the Contract.

Section 13.32 Entire Agreement; Modification. The Contract supersedes all contemporaneous or prior negotiations, representations, course of dealing, or agreements, either

written or oral. No modifications to the Contract shall be effective unless made in writing signed by both the Department and the Construction Manager, unless otherwise expressly provided to the contrary in the Contract.

Section 13.33 **Severability.** In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and in lieu of each such invalid, illegal or unenforceable provision, there shall be added automatically as a part of this Agreement a provision as similar in terms to such invalid, illegal or unenforceable provision as may be possible and be valid, legal and enforceable; each part of this Agreement is intended to be severable.

Section 13.34 **Anti-Deficiency Act**. The Department's obligations and responsibilities under the terms of the Contract and the Contract Documents are and shall remain subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§1341, 1342, 1349, 1350, 1351, (ii) the D.C. Code 47-105, (iii) the District of Columbia Anti-Deficiency Act, D.C. Code §§ 47-355.01 - 355.08, as the foregoing statutes may be amended from time to time, and (iv) Section 446 of the District of Columbia Home Rule Act. Neither the Contract nor any of the Contract Documents shall constitute an indebtedness of the Department, nor shall it constitute an obligation for which the Department is obligated to levy or pledge any form of taxation, or for which the Department has levied or pledged any form of taxation. **IN ACCORDANCE WITH § 446 OF THE HOME RULE ACT, D.C. CODE § 1-204.46, NO DISTRICT OF COLUMBIA OFFICIAL IS AUTHORIZED TO OBLIGATE OR EXPEND ANY AMOUNT UNDER THE CONTRACT OR CONTRACT DOCUMENTS UNLESS SUCH AMOUNT HAS BEEN APPROVED, IS LAWFULLY AVAILABLE AND APPROPRIATED BY ACT OF CONGRESS.**

Section 13.35 To the fullest extent permitted by law, the Construction Manager shall defend, indemnify and hold harmless the Department and the Department's consultants and agents and employees from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Construction Manager, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

ARTICLE 14
TERMINATION OR SUSPENSION

Section 14.1 **Cancellation Before Notice to Proceed.** The Department may cancel the Contract at any time before issuance of a Notice to Proceed, in the Department's sole discretion.

Such a cancellation shall not be a breach of the Contract, and the Construction Manager shall not be entitled to any compensation or damages if cancellation occurs.

Section 14.2 **Failure to Agree Upon GMP.** The Department shall have the right to terminate this Contract in the event that the Department and the Construction Manager are unable to agree upon a GMP for the Project and the Department shall have the right, but not the obligation, to assume any of the Construction Manager's trade subcontracts upon such terms and conditions as requested by the Department. The Department's decision to terminate under this clause shall be made in the Department's sole and absolute judgment and shall not be subject to review by any reviewing body, including, but not limited to, arbitrators appointed under this Contract or any court of competent jurisdiction. In the event the Department so terminates this Contract, the Department shall pay the Construction Manager an amount equal to fifty Percent (50%) of the total Preconstruction Fee and shall take sole and absolute title to and have the right to use any documents, schedules, bid packages, estimates or other materials prepared during the Preconstruction Phase and shall have the right to assume any Subcontracts or Supply Agreements entered into by the Construction Manager. If the Department has paid the Construction Manager an amount in excess of Fifty Percent (50%) of the Preconstruction Fee in such an event, the Construction Manager shall promptly refund any portion of the Preconstruction Fee that was received by the Construction Manager in excess of Fifty Percent (50%) of such fee.

