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## DIVISION II

### GENERAL CONDITIONS TO THE CMAR CONTRACT

#### ARTICLE 1      GENERAL CONDITIONS

##### 1.1      DEFINITIONS, CORRELATION AND INTENT

**1.1.1 Definitions.** Unless otherwise provided herein, capitalized terms used in this Contract, and not otherwise defined herein, have the respective meanings set forth in the Contract Documents that make up the entire agreement and incorporated herein by this reference.

**1.1.1.1 Contractor.** The term Contractor shall mean the same as Construction Manager at Risk (CMAR).

**1.1.2 Entire Agreement.** The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral.

**1.1.3 Contractual Relationship.** The Contract shall not be construed to create a contractual relationship of any kind (1) between the Engineer and Contractor, (2) between the Owner and a Subcontractor, or (3) between any persons or entities other than the Owner and Contractor. The Engineer, however, shall be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Engineer's duties. The Contractor is not a third-party beneficiary to any agreement among or between the Owner and Engineer. The Engineer's performance of duties under such agreements is solely for the benefit of parties identified as beneficiaries under such agreements.

**1.1.4 Intent.** The intent of the Contract is to include all items necessary for the proper execution and completion of the work by the Contractor.

**1.1.5 Supplementary Instructions.** The Engineer will issue written interpretations necessary for the proper execution of the work in the form of Supplementary Instructions with reasonable promptness. Supplementary Instructions may either be instructions, drawings or additional information but shall not change the Contract Sum or Contract Time without subsequently executed Change Orders (collectively "Supplementary Instructions").

**1.1.6 Requests for Clarification.** The Contractor shall submit requests for clarification of the Contract to the Engineer.

**1.1.7 Discrepancies in Contract.** If there is any discrepancy, inconsistency or ambiguity in the quality or quantity of the work or materials required under the Contract, the Contractor shall (1) immediately bring such discrepancy, inconsistency or ambiguity to the attention of the Engineer, and (2) provide the better quality of or greater quantity of the work or materials, without an increase in the Contract Sum, unless otherwise directed in writing by the Engineer or the Owner. If the Engineer or the Owner accepts the lower quality or quantity of work or materials, the Contractor shall remit to the Owner the difference in cost between the better quality or greater quantity and such lower quality or lesser quantity.

**1.1.8 Organization of Specifications and Drawings Not to Control Division of Work.** Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the

Contractor in dividing the work among Subcontractors or in establishing the extent of work to be performed by any trade.

**1.1.9 Contractor Solely Responsible for Division of Work.** The Contractor is solely responsible for the division of the work among Subcontractors. Neither the Owner nor the Engineer will act as arbiter as to which trade or Subcontractor is to furnish or install the various items indicated or required to complete the work. The Contractor shall make necessary arrangements to reconcile any and all labor conflicts without delay, damage or cost to the Owner and without recourse to the Engineer.

**1.1.10 Technical and Industry Meanings.** Unless otherwise stated in the Contract, words that have well-known technical or construction industry meanings are used in the Contract in accordance with such recognized meanings.

**1.1.11 Current Standards.** Where a reference in the Contract to an American Society for Testing and Materials Standard (ASTM), American National Standards Institute Standard (ANSI), federal specification or other recognized standard does not include the date of the standard, the edition current as of the date of issuance of the permit for the work shall apply. No consideration will be given to claimed ignorance as to what a cited standard contains, since the Contractor and each Subcontractor is considered to be experienced and familiar with the generally accepted, published standards of quality and workmanship for its own trade. Requirements of such referenced standards form a part of the Specifications to the extent indicated by the references thereto.

## **1.2 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS**

All Drawings, Specifications and copies thereof furnished by the Engineer are and shall remain the property of the Owner. The Drawings and Specifications and the design reflected therein shall be kept strictly confidential and shall not be disclosed or released except as necessary for the performance of the work. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor shall own or claim a copyright in the Drawings, Specifications or other documents prepared by the Engineer. The Owner will retain all common law, statutory and other reserved rights, in addition to the copyright. All copies of them, except the Contractor's record set, shall be returned to the Owner upon completion of the work. The Drawings, Specifications and other documents prepared by the Engineer, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor on other projects or for additions to this Project outside the scope of the work without the specific written consent of the Owner. The Contractor and its Subcontractors are granted a limited license to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Engineer necessary for execution of the work. All copies made under this license shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Engineer. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Owner's copyright or other reserved rights.

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## ARTICLE 2     OWNER

### **2.1     INFORMATION AND SERVICES REQUIRED OF THE OWNER**

**2.1.1 Financial Arrangements.** The Owner shall, at the request of the Contractor, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract.

**2.1.2 Survey and Work Milestone Dates.** The Owner shall furnish a survey of the Site and work Milestone Dates, if any, required for performance of the work.

**2.1.3 Not Used.**

**2.1.4 Communication with Contractor.** The Owner shall forward communications to the Contractor either through the Engineer or directly.

### **2.2     OWNER'S RIGHT TO STOP THE WORK.**

If the Contractor fails to perform or correct work that is not in accordance with the requirements of the Contract or does not allow other Contractors to timely perform their work, the Owner may order the Contractor to stop the work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

### **2.3     OWNER'S RIGHT TO CARRY OUT THE WORK.**

The Owner shall have the right to contact the Contractor's Surety if the Owner determines that the Contractor is not performing in accordance with the Contract. If the Contractor defaults or neglects to carry out the work in accordance with the Contract or fails to commence and continue correction of such default or neglect with diligence or promptness, the Owner may, after forty eight (48) hours written notice to the Contractor and its Surety, require the Surety to promptly assume the obligations of the Contract. Should the Surety fail to assume the obligations within five (5) calendar days after receipt of the written notices then Owner, without prejudice to any other remedy it may have, may correct such nonconforming work. In such case, an appropriate Change Order shall be issued deducting from the payments then or thereafter due the Contractor or the Surety all costs of correcting such nonconforming work, including but not limited to, compensation for the Engineer's additional services made necessary by such default, neglect or failure. If the payments then or thereafter due the Contractor or its Surety are not sufficient to cover such amount, the Contractor or its Surety shall pay the difference to the Owner within thirty (30) days after the Owner's invoice therefore.

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## ARTICLE 3      CONTRACTOR

### **3.1 REVIEW OF CONTRACT AND FIELD CONDITIONS BY CONTRACTOR.**

**3.1.1 Notice of Errors.** The Contractor warrants that he has carefully reviewed the Contract, including the work Milestone Dates, if any, and all documents pertaining to the work, including but not limited to the plans, Specifications and the work Milestone Dates, and that he is satisfied as to the feasibility and correctness of the Contract, including the work Milestone Dates, to perform the work within the Contract Time. The Contractor shall immediately report to the Engineer any errors, inconsistencies or omissions discovered in the Contract, including the work Milestone Dates. If the Contractor performs any construction activity containing an error, inconsistency, or omission that the Contractor recognized or should have recognized through the exercise of reasonable diligence, without reporting such error, inconsistency or omission to the Engineer, the Contractor shall assume responsibility for such performance and shall bear the costs for correction.

**3.1.2 Examination of Site.** The Contractor warrants that he has visited and examined the character of the Site and any existing structures and/or has satisfied himself as to the nature of the work and all matters which could in any way affect the work. The Contractor shall take field measurements and verify field conditions and shall compare such field measurements and conditions and other information known to the Contractor with the Contract before commencing the work. Errors, inconsistencies or omissions discovered shall be reported to the Engineer immediately. The Engineer or Owner does not guarantee the accuracy of grades, elevations, dimensions, or locations on work installed by other Contractors. The Contractor shall verify the accuracy of all grades, elevations, dimensions and locations relating to the work. In cases of interconnection of the Contractor's work with other work, it shall verify at the Site all dimensions relating to such other work. The Contractor shall promptly rectify any error due to the Contractor's failure to verify the accuracy of such grades, elevations, location or dimensions without any additional cost to the Owner.

**3.1.3 Contractor License and Compliance with Law.** The Contractor warrants (1) that it is licensed under the laws of the State of Arizona to perform the work, and (2) that it is familiar and will comply with all applicable laws, statutes, ordinances, building codes, rules and regulations and lawful orders of public authorities in performing the work, including but not limited to environmental laws and A.R.S. Title 34 as amended.

**3.1.4 Contract Compliance with Law.** If the Contractor observes that portions of the Contract are at variance with applicable laws, statutes, ordinances, building codes, or rules and regulations, the Contractor shall promptly notify the Engineer and Owner in writing, and necessary changes shall be accomplished by appropriate modification. If the Contractor performs work it knows or should know to be contrary to laws, statutes, ordinances, building codes, or rules and regulations without such notice to the Engineer and Owner, the Contractor shall assume full responsibility for such work and shall bear all damages, losses, costs and expenses attributable thereto.

**3.1.5 Contractor Compliance with Contract.** The Contractor shall perform the work in accordance with the Contract and in a first class and workmanlike manner. In the event that the Contractor fails to do so, the Owner may withhold payments to protect the Owner from loss, regardless of whether payment has previously been made for the work in question.

## 3.2 SUPERVISION AND CONSTRUCTION PROCEDURES.

**3.2.1 Contractor to Supervise Work.** The Contractor shall supervise and direct the work using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences, safety, and procedures associated with its work and for coordinating all portions of the work under this Contract. The Contractor shall designate in writing and assign to the Project a qualified and experienced project superintendent, who shall be fully authorized to act and receive communications on the Contractor's behalf. The superintendent shall be present on site at all times necessary or appropriate to adequately supervise and coordinate the work.

Contractor shall have an authorized and qualified representative on site at all times when a subcontractor, or lower tier subcontractor, is conducting any work.

**3.2.2 Acts and Omissions.** The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the work under a contract with the Contractor.

**3.2.3 Duty to Perform.** The Contractor shall not be relieved of obligations to perform the work in accordance with the Contract either by activities or duties of the Engineer in its administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

**3.2.4 Duty to Inspect.** The Contractor shall inspect portions of the Project related to the Contractor's work in order to determine that such portions are in proper condition to receive subsequent work.

**3.2.5 Limitation on Liability.** Contractor acknowledges that neither the Owner nor Engineer nor any of their respective agents, employees, successors or assigns shall control the day-to-day operations of the Contractor and shall not determine construction means, methods, techniques or procedures or safety precautions and programs in connection with the work. Contractor agrees that neither the Owner nor Engineer nor any of their respective agents, employees, successors or assigns shall be responsible for the failure of the Contractor to perform the work in accordance with the Contract or with the laws, ordinances, rules, permit conditions, regulations or lawful orders of any governmental agency having regulatory authority over the manner, methods or means of performance of the work.

## 3.3 LABOR AND MATERIALS.

**3.3.1 Contractor to Provide.** The Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, storage and other facilities and services necessary for proper execution and completion of the work, whether temporary or permanent and whether or not incorporated or to be incorporated in the work.