Section 14.3 **Termination for Default.** The Department may terminate the Contract for default if the Construction Manager fails materially to perform any of its duties or obligations under the Contract. In particular, but without limitation, the Department may terminate the Contract if:

.1 the Construction Manager fails to prosecute the Work diligently, in accordance with the Project Schedule or to make such progress in the Work as the Department reasonably believes is necessary to complete the Project within the time required by the Contract; or

.2 the Construction Manager fails to perform the Work in a good and workmanlike manner or to correct defects in the Work promptly upon notice by the Department; or

.3 the Department reasonably determines that the Construction Manager has abandoned the Work, or has failed to pay laborers, mechanics, materialmen, Subcontractors or suppliers when payment is due; or

.4 becomes insolvent, makes an assignment for the benefit of creditors, files a voluntary petition under any chapter of the Bankruptcy Code or has an involuntary petition filed against it under any chapter of the Bankruptcy Code, or has a receiver appointed, or files for dissolution or otherwise is dissolved; or

.5 the Construction Manager fails to pay its debts in a timely manner or becomes insolvent, or the Department reasonably determines that the Construction Manager does not have the financial ability to carry out its obligations under the Contract and the Construction Manager fails to give the Department prompt and reasonable assurances of its ability to perform.

.6 The Department must provide the Construction Manager with written notice of its intent to terminate the Contract under this provision seven (7) days before actually putting the termination into effect. If the Construction Manager has begun its curative action and has made progress satisfactory to the Department within the seven days, the Department may so notify the Construction Manager and the termination will not take effect. Otherwise, the termination shall take effect after seven days without further notice or opportunity to cure.

.7 If the Department terminates the Contract for default, the Department will have the right to take over the Work, to accept assignment of some or all Subcontracts or agreements with material suppliers, to take possession of the Project, to take and use all tools, equipment and supplies then being used in connection with the Work, and to finish the Project by whatever method it deems expedient, including accepting assignment of all outstanding Subcontracts and Supply Agreements.

Section 14.4 <u>Termination for Convenience</u>

Section 14.4.1 The Department may, upon seven (7) days written notice to the Construction Manager, terminate the Contract in whole or specified part, for its convenience, whether the Construction Manager is in breach of Contract or not. The notice of termination shall state the effective date of termination, the extent of the termination, and any specific instructions.

Section 14.4.2 After receiving notice of termination for convenience, the Construction Manager shall (1) stop work on the terminated portion of the Project as of the effective date of the termination and stop placing subcontracts or supply agreements thereunder; (2) consult with the Department regarding the disposition of existing orders and subcontracts, and use its best efforts to terminate them on terms favorable to the Department; (3) consult with the Department to decide what actions should be taken to protect work in place and equipment that has been delivered and not yet installed, and to render the site safe, and proceed to take such actions as may be agreed upon or, absent agreement, as may be reasonable; (4) take necessary or directed action to protect and preserve property in the Construction Manager's possession in which the Department has or may acquire an interest and, as directed by the termination notice or other order from the Department, deliver the property to the Department; and (5) promptly deliver to the Department all computer files it has prepared relating to the Project. The Construction Manager shall also promptly notify the Department, in writing, of any legal proceeding arising from any subcontract or supply agreement related to the terminated portion of the Project, and, in

consultation with the Department, settle outstanding liabilities arising out of the terminated portion of the Project on the best terms reasonably possible.

Section 14.4.3 The Construction Manager shall be entitled to receive only the following with respect to the terminated portion of the Project: (1) Cost of Work performed up to the date of termination; (2) reasonable costs of terminating outstanding subcontracts and supply agreements and other similar wind-up costs in a reasonable amount; (3) a fair and reasonable portion of the Design-Build Fee attributable to the Work performed on the terminated portion of the Project, up to the time of termination. The Construction Manager shall not be entitled to recover the Design-Build Fee or overheads or profits on unperformed portions of the Work. Further, if it appears to the Department that the Cost of Work, added to the Construction and Design Management Fee and Preconstruction Fee, would have exceeded the GMP, the Department shall have the right to adjust the settlement figure downward in an appropriate amount. In no case shall the Construction Manager be entitled to receive an amount in settlement for termination for convenience that would exceed the percentage value of the Work actually performed in accordance with the Contract, multiplied by the GMP, and reduced by any damages, liquidated or otherwise, the Construction Manager may owe the Department.

Section 14.4.4 Payment of such amounts shall be the Construction Manager's sole remedy for termination for convenience.

Section 14.4.5 The Construction Manager shall, promptly after termination, submit a proposal for settlement of the amounts due to it as a result of the termination for convenience. The proposal shall be consistent with the requirements of Subparagraphs 14.4.2 through 14.4.4, and shall be accompanied by such documentation of costs as the Department may reasonably require. Such documentation may include cost and price data in accordance with the Department's Regulations.

Section 14.5 **Effect of Wrongful Termination.** Any termination for cause which is later determined to have been improperly effected shall be deemed to have been a termination for convenience pursuant to Paragraph 14.4 and shall be governed by that Paragraph.

Section 14.6 **Continued Responsibility After Termination.** If the Construction Manager is terminated, either for default or otherwise, the Construction Manager shall remain responsible for defects or non-conformities in all Work performed to the date of the termination.

Section 14.7 **Suspension**

Section 14.7.1 **Suspension at the Convenience of the Department.** The Department may at any time, with or without cause, suspend, delay, reduce or interrupt performance of all or any portion of the Work for such period or periods as the Department elects by giving the Construction Manager written notice specifying which portion of the Work is to be suspended and the effective date of such suspension. Such suspension, delay or interruption shall continue until the Department terminates such suspension, delay or interruption

by written notice to the Construction Manager. No such suspension, delay, interruption or reduction by the Department shall constitute a breach or default by the Department under the Contract Documents. The Construction Manager shall continue to diligently perform any remaining Work that is not suspended, delayed, reduced or interrupted and shall take all actions necessary to maintain and safeguard all materials, equipment, supplies and Work in progress affected by the suspension, delay, reduction or interruption.

Section 14.7.2 **Payment Upon Suspension For Convenience.** In the event of suspension, delay, reduction or interruption for convenience by the Department, the Department shall pay the Construction Manager and the Guaranteed Maximum Price shall be increased by such amounts (subject to the payment and related requirements of the Contract Documents) as follows:

Section 14.7.2.1 Additional Costs of the Work, if any, which are incurred by the Construction Manager, its Subcontractors and Vendors as a result of continuing to maintain dedicated personnel, materials and equipment at the Site at the Department's request during any suspension, delay or interruption period, including for the purpose of safeguarding all material, equipment, supplies and the Construction Manager's Work in progress caused solely by such suspension, delay or interruption ordered by the Department for convenience, but the Guaranteed Maximum Price shall be increased only if and to the extent such delay, suspension or interruption exceeds a period of thirty (30) consecutive days following commencement of the Work; and

Section14.7.2.2 Other reasonable and unavoidable Costs of the Work, if any, which are directly related to any subsequent re-mobilization of the suspended, delayed or interrupted the Construction Manager's Work caused solely by such suspension, delay or interruption ordered by the Department for convenience, but the Guaranteed Maximum Price shall be increased only if and to the extent such delay, suspension or interruption exceeds a period of thirty (30) consecutive days following commencement of the Work.

Section 14.7.2.3 Provided, however, that no adjustment shall be made to the extent that performance was otherwise subject to suspension, delay or interruption by another cause for which the Construction Manager is responsible. Furthermore, the Construction Manager shall not be entitled to an increase in its Preconstruction or Design-Build Fee for a suspension ordered by the Department.

ARTICLE 15
OTHER CONDITIONS AND SERVICES

This Contract and the rights and obligations of the Department and Construction Manager herein are subject to the approval of the Council for the District of Columbia.

ARTICLE 16
DEFINITIONS

Section 16.1 **Agreement.** This Agreement mean this Agreement consisting of __ pages. It does not include exhibits attached hereto or any document incorporated by reference.