**3.3.2 Skilled Labor.** The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

**3.3.3 Standard of Quality.** Wherever materials, products, articles, equipment systems or similar items are identified by reference to proprietary terms or by a similar reference, it is intended to establish the minimum standard or measure of quality that has been determined as requisite or intended for the work.

**3.3.4 E-verify Requirements.** To the extent applicable under Arizona Revised Statutes § 41-4401, the Contractor and its Subcontractors warrant compliance with all federal immigration laws and regulations that relate to their employees and compliance with the E-verify requirements under A.R.S. § 23-214(A). Contractors or its Subcontractors failure to comply with such warranty shall be deemed a material breach of this Contract and may result in the termination of this Contract by the Authority.

### **3.4 SUBSTITUTION OF PRODUCTS.**

**3.4.1 Requests for Substitutions.** After the Contract has been executed, the Owner and Engineer may consider, but shall have no obligation to consider, a formal request for the substitution of products in place of those specified under the conditions set forth herein and those set forth in Division VI, Technical Specifications. The decision in the first instance on acceptance or rejection of proposed alternate, substitute or similar materials, products, equipment or systems shall be vested in the Engineer, and ultimately with the Owner, whose decision shall be final and binding.

**3.4.2 Conditions for Substitutions.** By making requests for substitutions, the Contractor (1) represents that the Contractor has personally investigated the proposed substitute product and determined that it is equal or superior in all respects to that specified, (2) represents that the Contractor will provide the same warranty for the substitution that the Contractor would for that specified, (3) certifies that the cost data presented is complete and includes all related costs under the Contract except the Engineer's analysis and redesign costs, and waives all claims for additional costs related to the substitution which subsequently become apparent, and (4) will coordinate the installation of the accepted substitute, making such changes as may be required for the work to be complete in all respects.

**3.4.3 Criteria for Acceptance or Rejection of Substitutes.** Acceptance or rejection of proposed alternate, substitute, or similar materials, products, equipment or systems for use may be based on the construction, design, function, type, size, capacity, performance, strength, durability, finish, aesthetic quality, the Owner's standard for repair, replacement and maintenance or other characteristics or criteria approved by the Owner.

**3.4.4 Expense for Modification.** The Contractor proposing the substitution shall pay any modification to the Contract or work necessary as a result of the use of an approved alternate or substitute.

**3.4.5 Rejection of Substitute.** If any alternate or substitute is not approved, the Contractor shall use the specified material, product, equipment or system without adjustment to the Contract Sum or Contract Time.

### **3.5 WORK HOURS.**

Except as otherwise provided in the Contract, work can be performed six (6) days per week, excluding Sundays, except for Holidays. Refer to Special Provision Specification section 30.02 to the limitations of work during the Holidays. Notwithstanding the foregoing, in the event of emergency or when required to complete the work in accordance with the work Milestone Dates, if any, work may be performed on night shifts, overtime, weekends, or Holidays, provided that permission to do so has been obtained from the Engineer and confirmed in writing by the Owner within 72 hours of the commencement of such work. The Contractor will not be entitled to additional compensation for work performed outside of regular working hours, except to the extent the Owner approves such compensation in advance. If so approved, such compensation shall in such event cover only the direct cost of the premium portion of the time involved and not overhead and profit. In no event will Contractor be entitled to additional compensation for work performed outside regular hours where occasioned by delays, need for repairs or other causes attributable to Contractor or its

Subcontractors. Notwithstanding the foregoing and unless overtime has been requested by the Owner, the Contractor shall bear all costs of standby contractors or subcontractors, if any. In the event the Contractor performs any of the work on night shifts, overtime, weekends or holidays, the Contractor shall comply with all laws, ordinances, codes, rules, and regulations applicable thereto (including, without limitation, those relating to noise).

### **3.6 WARRANTY.**

**3.6.1 Free from Defects.** The Contractor warrants to the Owner and Engineer that (1) materials and equipment furnished under the Contract will be of first quality and new, (2) the work will be free from defects, and (3) the work will conform to the requirements of the Contract. Work not conforming to these requirements, including substitutions not properly approved and authorized, shall be considered defective. This warranty is in addition to and not limited by the provisions of Section 12.2.

**3.6.2 Assignment of Warranties.** The Contractor shall assign to the Owner, before Final Payment is due, all manufacturer's warranties relating to equipment, materials, and labor used in the work.

### **3.7 TAXES.**

**3.7.1** The Contractor shall pay any and all sales, consumer, use, transaction privilege, and similar taxes on all monies owed for the Work or portions thereof provided by the Contractor.

**3.7.2** The Phoenix-Mesa Gateway Airport Authority has been certified by the State of Arizona as an eligible entity in a designated Military Reuse Zone (MRZ). As a result, construction-type improvements within the MRZ are eligible for exemption from State Transaction Privilege Taxes (sales taxes).

**3.7.3** Owner, with assistance of the Contractor, shall apply for any and all applicable benefits. If Owner is deemed eligible, Contractor shall then apply for a Letter of Qualification for MRZ Transaction Privilege Tax Exemption from the Arizona Department of Revenue (ADOR) in a timely manner. Owner will issue Notice to Proceed only after such letter has been sent by Contractor to ADOR.

The MRZ tax exemption only applies to the State of Arizona Transaction Privilege Tax. No such exemption exists for the City of Mesa Transaction Privilege Taxes. See Section 3.7.1 above regarding payment of required taxes.

**3.7.4** Within thirty (30) days of release of Retention by Owner to Contractor, Contractor must submit a Completion Report to the Arizona Commerce Authority, or as required by the program, to secure the tax exemption.

**3.7.5** If Contractor fails to file any reports as required, after Owner has been deemed eligible under the MRZ program, Contractor will be obligated to pay any and all taxes, not the Owner.

### 3.8 PERMITS AND FEES.

The Contractor shall secure and pay, as applicable, for the building permit and plan check fee, and the Contractor shall secure and pay for all other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the work.

### 3.9 ALLOWANCES.

**3.9.1 Allowances Included in Contract Sum.** The Contractor shall include in the Contract Sum all allowances stated in the Contract, if any. Such persons or entities shall supply for such amounts and items covered by allowances as the Owner may direct.

**3.9.2 Costs Included in Allowances.** Unless otherwise provided in the Contract:

- .1 Allowances shall cover the cost to the Contractor of materials and equipment delivered at the Site and all required taxes, less applicable trade discounts, rebates, credits or other such reductions in cost made available to Contractor;
- .2 Contractor's costs for unloading and handling at the Site, labor, installation costs, bonds, permits, insurance, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum and not in the allowances except when installation is specified as part of the allowance in the General Requirements (Division I of the Specifications); and
- .3 Whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.9.2.1 and (2) changes in Contractor's costs under Section 3.9.2.2.

**3.9.3 Selection of Products.** Contractor shall, at the time of submittal of the Contractor Construction Schedule, advise the Owner of the date when the final selection and purchase of each product or system described by an allowance must be completed to avoid delaying the work.

### 3.10 SUPERINTENDENT.

**3.10.1 On Site.** The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Site during performance of the work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. The Contractor shall confirm important communications in writing. If prime contractor is working on more than one project at Phoenix-Mesa Gateway Airport a separate superintendent will be provided for this project.

**3.10.2 Satisfactory to Owner and Engineer.** The Contractor's superintendent and staff must be satisfactory to the Owner. The Contractor, within ten (10) days of the Contract award, shall submit to the Engineer and Owner the names and resumes of the superintendent and staff it proposes to use for the work. The superintendent and key members of the Contractor's staff shall not change without the prior consent of the Owner. However, the Contractor agrees to change any superintendent or key member of the Contractor's staff at the request of the Owner if in the sole opinion of the Owner such person's performance is unsatisfactory.



### 3.11 CONTRACTOR'S SCHEDULES.

**3.11.1 Contractor Construction Schedule.** The Contractor, within ten (10) calendar days after being awarded the Contract, shall meet with the Engineer and prepare and submit for the Owner's and Engineer's information and review a construction schedule for the work ("Contractor Construction Schedule"). Such schedule (1) shall not exceed time limits current under the Contract, (2) shall be updated and submitted monthly or more often as directed by the Owner or Engineer, (3) shall comply with the work Milestone Dates, and (4) shall provide for expeditious and practicable execution of the work.

**3.11.2 Updated Schedules.** The updated Contractor Construction Schedules shall not exceed time limits current under the Contract and shall be in accordance with, and fully coordinated with all information previously supplied to the Contractor, including the work Milestone Dates. The Contractor shall submit an updated Schedule with each monthly pay application.

The Contractor, prior to the start of the weekly progress meetings shall, if required, develop a three (3) week look-ahead schedule. The Contractor will discuss this schedule during the progress meetings. The Contractor's three (3) week look-ahead schedule shall not be changed without the approval of the Engineer. Permitted revisions to the schedule will be based on the availability of inspection staff, materials testing staff and the amount of lead time provided for the requested schedule change. Should the Contractor request a change in the three (3) week look-ahead schedule to request to work night shifts, weekends or Holidays; a minimum of a 72-hour notice will be required. The Engineer/Owner may not approve the requested change if the Contractor does not provide the 72-hour notice. Should the Engineer/Owner approve the requested change, the Contractor shall immediately furnish a revised three (3) week look-ahead schedule to the Engineer.

**3.11.3 Critical Path Method.** The Contractor Construction Schedule shall be a critical path method (CPM) precedence diagram network or other mutually agreed upon form of schedule with supporting printouts and a computer disk prepared on software as may be acceptable to the Owner and Engineer.

**3.11.4 Scheduling Cooperation.** The Contractor shall cooperate with the Engineer in scheduling and performing the Contractor's work to avoid conflict, delay in or interference with the work of other contractors or the construction or operations of the Owner's own forces.

**3.11.5 Submittal Schedule.** The Contractor, within ten (10) calendar days after being awarded the Contract, shall prepare and submit for the Owner's information and the Engineer's review a schedule for submittal of Shop Drawings, Product Data, Samples, mockups, models and other submittals ("Submittal Schedule") which is coordinated with the Contractor Construction Schedule and the work Milestone Dates, if any, and which allows the Engineer reasonable time for review of such submittals. The Contractor shall issue to the Engineer a monthly updated Submittal Schedule that identifies both submitted and to be submitted items and the approval status of such items.

**3.11.6 Conform to Most Recent Schedule.** The Contractor shall conform to the most recent schedules.

**3.11.7 Material Status Report.** The Contractor, within ten (10) calendar days after the Notice of Award shall prepare and submit a report for materials ("Material Status Report") on a form approved by the Engineer. This report shall be updated and submitted on a monthly basis or more often as directed by the Engineer. Delivery dates provided on the Material Status Report shall conform to the Contractor's Submittal Schedule, the Contractor Construction Schedule and the work Milestone Dates, if any.

**3.11.8 Manpower Schedule.** The Contractor, within ten (10) calendar days of the Notice of Award shall prepare and submit a projected schedule for manpower (“Manpower Schedule”) for the duration of the work. This schedule shall be updated and submitted on a monthly basis or more often as directed by the Engineer. The Manpower Schedule shall be broken down by craft or trade. This schedule shall conform to the Contractor Construction Schedule and the work Milestone Dates, if any.

**3.11.9 Compliance with Schedules.** The Contractor shall be responsible for all costs resulting from its lack of diligence or failure to provide needed labor or materials to meet the requirements of the work Milestone Dates, if any, or the Contractor Construction Schedule. Owner may withhold payments to Contractor if requested to do so by Contractor’s Surety, or otherwise if necessary to protect the Owner from delay or expense occasioned by the Contractor’s failure to perform under the Contract.

### **3.12 DOCUMENTS AND SAMPLES AT THE SITE.**

**3.12.1 Contractor to Maintain.** The Contractor shall maintain at the Site for the Owner one record copy of the Drawings, Specifications, Change Orders, Shop Drawings, Product Data, Samples, current As-Built Drawings, and addenda or modifications in good order and marked currently to record changes and selections made during the work. These shall be available to the Owner and Engineer and shall be delivered to the Engineer for submittal to the Owner before Final Payment is due.

**3.12.2 Record Drawings.** The Contractor shall keep one (1) copy of all specifications, plans, addenda, modifications, working drawings, and shop drawings at the site and in good order, and the Contractor shall annotate these to show all changes made during construction as the changes occur. When the Project is complete but before the final application for payment is submitted, the annotated set of plans showing the as-built work and any annotated working and shop drawings shall be delivered to the Engineer for the Owner’s record.

**3.12.3 Preparation of Manuals.** Before final payment is due, the Contractor shall furnish to the Engineer five (5) sets of manuals containing the manufacturers’ instructions for maintenance and operation of each item of equipment and apparatus furnished under the Contract and any additional data requested under the Specifications for each division of the work. The manuals shall have a table of contents, indexes and be bound in a 3-ring notebook.

### **3.13 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES.**

**3.13.1 Not Part of Contract.** Shop Drawings, Product Data, Samples and similar submittals are not part of the Contract. The purpose of their submittal is to demonstrate for those portions of the work for which submittals are required the way the Contractor proposes to conform to the information given and the design concept expressed in the Contract.

**3.13.2 Prompt Submittal.** The Contractor shall submit, in accordance with its Submittal Schedule, Shop Drawings, Product Data, Samples and similar submittals required by the Contract with such promptness as to cause no delay in the Contractor’s own work or in that of any other contractor. The Contractor shall cooperate with the Engineer in the coordination of the Contractor’s Shop Drawings, Product Data, Samples and similar submittals with related documents submitted by other contractors. Submittals made by the Contractor that are not required by the Contract may be returned without action.

**3.13.3 Review Required.** The Contractor shall perform no portion of the work requiring submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the Engineer has reviewed the submittal. Such work shall be performed in accordance with reviewed submittals.

**3.13.4 Representations Made by Submittals.** By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the work and of the Contract.

**3.13.5 Effect of Review.** The Contractor shall not be relieved of responsibility for deviations from requirements of the Contract by the Engineer's review of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Engineer in writing of such deviation at the time of submittal and the Engineer has given written approval to the specific deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Engineer's review thereof.

**3.13.6 Revisions to Submittals.** The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Engineer on previous submittals.

**3.13.7 Informational Submittals.** Informational submittals upon which the Engineer is not expected to take responsive action shall be so identified in the submittals.

**3.13.8 Professional Certification.** When professional certification of performance criteria of materials, systems or equipment is required by the Contract, the Engineer shall be entitled to rely upon the accuracy and completeness of such calculations and certifications.

**3.13.9 Cost for Re-submittals.** The Owner shall have the right to require the Contractor to pay the additional costs of the Engineer resulting from the review by the Engineer of any Shop Drawings, Product Data, Samples and similar submittals which have been submitted three (3) or more times.

### **3.14 USE OF SITE.**

**3.14.1 Limits on Use.** The Contractor shall confine operations at the Site to areas permitted by law, ordinances, permits, and the Owner and shall not unreasonably encumber the Site with materials or equipment. Only materials and equipment that are to be used directly in the work shall be brought to the Site. After equipment is no longer required for the work, it shall be promptly removed from the Site.

**3.14.2 Owner Approval.** The Contractor shall coordinate the Contractor's operations with, and secure the approval of, the Owner before using any portion of the Site.

**3.14.3 Display of Signs.** The Contractor shall not display on or about the Site any sign, trademark or other advertisement without the consent of the Owner.

**3.14.4 Equipment Location.** The Contractor's field offices, shanties, materials, storage rooms, etc., if any, will be placed in locations designated by the Engineer or Owner. When it becomes necessary, due to the progress of the Project, for the Contractor to relocate the Contractor's field operations, such relocation will be accomplished in an expeditious manner with no increase in the Contract Time or Contract Sum.

### 3.15 CUTTING AND PATCHING

**3.15.1 Contractor Responsible.** The Contractor shall be responsible for cutting, fitting or patching required to complete the work or to make its parts fit together properly with other work.

**3.15.2 Consent Required.** The Contractor shall not damage or endanger work performed by the Owner or other contractors by cutting, patching, excavating or otherwise altering such construction. The Contractor shall not cut or otherwise alter work performed by the Owner or other contractors except with written consent of the Owner and such other contractors. The Contractor shall not unreasonably withhold from the other contractors or the Owner the Contractor's consent to cutting or otherwise altering the work.

### 3.16 CLEANING UP.

**3.16.1 Daily Clean Up.** The Contractor shall, on a daily basis, clean up after its operation by removing rubbish, including old and surplus materials. The Contractor shall use its best efforts to prevent dust. All waste materials, rubbish and debris resulting from Contractor's work shall be removed regularly from the Site and disposed in accordance with federal, state, and local laws.

**3.16.2 Final Clean Up.** At the completion of the work, the Contractor shall remove all its waste materials and rubbish from and about the Site as well as all its tools, construction equipment, machinery and surplus materials. The Contractor shall professionally wash and clean all surfaces and leave the work neat and clean, ready for occupancy by the Owner, unless higher cleaning standards are required elsewhere in the Contract. The Contractor shall be responsible for the overall cleanliness and neatness of the work.

**3.16.3 Failure to Clean Up.** If the Contractor fails to perform regular daily cleanup or to cleanup at the completion of the work as specified, the Owner may do so or cause such work to be performed, with the cost paid for by the Contractor. The Owner shall have the right to retain such costs from payments due Contractor.

**3.16.4 Clean Up Disputes.** If a dispute arises between the Contractor and other contractors as to their responsibility for cleaning up as required by this Section 3.16, or elsewhere in the Contract, the Owner may clean up and equitably charge the cost thereof to the several contractors. The Owner shall have the right to retain such costs from payments due Contractor.

### 3.17 ACCESS TO WORK.

The Contractor shall provide the Owner and Engineer access to the work in preparation and progress wherever located. The Contractor shall provide facilities for such access so that the Engineer may perform its functions under the Contract.

### 3.18 ROYALTIES AND PATENTS.

**3.18.1 Contractor Responsibility.** The Contractor shall pay all royalties and license fees applicable to the Contractor's work. The Contractor shall indemnify, defend and hold harmless the indemnified parties from any and all suits, demands or claims for infringement of any patent rights unless a particular design, process or product is specified in the Contract. If such specification is made and the Contractor has reason to believe it is an infringement of a patent, the Contractor shall be responsible for any loss arising therefrom unless the Contractor promptly notifies the Engineer before performing any portion of the work involving the patented item.

**3.18.2 Effect of Review by Engineer.** The review by the Engineer of any method of construction, invention, appliance, process, article, device or material of any kind shall not constitute an approval thereof for use by the Contractor in violation of any patent or other rights of any third party.

### **3.19 INDEMNIFICATION.**

**3.19.1 Indemnification for Claims Arising From Work.** To the fullest extent permitted by law, the Contractor shall fully protect, indemnify, defend and hold harmless the indemnified parties from and against any and all liabilities, claims or demands, arising out of or resulting from, either directly or indirectly, the performance of the work or the conditions of the Site, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (including the work itself) including the loss of use resulting therefrom, and (2) is caused by any act, neglect, default or omission of the Contractor or Subcontractor or anyone for whose acts either of them may be liable. But in no event shall Contractor be required to indemnify Owner for Owner's negligence. The Contractor's indemnity obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity that would otherwise exist as to any party or person described in this Section 3.19.1. The Contractor at its own expense and risk shall defend all legal proceedings that may be brought against the indemnified parties on any such liability, claim or demand, and satisfy any resulting judgment that may be rendered against any of them.

**3.19.2 Effect of Workers' Compensation Law on Indemnification.** In any and all claims against the indemnified parties by any employee of the Contractor or Subcontractor, or anyone for whose acts any of them may be liable, the indemnification obligation under this Section 3.19 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any subcontract under Workers' or Workmen's compensation acts, disability benefit acts or other employee benefit acts.

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## **ARTICLE 4      ADMINISTRATION AND RESOLUTION OF DISPUTES**

### **4.1      ADMINISTRATION OF THE CONTRACT.**

**4.1.1 Owner's Representatives.** The Engineer may provide administration of the Contract and may be the Owner's representative (1) during construction, (2) until Final Payment is made, and (3) with the Owner's concurrence, from time to time during the correction period described in Section 12.2.

**4.1.2 Coordination of Contractors.** The Owner will provide for coordination of the activities of other contractors and of the Owner's own forces with the work of the Contractor, who shall cooperate with them. The Contractor shall participate with other contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the Contractor Construction Schedule deemed necessary by the Engineer or Owner.

**4.1.3 Coordination with Work Milestone Dates.** The Contractor shall schedule and coordinate its activities in accordance with the work Milestone Dates, if any. The Owner will schedule and coordinate all Contractors with respect to their use of the Site.

**4.1.4 Engineer's Observation of the Work.** The Engineer may visit the Site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed work and to determine in general if the work is being performed in a manner indicating that the work, when completed, will comply with the Contract. The Owner may assign an inspector to observe the work and report to the Engineer on its progress. Whenever it appears that material furnished or work performed by the Contractor fails to fulfill Contract Document requirements, the inspectors may, but shall not be required to, report their observations to the Engineer. The inspector may direct the attention of the Contractor to such work defects or deficiencies, but nothing the inspector observes, says, or does shall relieve the Contractor from the obligation to perform the work strictly in accordance with the Contract Documents. The inspector shall have the authority to reject defective work. The Owner shall have the authority to suspend the work until an issue can be referred to and decided by the Owner. Inspectors are not authorized to revoke, alter, enlarge, relax, or release any requirements of the Contract Documents. Inspectors shall in no case act as foremen or perform other duties for the Contractor or interfere with prosecution of the work.

**4.1.5 Control of Work.** The Owner and Engineer will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work, since these are solely the Contractor's responsibility and neither will be responsible for the Contractor's failure to carry out the work in accordance with the Contract. Neither the Owner nor the Engineer will have control over or charge of or be responsible for acts or omissions of the Contractor or Subcontractors. Inspections by the Engineer or designee shall not constitute control of individual workmen or the work. Direct control of workmen shall be solely the responsibility of the Contractor. Refer to General Provision Specification Section 50 for additional provisions related to Control of Work.