Section 16.2 **Change Directive.** A written direction signed and issued by the Department ordering the Construction Manager either to provide pricing and schedule impact information for a described change to the Work or to proceed with a described change and provide pricing and schedule impact information after beginning the changed Work.

Section 16.3 **Change Event.** Any condition, event, act, omission or breach, other than the issuance of a Change Directive, which the Construction Manager believes entitles it to a change in the Guaranteed Maximum Price, the Preconstruction Fee, the Construction Management Fee, or the Substantial or Final Completion Date.

Section 16.4 **Change Order.** A written document, executed by the Department and the Construction Manager, setting forth the agreed terms upon which a change to the Contract has been made.

Section 16.5 **Construction Documents.** The final Drawings and Specifications, as prepared, sealed by the Architect/Engineer's design professional in accordance with the law, and issued by the Construction Manager for the purpose of obtaining bids from potential trade Subcontractors and material suppliers for use in constructing the Project.

Section 16.6 **Cost of General Conditions.** The Cost of General Conditions shall have the meaning set forth in Section 7.3 of this Agreement.

Section 16.7 **Contract.** The entire, integrated agreement between the Department and the Construction Manager with respect to the Project, consisting of this Agreement, the Exhibits to the Agreement, the GMP Amendment, and any Change Directives or Change Orders that have been executed by the Department.

Section 16.8 **Contract Documents.** The Contract Documents consist of the Agreement between the Department and the Construction Manager, including any modifications or changes thereof, the Drawings and Specifications, and any addenda issued thereto.

Section 16.9 **Differing Site Conditions.** The term Differing Site Conditions shall mean subsurface conditions on or adjacent to the Project site which differ materially from those indicated in the geotechnical reports prepared by the Architect/Engineer and its subconsultants. It shall be the responsibility of the Construction Manager to work with the Architect/Engineer during the Preconstruction Phase to review the reports prepared by the Architect/Engineer. The GMP Assumptions and Clarifications shall identify the geotechnical reports upon which it is based. The term Differing Site Conditions shall also include unknown physical conditions at the

site of an unusual nature which differ materially from those ordinarily encountered and generally recognized as inhering to work of the character provided for in the Contract. During the Preconstruction Phase, the Construction Manager shall be required to conduct a thorough review of the Project site and the surrounding area and shall document its findings. In the event the Construction Manager fails to undertake and document such a thorough review, the Construction Manager shall be deemed to have known of those conditions which a thorough review would have detected.

Section 16.10 Drawings. The Drawings are the graphic and pictorial portions of the Contract Documents, wherever located and wherever issued, showing the design, locations and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

Section 16.11 Final Completion. The point at which Substantial Completion has been achieved, all punch list items noted at Substantial Completion have been completed and all documents the Construction Manager is required to deliver to the Department as a condition to receiving final payment have been received by the Department.

Section 16.12 Final Completion Date. Sixty (60) days after the Substantial Completion Date. The Final Completion Date may be modified only by Change Order or Change Directive in accordance with the Agreement.

Section 16.13 Fully Complete. To undertake all of the Work necessary to fully construct and complete the Project and execute all tasks necessary to obtain the final Certificate of Occupancy for the Project from the District of Columbia; submit final lien releases from the Construction Manager and Subcontractors and material suppliers; complete all punch list items to the Department's approval and sign-off; and cause all representations, warranties and guarantees to be honored and otherwise fulfill all of the requirements set forth in the Contract.

Section 16.14 Guaranteed Maximum Price or GMP. The maximum amount, including, but not limited to, the Preconstruction Fee, the Construction Management Fee and the Cost of the Work, that will be paid the Construction Manager to Fully Complete the Project. The GMP shall be established in the GMP Amendment. The GMP may be modified only by Change Order or Change Directive in accordance with the Agreement.