**4.1.6 Communication with Owner and Engineer.** Except when direct communications have been specifically not authorized in the Contract, the Contractor shall communicate with the Owner through the Engineer. Communications by and with Subcontractors shall be through the Contractor. Communications by and with other contractors shall be through the Owner.

**4.1.7 Authority to Reject Work.** The Engineer/Owner and the Inspectors shall have authority to reject work that does not comply with the Contract and to require additional testing and inspection.

**4.1.8 Engineer's Review of Submittals.** The Engineer will receive from the Contractor and review shop drawings and submittals as listed in Special Provision Specifications.

**4.1.9 Limitation on Engineer's Review of Submittals.** The Engineer will review or take other appropriate action on the Contractor's submittals such as shop drawings, working drawings, supplemental drawings, product data and samples, but only for the limited purpose of checking for general conformance with information given and the design concept expressed in the Contract. The Engineer's action will be taken within two (2) weeks of the date of submittal to the Engineer. Review is for general compliance with the intent of the Contract Documents only. The Contractor is responsible for dimensions, quantities, performance, details, coordination with other trades, safety and other requirements of the Contract Documents. Review does not authorize changes to the contract requirements unless specifically stated in a separate letter of change order. The Engineer's review of the Contractor's submittals shall not relieve the Contractor of the obligations under the Contract. The Engineer's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Engineer, of any construction means, methods, techniques, sequences or procedures. The Engineer's review of a specific item shall not indicate approval of an assembly of which the item is a component.

**4.1.10 Inspections by the Engineer.** The Engineer will conduct inspections to determine the dates of Substantial Completion and Final Completion and will receive written warranties and related documents required by the Contract and assembled by the Contractor.

**4.1.11 Aesthetic Decisions.** The Owner's decisions on matters relating to aesthetic effect will be final.

**4.1.12 Engineer Representation at Site.** The Engineer will be represented at the Site by appropriate construction supervisory staff for the observation of the Contractor's work. The Owner will establish procedures for coordination among the Owner, Engineer and other contractors as appropriate for all aspects of the project.

**4.1.13 Contractors Required to Attend Meetings.** The Engineer or Owner will call for weekly meetings of the Contractor and Subcontractors, as Engineer or Owner deems necessary. Such meetings shall be held at the Site on regular working days during regular working hours, unless otherwise directed. Attendance shall be mandatory for all parties notified to attend, and the Contractor and Subcontractors so notified are required to have a responsible member of their organizations with full decision-making authority in attendance.

**4.1.14 Acts or Omissions by Engineer.** In no event shall any act or omission on the part of the Engineer relieve the Contractor from its obligation to perform the work in full compliance with the Contract.

## **4.2 CLAIMS AND DISPUTES.**

**4.2.1 Time Limits on Claims.** Claims by the Contractor must be made within the number of days specified in Sections 4.2.3, 4.2.4, 4.2.5 or 4.2.6 before the occurrence of the event giving rise to such claim. Claims shall be made by written notice. An additional claim made after the initial Claim has been implemented, by Change Order, shall not be considered.

**4.2.2 Continuing Contract Performance.** Pending final resolution of a claim, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract other than amounts in dispute.

**4.2.3 Claims for Concealed or Unknown Conditions.** Claims for Concealed or Unknown Conditions. If conditions are encountered at the Site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract, (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent at the Site, and (3) could not have been discovered by a thorough inspection and investigation of the Site by the Contractor, the Contractor shall give written notice within 24-hours of observing such conditions to the Engineer and Owner. The Engineer will promptly investigate these conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the work, may recommend to the Owner an equitable adjustment in the Contract Sum or Contract Time, or both. If the Engineer, in consultation with the Owner, determines that the conditions at the Site are not materially different from those indicated in the Contract and that no change in the terms of the Contract is justified, the Engineer shall so notify the Contractor in writing, stating the reasons. Claims by the Contractor in opposition to such determination shall be made within three (3) calendar days after the Engineer has given notice of the decision. Failure to give notice in strict compliance with this time frame shall constitute a waiver of such claim.

**4.2.3.1 Required Notice Prior to Execution of Work.** If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided in Section 4.2.4.2 shall be given 24-hours before proceeding to execute the work. If the Contractor believes additional cost is involved for reasons including but not limited to (1) a changed condition unknown to all parties at the time of bid, (2) an order by the Owner to stop the work where the Contractor was not at fault, (3) a written order for a major change in the work issued by the Engineer, (4) failure of payment by the Owner, or (5) other reasonable grounds, the claim shall be filed in accordance with Section 4.2.4.2.

**4.2.3.2 Claims for Adjustment and Disputes.** If the Contractor wishes to make a claim for an increase in the Contract Sum, the Contractor shall give the Engineer written notice thereof within 24-hours before proceeding with the work for the event giving rise to such claim, in the exercise of due diligence, for the condition giving rise to such Claim.

**4.2.3.3 Waiver of Claim for Additional Cost.** Failure to give notice of a claim for an increase in the Contract Sum, in strict compliance with the requirements of this Section 4.2.4 shall constitute a waiver of such Claim.

**4.2.3.4 Not Used**

**4.2.3.5 Not Used**

**4.2.4 Claims for Additional Time.**

**4.2.4.1 Estimate of Cost and Delay.** If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided in Section 4.2.5.4 shall be given. The Contractor's claim shall include an estimate of cost and of probable effect of delay on progress of the work. In the case of a continuing delay only one claim is necessary.

**4.2.4.2 Adverse Weather.** The Contractor is required, in preparing the Project Schedule, to take into account all relevant weather conditions, including normal rainfall and distribution. No additional compensation shall be given for any rain-related delays or impacts on the Work or the Project Schedule. No time extension will be granted in the Project Schedule unless actual monthly inclement weather exceeds the monthly average for that identified in **Table 1** for the same month. The City of Mesa average monthly precipitation data has been provided as shown in **Table 1** below, based on data published by the Western Regional Climate Center (Jan 2016). In addition, the excessive rainfall must have actually impacted Work Activities on the Critical Path



and cause delay beyond any remaining Float at the time of the rain-caused delay. The burden of documenting normal rainfall, the excessive rainfall and the impact on Critical Path activities is on the Contractor. All other provisions in the Contract Documents relating to claims, including without limitation notice requirements, apply to any claim by the Contractor for a rain delay.

The Contractor shall request an extension of time in writing within twenty-four (24) hours after the event that caused the delay.

**TABLE 1 – City of Mesa Average Monthly Precipitation Data.**

Month	Average Monthly Precipitation
January	0.93-inches
February	0.89-inches
March	0.91-inches
April	0.36-inches
May	0.13-inches
June	0.09-inches
July	0.92-inches
August	1.13-inches
September	0.80-inches
October	0.56-inches
November	0.66-inches
December	0.98-inches

**4.2.4.3 Critical Path.** No extension of time shall be granted to the Contractor for a delay caused by the Owner, Engineer, any of the other contractors, or other causes beyond the Contractor’s control, unless the delay affects the critical path of the Project and then only to the extent that the delay affects the critical path. No extension of time shall be granted to the Contractor to the extent that, notwithstanding the existence of any such circumstance beyond the Contractor’s control, delay would have resulted in any event due to a concurrent unexcused delay by the Contractor.

**4.2.4.4 Notice of Claim for Additional Time.** If the Contractor contends that it is entitled to an extension of time for completion of any portion or portions of the work, the Contractor shall, within 24-hours of the occurrence of the cause of the delay, notify the Engineer in writing of its Claim, setting forth (a) the cause of the delay, (b) a description of the portion or portions of work affected by the delay, (c) the specific number of days of delay for which an extension of time is requested, and (d) all details pertaining thereto. Within three (3) calendar days after the expiration of any such delay, if such delay continues after the filing of the Claim pursuant to the foregoing sentence, the Contractor shall deliver to the Engineer a subsequent written application for the specific number of days of extension of time requested.

**4.2.4.5 Request for Changes in Time Resulting from Change in Work.** For changes in the work which significantly affect the time and progress of the work, any time extension shall be requested no later than when the change in the work is requested.

**4.2.4.6 Waiver of Claim for Additional Time.** Failure to give notice of a Claim for extension of time in strict compliance with the requirements of this Section 4.2.5 shall constitute a waiver of such Claim.

**4.2.5 Injury or Damage to Person or Property.** If the Contractor suffers injury or damage to person or property because of an act or omission of the Owner, written notice of such injury or damage, whether or

not insured, shall be given to the Owner within a reasonable time not exceeding 24-hours after first observance. The notice shall provide sufficient detail to enable the Owner to investigate the matter. If a Claim for additional cost or time related to this Claim is to be asserted, it shall be filed as provided in Section 4.2.4 or 4.2.5.

### **4.3 ALTERNATIVE DISPUTE RESOLUTION.**

**4.3.1 Negotiations.** If a dispute arises out of or relates to this Contract or its breach, the parties to this Contract shall endeavor to settle the dispute through direct discussions as a condition precedent to mediation or binding dispute resolution.

**4.3.2 Mediation.** Should the parties to this Contract be unable to resolve their dispute through direct negotiations, the parties to this Contract, upon the written request of either, shall engage in mediation, to be administered privately by a mediator and according to rules mutually agreed upon by the parties to this Contract, or, the absence of such mutual agreement, by a mediator appointed by JAMS and administered by JAMS in accordance with its then-current mediation rules. The fees and costs of mediation shall be split equally by the parties to this Contract, but subject to reallocation following binding dispute resolution.

**4.3.3 Binding Dispute Resolution.** Should the parties to this Contract be unable to resolve their dispute through direct negotiations or mediation, either party may, within the time limitations for bringing claims under Arizona law and this Contract, commence formal dispute resolution proceedings. Both parties to this Contract consent to binding arbitration administered by JAMS according to its then current arbitration rules, provided, however, that (i) in the event both parties agree, the arbitration may be administered privately by an arbitrator and according to rules mutually agreed upon by the parties to this Contract, and (ii) in the event any party seeks relief against the other party or against a non-party which cannot fully be granted in arbitration, by reason of non-joinder or otherwise, the parties to this Contract are excused from this arbitration requirement and the parties to this Contract shall proceed in the state or federal courts of competent jurisdiction and located in Maricopa County, Arizona. In any arbitration or litigation, the prevailing party shall be entitled to an award of its reasonable attorneys' fees and costs as determined by the arbitrator or court as applicable.

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## ARTICLE 5      SUBCONTRACTORS

### **5.1 CONTRACTUAL RELATIONSHIP.**

Nothing contained in the Contract shall create any contractual relationship between the Owner or Engineer and any Subcontractor.

### **5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK.**

**5.2.1 Division of Work.** The Contractor shall submit a Subcontractor List with his bid. The Contractor shall designate and distinguish in writing with his Bid those portions of the work to be performed by Subcontractors and the Contractor's own forces.

**5.2.2 Proposed Subcontractors.** The Contractor shall furnish in writing to the Engineer for review by the Owner and Engineer the names of persons or entities (including those who are to furnish materials or equipment) proposed for each principal portion of the work with his Bid. The proposed Subcontractors shall be established, reputable firms of recognized standing with a record of successful and satisfactory past performance with the type of work and/or items proposed to be provided or furnished by them. The Contractor shall with this information provide an experience statement or other requested information providing evidence of the Subcontractors' qualifications for the work and experience with similar projects. The Owner and Engineer shall have the right to reject any proposed Subcontractor for whom they have a reasonable objection. The Engineer will promptly reply to the Contractor in writing stating whether or not the Owner or Engineer, after due investigation, has reasonable objection to any such proposed person or entity.

**5.2.3 Opportunity to Review List of Proposed Subcontractors.** No subcontracts shall be executed until the Owner and Engineer have had a reasonable opportunity to review the list of Subcontractors. The Contractor shall not contract with a proposed person or entity to which the Owner or Engineer has made reasonable and timely objection.

**5.2.4 Reasonable Objection to Proposed Subcontractors.** If the Owner has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Engineer has no reasonable objection. No increase in the Contract Sum or Contract Time shall be allowed for such change.

**5.2.5 Substitution or Addition of Subcontractors.** The Contractor will not change any Subcontractor that has been previously approved by Owner without the prior written consent of the Owner. Nor shall the Contractor add any additional Subcontractors without the prior written consent of the Owner. Owner and Engineer shall have the right to reject any proposed replacement or additional Subcontractor for whom they have a reasonable objection. The Owner will promptly reply to the Contractor in writing stating whether or not the Owner or Engineer, after due investigation, has reasonable objection to any such proposed person or entity.

**5.2.6 Contractor Responsibility Not Diminished.** The right of the Owner to reject proposed Subcontractors shall not diminish the Contractor's responsibility for the performance of the Contractor's Subcontractors. The Contractor shall continue to be fully responsible to the Owner for the proper, complete and timely execution of the work, even though a portion of such work has been subcontracted to a Subcontractor acceptable to the Owner.

### 5.3 SUBCONTRACTUAL RELATIONS.

**5.3.1 Subcontractors Subject to Contract.** By an appropriate written Agreement, the Contractor shall require each Subcontractor, to the extent of the work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract, and to assume toward the Contractor all the obligations and responsibilities which the Contractor assumes toward the Owner and Engineer, except with respect to the ADR provisions of this Contract. The Contractor shall require its Subcontractors to enter into similar agreements with their Subcontractors, except with respect to the ADR provisions of this Contract. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract, copies of this Contract to which the Subcontractor will be bound, except with respect to the ADR provisions of this Contract. Each Subcontractor shall similarly make copies of this Contract available to their Subcontractors.

**5.3.2 Terms to be Included in Subcontracts.** All work performed for the Contractor by a Subcontractor shall be pursuant to a written subcontractor agreement between the Contractor and the Subcontractor. The Contractor will insure that each such subcontract contains provisions requiring:

- .1 that the work be performed and guaranteed in accordance with the requirements of this Contract.
- .2 submission to the Contractor of Applications for Payment under each subcontract, and reasonable time to enable the Contractor to apply for payment in accordance with Article 9;
- .3 that the Subcontractor pay sub-subcontractors in accordance with A.R.S. § 32-1129.02 and 34-221(E);
- .4 that the Subcontractor purchase and maintain insurance and comply with all insurance provisions as required by Article 11; and
- .5 that the Subcontractor consent to an assignment of the subcontract from the Contractor to the Owner in the event of termination of the Contractor by the Owner.
- .6 all Federal Assurances as listed in these Specifications.

### 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACT.

The Contractor hereby assigns a portion of the work to the Owner any subcontracts held by the Contractor provided that:

- .1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.1 and only for those subcontracts which the Owner accepts by notifying the Subcontractor in writing; and
- .2 assignment is subject to the prior rights of the Surety, if any, obligated under the bond required by the Contract.

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**ARTICLE 6      CONSTRUCTION BY OWNER OR BY OTHER CONTRACTORS****6.1      OWNER'S RIGHT TO PERFORM CONSTRUCTION WITH OWN FORCES AND TO AWARD OTHER CONTRACTS.**

The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, which include persons or entities under separate contracts involving different Engineers. The Owner further reserves the right to award other contracts in connection with other portions of the Project or other construction or operations on the Site.

**6.2      MUTUAL RESPONSIBILITY.**

**6.2.1 Coordination with Owner's Forces.** The Contractor shall afford the Owner's own forces and other Contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract.

**6.2.2 Defects in Other Work.** If part of the Contractor's work depends upon construction or operations by the Owner's own forces or other contractors, the Contractor shall, prior to proceeding with that portion of the work, promptly report to the Engineer apparent discrepancies or defects in such other construction that would render it unsuitable for proper execution and results. Failure of the Contractor to so report shall constitute an acknowledgment that the Owner's own forces or other contractors completed or partially completed construction is fit and proper to receive the Contractor's work, except as to defects not then reasonably discoverable.

**6.2.3 Damage to Other Work.** The Contractor shall promptly remedy damage caused by the Contractor to the completed or partially completed Project or to the property of the Owner or other contractors.

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## ARTICLE 7      CHANGES IN THE WORK

### **7.1 CHANGE ORDERS.**

**7.1.1 Defined.** A Change Order is a written order to the Contractor signed by the Owner authorizing a change in the (1) Work, (2) Contract Sum or (3) Contract Time. Only a Change Order may change the Contract Sum or Contract Time. The Contractor or its Subcontractors shall not perform any work for which the Contractor intends to seek additional money or an extension of time unless the Contractor obtains a written Change Order or written approval by the Owner prior to performing the work. A Change Order signed by the Contractor indicates the Contractor's agreement therewith, including without limitation, any adjustment in the Contract Sum or Contract Time. A Change Order signed by the Contractor without any indication of change in the Contract Sum or Contract Time indicates the Contractor's agreement that there will be no change in the Contract Sum or Contract Time (collectively "Change Order").

**7.1.2 Contract Sum.** Adjustments to the Contract Sum shall be based on one of the following methods:

- .1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 unit prices stated in the Contract or subsequently agreed upon;
- .3 actual cost of the change, as determined by payroll records and paid receipts, plus allowances for the Contractor's overhead and profit as provided for in Section 7.1.4 subject to a predetermined maximum amount, less applicable trade discounts, rebates, credits or other such reductions in cost made available to Contractor; and
- .4 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee.

**7.1.3 Itemized Costs.** For the purpose of preparing Change Orders, the Contractor shall submit to the Engineer and Owner a complete itemization of all costs required for the change in such form and detail requested by the Engineer/Owner.

**7.1.4 Overhead and Profit.** The maximum that will be allowed for combined overhead and profit, expressed as a percentage of the actual basic cost of the change, shall be as set forth in General Provisions Section 90.05. However, the percentage for overhead and profit allowed by the Owner may be less, depending on the nature, extent or complexity of the change, where the percentage is not commensurate with the responsibility and administration involved (such as the Contractor merely processing a substantial Change Order to a Subcontractor).

**7.1.5 Limitations on Costs.** Costs for changes, to which overhead and profit are to be applied, shall be limited to the following:

- .1 actual costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- .2 actual costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed, less applicable trade discounts, rebates credits or other such reductions in cost made available to Contractor;

- .3 actual rental costs of machinery and equipment per ADOT schedule of equipment rates.
- .4 actual costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the work; and
- .5 additional costs of supervision and field office personnel directly attributable to the change.

**7.1.6 Costs of Material.** Material costs shall be at the actual cost to the Contractor or Subcontractor. Upon request, the Contractor, or Subcontractor, shall submit evidence to substantiate the costs. Materials shall be quoted at trade discount price, with quantity discounts also applied where the quantities warrant. Cash or prompt payment discounts need not be credited. In any proposal with material credits, the credit shall be based on the actual contract cost of the material (including trade and quantity discounts) less any charges actually incurred for handling or returning material that has been delivered. No cancellation or restocking charge will be allowed when material has not been shipped.

**7.1.7 Actual Costs.** Except for changes based on unit prices included in the Contract, cost changes shall be computed by determining the actual cost enumerated in Section 7.1.5 to which the combined overhead and profit may be added, and then adding the tax on materials.

**7.1.8 Unit Prices.** Unit prices proposed on the bid form and included in the Contract are not subject to further overhead and profit adjustments. The Contract Sum will be adjusted by the direct extension of the number of units and the unit prices.

**7.1.9 Impact Costs.** No claim for impact costs resulting from the performance of a Change Order will be permitted against the Owner, the Engineer, or any other party in privity of contract with the Owner with respect to the Project after the time the Change Order is signed by the Contractor.

**7.1.10 Prompt Response to Proposed Changes.** The Contractor shall promptly respond to requests for proposals for changes initiated by the Owner or the Engineer, and in any event shall provide a written itemized proposal in response to any such request within five (5) calendar days after such request is made to the Contractor.

**7.1.11 Final Settlement.** Agreement on any Change Order shall constitute a final settlement of all matters relating to the change in the work which is the subject of the Change Order, including, but not limited to, all direct and indirect costs associated with such change, any impact such change may have on the unchanged work, and any and all adjustments to the Contract Sum or the Contract Time. In the event a Change Order increases the Contract Sum, the Contractor shall include the work covered by such Change Orders in Applications for Payment as if such work were originally part of the Contract. Agreement on any Change Order releases the Owner, Engineer, and any other party in privity of Contract with the Owner with respect to the Project from all claims or liabilities arising in any way in connection with, or in any way association with, such change.

## **7.2 CHANGE DIRECTIVE.**

**7.2.1 Defined.** A Change Directive is a written order prepared by the Engineer and signed by the Owner and Engineer directing the Contractor to proceed with a change in the work when the Owner and Contractor do not agree on the extent of the work, Contract Sum, or Contract Time related to the requested change ("Change Directive"). The Change Directive shall include a proposed basis for adjustment in the Contract Sum or Time, if any adjustment is to be made.

**7.2.2 Contract Sum.** If the Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 unit prices stated in the Contract or subsequently agreed upon;
- .3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 as provided in Section 7.1.5.

**7.2.3 Contractor's Duty to Proceed with the Change in the Work.** Upon receipt of a Change Directive, the Contractor shall promptly proceed with the change in the work involved and advise the Engineer of the Contractor's agreement or disagreement with the method, if any, provided in the Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

**7.2.4 Contractor's Signature on Change Directive.** A Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time and the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

**7.2.5 Change Order Required for Payment.** Pending final determination of cost by the Owner, amounts not in dispute in a Change Directive may be included in Applications for Payment, provided amounts not in dispute have been previously approved in a Change Order. The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost as determined by Sections 7.1.4 and 7.1.5 and confirmed by the Engineer. When both additions and credits covering related work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

### **7.3 MINOR CHANGES IN THE WORK.**

The Engineer will have authority to order minor changes in the work not involving adjustment in the Contract Sum or Contract Time and not inconsistent with the intent of the Contract. Such changes shall be effected by written order issued through the Engineer and shall be binding on the Contractor. The Contractor shall carry out such written orders promptly.