Section 16.15 Hazardous Material. Any toxic substance or hazardous chemical defined or regulated pursuant to federal, state or local laws relating to pollution, treatment, storage or disposal of waste, or protection of human health or the environment. Such laws include, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation and Recovery Act, the Clean Water Act, the Clean Air Act and laws relating to emission, spills, leaks, discharges, releases or threatened releases of toxic material. The term Hazardous Materials shall also include petroleum and petroleum bi-products

Section 16.16 Hazardous Materials Remediation Costs. The direct Costs (excluding, however, the Cost of General Conditions) incurred by the Construction Manager in connection with the removal, remediation, passivation or encapsulation of Hazardous Materials.

Section 16.17 Notice to Proceed. A written notice to proceed, signed by the Department, directing the Construction Manager to proceed with the Project or any portion of the Project.

Section 16.18 Project Schedule. The schedule for the project agreed to by the Department and the Construction Manager as part of this Agreement. Such schedule shall not be changed except by a Change Order or Change Directive issued by the Department. The schedule shall be in a form and contain such detail as may be agreed upon by the parties.

Section 16.19 Self-Performed Work. Trade work performed by employees of (1) the Construction Manager; (2) any entity that is a partner or member of the entity comprising the Construction Manager; (3) any entity that controls, is controlled by, or is under common control with the Construction Manager; or (4) any entity that controls, is controlled by, or is under common control with any entity that is part of the Construction Manager. Self-Performed Work is distinguished from trade work performed by Subcontractors unaffiliated with the Construction Manager or the entities of which the Construction Manager is comprised.

Section 16.20 Specifications. The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, construction systems, standards and workmanship for the Work, and performance of related services.

Section 16.21 Subcontractor. Any person, natural or legal, to whom the Construction Manager delegates performance of any portion of the Work required by the Contract. The term "Subcontractor," used without a qualifier, shall mean a subcontractor in direct privity with the Construction Manager. "Subcontractors at all tiers" shall mean not only those Subcontractors in direct privity with the Construction Manager, but also those performing Work pursuant to sub-subcontracts, subsubsubcontracts, and so on. "Subcontractors" shall include both those who are retained to perform labor only and those who are retained both to perform labor and to supply material or equipment. "Subcontractors" shall also include design professionals who are not the Construction Manager's employees and to whom the Construction Manager delegates any part of its responsibilities under the Contract, except that references to "trade Subcontractors" shall exclude design professionals.

Section 16.22 Substantial Completion. Substantial Completion shall mean that all of the following have occurred: (1) the construction and installation work have been completed with only minor punch list items remaining to be completed; (2) a permanent certificate of occupancy and all other required permits or approvals have been obtained; (3) all operating and maintenance manuals, training videotapes and warranties required by the Contract have been delivered to the Department; (4) any supplemental training session required by the Contract for operating or maintenance personnel have been completed; (5) all clean-up required by the

Contract has been completed; and (6) the Project is ready for the Department to use it for its intended purpose. "Minor punch list items" are defined for this purpose as items that, in the aggregate, can be completed within thirty (30) days without interfering with the Department's normal use of the Project.

Section 16.23 **Substantial Completion Date.** The date established herein by which the Construction Manager shall achieve Substantial Completion. The Substantial Completion Date may be modified only by Change Order or Change Directive in accordance with the Agreement.

Section 17 **RFP and Proposal.** Reference is made to the Request for Proposals issued by the Department and the proposal submitted by the Construction Manager in response thereto. Copies of the cover pages of those documents are attached as **Exhibit [ ]**. Those documents are subordinate to the terms of this Agreement. To the extent that either of those documents is inconsistent with the terms of the Agreement, the terms of the Agreement shall prevail.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date below.

DEPARTMENT OF GENERAL SERVICES, an agency within the executive branch of the Government of the District of Columbia

By: _____
Name: _____
Title: _____
Date: _____

[CONTRACTOR]

By: _____
Name: _____
Its: _____
Date: _____