### **7.4 PAYMENT FOR EXTRA WORK.**

Extra work, performed in accordance with the subsection 40-04 of the General Provisions, titled EXTRA WORK of Section 40, will be paid for at the Contract prices or agreed prices specified in the change order or supplemental agreement authorizing the extra work. When the change order or supplemental agreement authorizing the extra work requires that it be done by force account, such force account shall be measured and paid for based on expended labor, equipment, and materials, overhead, taxes, insurance and profit, as follows:



- .1 General Contractor Self-Performed Work and Subcontractor Work Markups. For overhead and profit, the actual or approved costs for equipment, material, and labor shall be marked up by no more than ten (10.0) percent for profit and overhead.
- .2 General Contractor Markups of Subcontractor Work. The Contractor will be allowed to markup actual or approved subcontractor costs for equipment, material, and labor (excluding subcontractor overhead and profit) by up to five (5.0) percent.
- .3 Subcontractor Markups for Self-Performed Work. The subcontractor will be allowed to markup actual or approved costs for equipment, material, and labor performed by that subcontractor's own forces, by up to ten (10.0) percent.
- .4 Subcontractor Work Markups for Sub-subcontractors. The subcontractor will be allowed to markup actual or approved costs for equipment, materials and labor performed by the sub-subcontractor by up to five (5.0) percent.
- .5 Bond. The Contractor shall be allowed to markup the cost for change order work for payment and performance bonds utilizing the same percentage used on the initial Contract and shall submit verification of this percentage from the bonding company.
- .6 Insurance. The Contractor shall be allowed to markup the cost for change order work plus bond costs for property damage/public liability insurance, utilizing the same percentage used on the initial Contract. Verification, from insurance carriers, of this percentage shall be submitted with the initial change order request.
- .7 Sales Tax. The Contractor shall be allowed to markup the cost for change order work plus bond and insurance cost by the current, approved sales tax rate required by the City of Mesa unless modified by the Military Re-Use Zone Tax Credit.
- .8 Equipment. For all equipment, the use of which has been authorized by the Engineer, except for small tools and manual equipment, the Contractor will be paid in accordance with the latest Schedule of Equipment Rates used by the Arizona Department of Transportation.
- .9 Material. For all material, accepted by the Engineer and used in the work, the Contractor will be paid the actual cost of such material. See General Conditions Section 7.1.6 for additional information.
- .10 Labor. For all labor and for the foreman, when he is in direct charge of the operation, the Contractor will be paid the actual wages paid.
- .11 Miscellaneous. No additional allowance will be made for general superintendence, the use of small tools, or other costs for which no specific allowance is herein provided.
- .12 Comparison of Records. The Contractor and the Engineer shall compare records of the cost of force account work at the end of each day. Agreement shall be indicated by signature of the Contractor and the Engineer or their duly authorized representatives. The Contractor

- shall submit all required backup and supplemental information, calculations, invoices, etc., that are required to justify and support all Contractor, subcontractor and/or supplier costs.
- .13 Statement. No payment will be made for work performed on a force account basis until the Contractor has furnished the Engineer with an itemized statement of the cost of such force account work detailed as follows:
- Name, classification, date, daily hours, total hours, rate and extension for each laborer and operator.
  - Designation, dates, daily hours, total hours, rental rate(s), and extension for each unit of machinery and equipment.
  - Quantities of materials, prices, and extensions.
  - Statements shall be accompanied and supported by a receipted invoice for all materials used and transportation charges.

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## ARTICLE 8     TIME

### 8.1     PROGRESS AND COMPLETION.

**8.1.1 Consent to Contract Time.** The Contractor acknowledges that the Contract Time is a reasonable period for performing the work, and that it is capable of properly completing the work within the Contract Time.

**8.1.2 Effective Date of Insurance.** Except by agreement or instruction of the Owner in writing, the Contractor shall not knowingly prematurely commence operations on the Site or elsewhere before the effective date of insurance provided by Contractor under Section 11.2 and bonds to be furnished by the Contractor under Section 11.3.1.

**8.1.3 Compliance with Contract Time.** The Contractor shall carry the work forward expeditiously with adequate forces to maintain progress in accordance with the Contractor Construction Schedule and the work Milestone Dates, if any, and to complete the work within the Contract Time.

**8.1.4 Notice Required Before Commencing Work.** The Contractor shall give notice in writing at least forty-eight (48) hours before commencement of the work, to all persons, public utility companies, owners of property having structures or improvements in proximity to the Site, superintendents, inspectors, or those otherwise in charge of property, streets, water lines, gas lines, sewer lines, telephone cables, electric cables, railroads, or others who may be affected by Contractor's operations, in order that they may remove any obstruction for which they are responsible, and have representation on the Site to see that their property is properly protected. Such notice does not relieve the Contractor of responsibility for any damages, claims, or defense of all actions against the Owner or Engineer resulting from performance of the work.

**8.1.5 Maintenance of Utilities.** The Contractor shall (1) protect utilities encountered whether indicated on Drawings or not; (2) exercise care in excavation around utilities; (3) restore any damaged items to the same condition (or better) as existed prior to starting the work; and (4) maintain utilities or other services indicated to be abandoned in service until new services are provided, tested, and ready for use.

### 8.2     DELAYS AND EXTENSIONS OF TIME.

**8.2.1 Notice of Delays.** The Contractor shall provide prompt written notice to the Engineer of the occurrence of any delay, and in no event shall such notice be given later than (24) hours after commencement of the delay. The Contractor agrees that adjustments in the Contract Time will be permitted for a delay only to the extent such delay (1) is not caused or could not have been anticipated by the Contractor, and (2) could not have been limited or avoided by the Contractor's timely notice to its suppliers, Subcontractors, the Owner, or Engineer of the delay.

**8.2.2 Claims for Additional Time.** Claims relating to time shall be made in accordance with Section 4.2.5.

**8.2.3 Recover of Damages Not Precluded.** This Section 8.2 does not preclude recovery of damages for delay by either party.

### 8.3     TIME OF ESSENCE.

Time is of the essence with respect to the performance of each of the covenants, conditions and obligations contained in this Contract.

#### **8.4 LIQUIDATED DAMAGES.**

Liquidated damages shall be in accordance with the Construction Manager At Risk Construction Services Contract in Division I.

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## **ARTICLE 9**      **PAYMENTS AND COMPLETION**

### **9.1 SCHEDULE OF VALUES.**

At least thirty (30) calendar days before the first Application for Payment is submitted, or at the Pre-construction conference, whichever is sooner, the Contractor shall submit to the Engineer a schedule detailing values allocated to various portions of the work, prepared in such form and supported by such data to substantiate its accuracy as the Engineer may require (“Schedule of Values”). The Schedule of Values shall detail labor, materials and transportation costs for each pay item. This schedule, after acceptance by the Engineer, shall be used as a basis for reviewing the Contractor’s Applications for Payment.

### **9.2 APPLICATIONS FOR PAYMENT.**

**9.2.1 Defined.** On the 25th of each month or the next Business Day if the 25th is a legal holiday or weekend, the Contractor shall submit to the Engineer an itemized application requesting payment for work completed in accordance with the Schedule of Values, substantiating the Contractor’s right to payment as the Owner or Engineer may require, such as copies of requisitions from Subcontractors and reflecting retainage (“Application for Payment”).

**9.2.2 Contractor’s Statement of Subcontractor Utilization, “Attachment C”.** PMGAA is required to track all payments to Contractor’s subcontractors and lower tier subcontractors, regardless of DBE status. Therefore, if Contractor utilized a subcontractor(s) for any work Contractor is submitting an Application for Payment, then Contractor must include a completed and signed Attachment C and attach it to each Application for Payment. Further, each subcontractor and lower tier subcontractor are required to submit Attachment C, only as a reporting mechanism, when they are paying any lower tier subcontractor.

**9.2.3 Change Order Required for Payment.** Applications for Payment may not include requests for payment on account of changes in the work which have been properly authorized by Change Directives but not yet included in executed Change Orders.

**9.2.4 Disputes with Subcontractors.** Applications for Payment may not include requests for payment of amounts the Contractor does not intend to pay to a Subcontractor because of a dispute or other reason.

**9.2.5 Retainage.** Until the work is fifty (50) percent complete, the Owner will retain ten (10) percent of the amount due the Contractor on account of progress payments. When the contract is fifty (50) percent complete, one-half of the amount retained shall be paid to the Contractor upon the Contractor’s written request to Owner, provided the Contractor is making satisfactory progress on the Contract and there is no specific cause or claim requiring a greater amount to be escrow. At the time the work is fifty (50) percent complete and thereafter, five (5) percent of the amount of each progress payment will be retained unless the Engineer or Owner determines that the Contractor is not making satisfactory progress or is in default under the Contract. If the Engineer or Owner determines that the Contractor is not making satisfactory progress or is in default under the Contract, the Owner may continue or reinstate retainage of up to ten (10) percent for all progress payments made under the Contract subsequent to the determination. (Note that the Owner will accept Deposits in Escrow in accordance with *General Provisions* Section 90-08 PAYMENT OF WITHELD FUNDS in lieu of retention of partial payments).

**9.2.6 Payment for Stored Materials.** Unless otherwise provided in the Contract, payments shall be made on account of materials delivered and suitably stored at the Site for subsequent incorporation in the work.

Payment will not be made for materials and equipment suitably stored off the Site. Payment for materials and equipment stored on the Site shall be conditioned upon (1) compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, (2) property insurance as set forth in Section 11.1.1.4.2, (3) transportation to the Site, and (4) all other requirements as listed in the General Provision Specifications, Section 90-07, Payment for Materials on Hand. The Owner will not consider requests to pay for items that are stored offsite, or off-the-shelf type materials not requiring a long lead time to order.

**9.2.7 Lien Waivers.** The Contractor warrants that title to all work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor also warrants that upon submittal of an Application for Payment all work for which payments have been received from the Owner shall be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, or other persons or entities making a claim by reason of having provided labor, materials, or equipment relating to the work. All Applications for Payment shall include lien waivers executed by the Contractor and all Subcontractors providing labor, equipment or materials for the work in the form set forth in A.R.S. § 33-1008. If a Subcontractor, sub-subcontractor, vendor, supplier, manufacturer, or other entity or person supplying labor, equipment, or materials related to the work refuses to furnish a lien waiver for Contractor's Application for Payment, the Contractor shall furnish a bond satisfactory to the Owner against such possible lien prior to payment. Payment shall not be due until Contractor furnishes such bond. The Contractor shall also indemnify defend and hold harmless the indemnified parties against any lien by any Subcontractor, sub-subcontractor, vendor, supplier, manufacturer or other entity or person supplying labor, equipment, or materials related to the work.

**9.2.8 Certified Payroll and Statement of Compliance.** The Engineer shall return the monthly progress payment application to the Contractor with no action if all certified payrolls and statement of compliance have not been submitted to the Engineer through the ending date of the monthly progress payment application.

### **9.3 RECOMMENDATION FOR PAYMENT.**

**9.3.1 Timing for Payment.** The Owner shall pay the Contractor within fourteen (14) days once the Contractor's Application for Payment has been approved and certified by the Owner. In addition to the amount withheld under Section 9.2.4, the Owner may withhold an additional amount from the progress payment sufficient to pay the expenses that the Owner reasonably expects to incur in correcting the deficiency set forth in the written finding. Undisputed portions of progress payments shall be paid monthly after an Application for Payment is submitted to the Owner. The Engineer shall recommend payment to the Owner only upon the Engineer's determination that the work has progressed to the point indicated in the Contractor's Application for Payment and that to the Engineer's knowledge, information and belief, the quality of the work is in accordance with the Contract.

#### **9.3.2 Not Used.**

**9.3.3 Recommendation Subject to Later Evaluation.** The recommendation of the Engineer and the decision of the Owner to make a payment is subject to later evaluation of the work for conformance with the Contract upon Substantial Completion, to results of subsequent tests and inspections, to minor deviations from the Contract correctable prior to completion and to specific qualifications expressed by the Engineer. The issuance of a recommendation for payment will not be a representation that the Engineer has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the work, (2) reviewed the

Contractor's construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

#### **9.4 DECISIONS TO WITHHOLD RECOMMENDATION.**

**9.4.1 Criteria for Withholding Recommendation.** The Engineer may decide not to recommend payment and may withhold a recommendation in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Engineer's opinion the representations to the Owner required in Section 9.3.1 cannot be made. If the Engineer is unable to recommend payment in the amount of the Application for Payment, the Engineer will notify the Contractor and Owner as provided in Section 9.3.1. If the Contractor and Engineer cannot agree on a revised amount, the Engineer will promptly issue a recommendation for the amount for which the Engineer is able to make such representations to the Owner. The Engineer may also decide not to recommend payment or, because of subsequently discovered evidence or subsequent observations, may nullify the whole or a part of a recommendation previously issued, to such extent as may be necessary in the Engineer's opinion to protect the Owner from loss because of:

- .1 defective work not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims;
- .3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- .4 reasonable evidence that the work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or another contractor;
- .6 reasonable evidence that the work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;
- .7 persistent failure to carry out the work in accordance with the Contract;
- .8 failure to submit lien waivers as required by Section 9.2.7;
- .9 unsatisfactory prosecution of the work or failure to comply with the work Milestone Dates or Contractor Construction Schedule;
- .10 failure to supply Shop Drawings or other required submittals;
- .11 erroneous estimates by the Contractor of the value of the work performed; or
- .12 the existence of a breach by the Contractor of any provision in the Contract.

**9.4.2 Recommendation Made Upon Compliance.** When the above reasons for withholding recommendation are removed, recommendation will be made for amounts previously withheld.

#### **9.5 PAYMENTS TO SUBCONTRACTORS.**

**9.5.1 Prompt Payment.** The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 7 days from the receipt of each payment the prime contractor receives from Owner. The prime contractor agrees further to return retainage payments to each subcontractor for work satisfactorily completed within 7 days from the receipt of payment the prime contractor receives from Owner. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the Owner. This clause applies to both DBE and non-DBE subcontractors.

**For purposes of this section, a subcontractor’s work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the Owner. When Owner has made an incremental acceptance of a portion of this Contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.**

**9.5.2 Prompt Payment Required Contract Clause.** The prime Contractor will insert the above clause of Article 9.5.1, in its entirety and without modification, in each subcontract as a result of this Contract. In addition, prime Contractor will ensure that each lower tier contract include the above Prompt Payment clause.

**9.5.3 Enforcement Mechanisms for Prompt Payment to DBEs.** In the event the prime Contractor fails to meet Prompt Payment requirements, as outlined here, Owner shall notify Contractor in writing and may implement enforcement mechanisms including, but not limited to the following:

- .1 **Withhold a portion of payment due to Contractor to ensure compliance with payments**
- .2 **Suspend Contractor participation on future Federally assisted contract solicitations for a period of two (2) years**
- .3 **Breach of contract action, pursuant to the terms of the Contract**

**9.5.4 Statement of Subcontractor Utilization.** Contractor shall complete, sign, and submit to the Owner “Statement of Subcontractor Utilization” (Attachment C) with every pay request involving a subcontractor. Any subcontractor shall submit to the Owner “Statement of Subcontractor Utilization” (Attachment C) when paying any lower tier subcontractor, as a reporting mechanism only.

**9.5.5 Prompt Payment Certification.** For each payment made to a subcontractor or lower tier subcontractor, the Prime Contractor, or lower tier subcontractor as applicable, shall complete, sign, and submit to the Owner “Certification of Prompt Payment to Subcontractors” (Attachment E) upon payment.

**9.5.6 Certification of Payment of DBE to Lower Tier.** If Contractor utilizes a subcontractor that is a DBE and that subcontractor utilizes a non-DBE subcontractor for any portion of work, the DBE subcontractor shall complete, sign, and submit to Owner “Certification of Payment by a DBE to Lower Tier” (Attachment D”) upon payment to the non-DBE subcontractor.

**9.5.7 No Obligation to Oversee Payments.** Neither the Owner nor Engineer shall have an obligation to pay or to see to the payment of money to a Subcontractor, other than prompt payment monitoring as required by Federal regulations.

**9.5.8 Payment Not Acceptance of Work.** A payment recommendation, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of work not in accordance with the Contract.

**9.6 NOT USED.**

**9.7 NOT USED.**

**9.8 SUBSTANTIAL COMPLETION.**

**9.8.1 Defined.** Substantial completion is the stage in the progress of the work when all of the work is complete in accordance with the Contract Documents so the Owner can occupy or utilize the project for its



intended use. For the project and each construction phase to be substantially complete, the following items must be completed in accordance with the Contract Documents: full installation of PCCP meeting the design strength, all grinding for smoothness (if required), PCCP joint sealing, PCCP spall repair, permanent pavement markings, installation of aircraft tie-downs, cables and miscellaneous hardware, all electrical items as identified in the plans including the static grounding rods, and other work required by the Owner. The project area must be open and fully operational for airport and aircraft operations use as intended and shown in the plans. The purpose of granting or acknowledging substantial completion is to stop Contract time. Granting of substantial completion will eliminate the possibility of incurring liquidated damages or additional liquidated damages beyond the substantial completion date, whichever case may apply. The date of substantial completion shall be the date the Engineer receives, in writing, notification from the Contractor, that the work is substantially complete. If upon inspection the project Engineer determines that the project is not substantially complete and/or not ready for inspection, the date of notification from the Contractor will become void. In the event that the Engineer grants substantial completion, the Contractor shall have thirty (30) calendar days thereafter to complete punch list work, unless the Engineer grants additional time in writing. In no case shall a Contractor be granted more than thirty (30) calendar days to complete punch list work, unless there are extenuating circumstances such as a labor strike or circumstance beyond the Contractor's control that would necessitate a further time extension.

In the event the Contractor fails to complete the punch list work within thirty (30) calendar days following the Contract completion date, or in the case of specialized situations within the additional time allotted by the Engineer, the Contractor may be declared in default, and the Engineer may order the work completed by others. In the event of default, as described herein, the Engineer shall withhold from the Contractor's final payment, an amount equal to at least twice the estimated cost of the remaining work. In addition, the Engineer shall withhold the retention or securities deducted from Contract progress payments until all punch list work has been satisfactorily completed, whereupon twice the amount of the actual cost of completing the work shall be deducted from the Contractor's final payment and the remaining funds, if any, including the Contract retention, shall be released in accordance with the conditions set forth in Contract retention. The authority to determine whether the Contractor has achieved Substantial Completion is vested in the first instance with the Engineer in consultation with the Owner, and ultimately in the Owner, whose decision shall be final and binding.

**9.8.2 Certificate of Substantial Completion.** When the Contractor considers that all of the work that the Owner agrees to accept as substantially complete, the Contractor shall prepare and submit to the Engineer a comprehensive list of items to be completed or corrected. The Contractor shall, within 30 calendar days, complete and correct all items on the list, unless the Owner in writing grants a longer time. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all work in accordance with the Contract. Upon receipt of the list, the Engineer will make an inspection to determine whether the work or designated portion thereof is substantially complete. If the inspection discloses any item, whether or not included on the list, which is not in accordance with the requirements of the Contract, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Engineer. The Contractor shall then submit a request for another inspection by the Engineer to determine Substantial Completion. When the work or designated portion thereof is substantially complete, the Engineer will prepare a certificate which shall (1) establish the date of Substantial Completion, and (2) shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate ("Certificate of Substantial Completion"). The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate.

## 9.9 FINAL COMPLETION AND FINAL PAYMENT.

**9.9.1 Final Inspection/Request for Punch List.** Following the issuance of a Certificate of Substantial Completion of the work and upon completion of the work, the Contractor shall forward to the Engineer a written notice that the work is ready for final inspection and acceptance and shall also forward to the Engineer a final Application for Payment. Upon receipt, the Engineer will promptly make such inspection. When the Engineer, upon consultation with the Owner, finds the work acceptable under the Contract and the Contract fully performed, the Engineer will promptly issue a final recommendation stating that to the best of its knowledge, information and belief, and on the basis of its observations and inspections, the work has been completed in accordance with the Contract and that the remaining Contract Sum is due, including all retainage, less authorized deductions.

**9.9.2 Conditions to Final Payment.** Final Payment to the Contractor shall be made within sixty (60) days after compliance Sections 9.9.1 and 9.9.2. Neither Final Payment nor any remaining retainage shall become due until the Contractor submits to the Owner (1) an original affidavit acknowledging that all Subcontractors, material suppliers, payrolls, bills for materials and equipment, and other indebtedness connected with the work have been paid or otherwise satisfied, (2) an original certificate evidencing that insurance required by Section 11.2 is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no reason that the insurance will not cover the period required by Section 11.1, (4) the written consent of the Surety to Final Payment, (5) Record Drawings in accordance with Paragraph 3.12.2 and the Special Provision Specifications, certified by the Contractor that the Drawings as submitted are accurate and complete, (6) five (5) sets of manuals, indexed and bound, containing the manufacturer's warranties, instructions for maintenance and operation of each item of equipment and apparatus included in the work, and (7) a full and final release and waiver of liens from the Contractor and all Subcontractors. If a Subcontractor refuses to furnish a release and waiver of liens, the Contractor shall furnish a bond satisfactory to the Owner against such possible liens prior to Final Payment. Final Payment shall not be due until the Contractor furnishes such bond. The Contractor shall also indemnify, defend, and hold harmless the indemnified parties against liens by any Subcontractor (collectively "Final Payment").

**9.9.3 Delay of Final Completion.** If, after Substantial Completion of the work, Final Completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting Final Completion, and the Engineer so confirms, the Owner shall, upon application by the Contractor and recommendation by the Engineer, and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. In such case, the Owner will retain at least two times the value of the incomplete or uncorrected parts of the work, as determined by the Owner in consultation with the Engineer. If the remaining balance for work not fully completed or corrected is less than retainage stipulated in the Contract the written consent of Surety to payment of the balance due for that portion of the work fully completed and accepted shall be submitted by the Contractor to the Engineer prior to recommendation of such payment. Such payment shall be made under terms and conditions governing Final Payment.

**9.9.4 Waiver of Claims.** Acceptance of payment by the Contractor or Subcontractor shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

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### **9.10 INSPECTION BY ENGINEER.**

The Engineer will make up to two inspections of the work for the purpose of determining Substantial Completion and up to two inspections of the work for the purpose of determining Final Completion. If, after making either of such inspections, the Engineer determines that the work is not substantially complete or finally complete (as the case may be), the Contractor shall be responsible for the costs of the Engineer incurred in the performance of additional inspections for the purpose of determining Substantial Completion or Final Completion (as the case may be).

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**ARTICLE 10    PROTECTION OF PERSONS AND PROPERTY****10.1    SAFETY PRECAUTIONS AND PROGRAMS.**

**10.1.1 Contractor's Responsibility.** The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the work. The Contractor shall have a written safety program for the work and shall submit two (2) copies of this safety program to the Engineer within fifteen (15) days of the Contract award. The Contractor shall, prior to starting any work on the Site, prepare and provide for the Owner's information, the Contractor's pandemic response site safety procedures to apply to and be followed by personnel of the Contractor, Subcontractors, and all other persons present at the Site. If and when needed, the Contractor shall implement these procedures during the course of all activity on Site. The Contractor shall take reasonable measures to educate itself as to evolving best practices in pandemic response site safety procedures and shall modify its procedures accordingly. The Owner recognizes that the Contractor cannot assure the absence of infection on Site, but the Contractor shall use its best efforts to protect the Site and mitigate the impact of infection on the Site.

**10.1.2 Remedy for Failure to Maintain Safety.** If the Contractor fails to maintain the safety precautions required by law, the Owner may take action as necessary and charge the Contractor therefore. However, the failure of the Owner to take any such action shall not relieve the Contractor of its obligations set forth in Section 10.1.1. If the Contractor fails to maintain the safety precautions required by law, the Contractor shall, if directed by the Owner, remove all forces from the Project without cost or loss to the Owner until the Contractor complies with such safety precautions.

**10.1.3 Environmental Hazards.** In the event the Contractor encounters on the Site material reasonably believed to contain asbestos, polychlorinated biphenyls (PCBs), petroleum based substances, or hazardous substances (as defined or regulated under any federal, state, or local law), the Contractor shall (1) immediately suspend the work in the area affected and report the condition to the Owner and Engineer by the fastest available means and follow up in writing; and (2) take reasonable precautions to prevent or contain the movement, spread or disturbance of such materials. The work in the affected area shall not thereafter be resumed except by written consent of the Owner. In no event shall the Owner have any responsibility for any substance or material that is brought to the Site by the Contractor, any Subcontractor, any material-men or supplier or any entity for which any of them is responsible. The Contractor agrees not to use any fill or other materials to be incorporated into the work that are hazardous, toxic or comprised of any items that are hazardous or toxic. Contractor shall indemnify, defend, and hold harmless, the indemnified parties from and against any and all liabilities, claims, or demands (including attorney's fees and costs) arising out of or resulting from the presence, uncovering, release of suspected or confirmed asbestos, polychlorinated biphenyls (PCBs), petroleum based substances, or hazardous substances to the extent caused by the negligence of, or failure to comply with the terms and conditions of the Contract by, the Contractor, any Subcontractor, any material-men or supplier, or any entity for whom any of them is responsible.

**10.1.4 Duty to Suspend the Work.** If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance encountered on the Site by the Contractor, the Contractor shall, upon recognizing the condition, immediately suspend the work in the affected area and report the condition to the Owner and Engineer in writing.

## 10.2 SAFETY OF PERSONS AND PROPERTY.

**10.2.1 Contractor's Duty to Protect.** The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- .1 employees on the work and other persons who may be affected thereby;
- .2 the work and materials and equipment to be incorporated therein, whether in storage on or off the Site, under care, custody or control of the Contractor or the Contractor's Subcontractors;
- .3 other property at the Site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, Taxiways, Runways, Aprons, structures and utilities not designated for removal, relocation or replacement in the course of construction; and
- .4 construction or operations by the Owner or other Contractors.

**10.2.2 Compliance with Safety Notices and Laws.** The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

**10.2.3 Safety Precautions.** The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities. The Contractor shall also be responsible, at the Contractor's sole cost and expense, for all measures necessary to protect any property adjacent to the Site and improvements thereon. The Contractor shall promptly repair any damage to such property or improvements. Without limiting the indemnity provisions elsewhere in the Contract, the Contractor shall indemnify, defend and hold harmless the indemnified parties from and against any and all liabilities, claims or demands (including attorney's fees and costs) arising out of or resulting from damage to such property or improvements.

**10.2.4 Use of Explosives or Hazardous Materials.** When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel. When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary, the Contractor shall secure the Owner's approval prior to their storage or use.

**10.2.5 Contractor Liability.** The Contractor shall promptly remedy damage and loss to any property caused in whole or in part by the Contractor or Subcontractor or anyone or by anyone for whose acts they may be liable.

**10.2.6 Safety Representative.** The Contractor shall designate a responsible member of the Contractor's organization at the Site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Engineer. This person shall conduct regular safety meetings for employees of the Contractor and Subcontractors engaged in construction activities at the Site.

**10.2.7 Loading Precautions.** The Contractor shall not load or permit to be loaded any part of the Project including the structure or the Site in such a way as to cause damage to or endanger the Project or any persons or entities at the Site during or after completion of the work.

**10.2.8 Accident Reports.** The Contractor shall immediately report in writing to the Engineer all accidents arising out of or in connection with the work which cause death, personal injury or property damage, giving full details and statements of any witnesses. In addition, if death or serious personal injuries or serious damages are caused, immediately report the accident by telephone or messenger to the Engineer and Owner.

**10.2.9 Safety Cooperation.** The Contractor and its Subcontractors shall cooperate fully with all interested persons on accident prevention.

**10.2.10 Risk of Loss.** The Contractor shall be fully responsible for, and shall bear the full risk of loss of, all the Contractor's tools, equipment, materials, and other property, notwithstanding any security measures for the Site provided by the Owner.

### **10.3 EMERGENCIES.**

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Section 4.2 and Article 7.

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## **ARTICLE 11    INSURANCE AND BONDS**

### **11.1    CONTRACTOR-PROVIDED INSURANCE.**

**11.1.1 Scope.** The Contractor and Subcontractors shall purchase from and maintain in a company or companies authorized to do business in Arizona the following insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the Contractor, his agents, representatives, employees, or subcontractors. Such insurance shall be effective for the duration of the contract and for ten (10) years thereafter.

**11.1.1.1 Workers' Compensation.** Workers' Compensation insurance with statutory limits as required by the State of Arizona and Employer's Liability insurance with limits of no less than \$1,000,000 per occurrence for bodily injury, \$1,000,000 per employee for bodily injury by disease and a \$1,000,000 policy limit for bodily injury by disease. Such Workers' Compensation insurance will cover obligations imposed by federal and state statutes having jurisdiction of Contractor's or Subcontractors' employees while performing work at locations other than the Site and shall cover Contractor's employees after Substantial Completion of the work and Subcontractor's employees after Subcontractor has substantially performed its Subcontract.

**11.1.1.2 Commercial General Liability.** Commercial General Liability insurance, with a combined single limit of \$5,000,000 per occurrence and in the annual aggregate. Such insurance shall include coverage for Bodily Injury, Property Damage, Personal Injury, Broad Form Property Damage (including Completed Operations), Contractual, Contractors' Protective, Products and Completed Operations, and the hazards commonly referred to as "XCU." This insurance shall also be required for work performed at locations other than the Site, shall cover Contractor after Substantial Completion of the work, and shall cover Subcontractor after Subcontractor has substantially performed its Subcontract. Further, this insurance shall contain a severability of interest provision.

**11.1.1.3 Business Automobile Liability.** Business Automobile Liability insurance, with a combined single limit no less than \$5,000,000 combined single limit per accident for Bodily Injury and Property Damage with respect to all vehicles used in performance of the work on or off the Site, whether owned, non-owned, leased, hired, assigned, or borrowed.

**11.1.1.4 Not Used.**

**11.1.1.5 Not Used.**

**11.1.1.6 Property Insurance.** All-risk property insurance covering damages and/or destruction of all materials which will become part of the work until such materials are delivered to the Site.

**11.1.2 Additional Insured.** The policies required by Sections 11.1.1.2 and 11.1.1.3 herein shall be endorsed to include Phoenix-Mesa Gateway Airport Authority and the Engineer and their officers employees, successors and assigns as additional insured, shall provide that the insurance shall be primary, and shall stipulate that any insurance carried by the additional insured and their officers or employees, shall not be contributory insurance.

**11.1.3 Waiver.** Contractor and Subcontractors waive all rights of recovery against Phoenix-Mesa Gateway Airport Authority and the Engineer, their directors, officers, employees, successors and assigns, and shall require its insurers to waive all rights of subrogation against Phoenix-Mesa Gateway Airport Authority and the Engineer, and all of their respective directors, officers, employees, successors and assigns.

**11.1.4 Contractor to Provide Certificates of Insurance.** Before commencing any work under this Contract, Contractor shall furnish Owner with Certificates of Insurance issued by Contractor's and Subcontractors' insurer(s), as necessary, in a form acceptable to Owner, as evidence that the insurance policies, including all applicable endorsements, providing the coverage, conditions, and limits required by this Section 11.1, are in full force and effect. Owner will not be obligated, however, to review such certificates or to advise Contractor of any deficiencies in such documents, and such receipts shall not relieve Contractor from, or be deemed a waiver of, Owner's right to insist on strict fulfillment of Contractor's obligations hereunder.

**11.1.5 Cancellation Notice.** Contractor's and Subcontractors' Certificates of Insurance shall identify the Contract number and shall provide for not less than thirty (30) days' advance notice of any cancellation, termination, or alteration. All such certificates, endorsements, and notices shall be sent to the following:

Owner:	Phoenix-Mesa Gateway Airport Authority
Address:	5835 South Sossaman Road Mesa, Arizona 85212-6014
Attn:	Mr. Bob Draper, PE – Engineering and Facilities Director

**11.1.6 Not Used.**

**11.1.7 Cancellation of Insurance.** In the event any insurance coverage for the work is cancelled or terminated, Contractor agrees to replace the insurance without any lapse of protection to Owner.

**11.1.8 Contractual Obligations.** The stipulation of insurance coverage in this Section 11.1 shall not be construed to limit, qualify, or waive any liabilities or obligations of Contractor, assumed or otherwise, under this Contract.

**11.1.9 Notice of Loss.** All physical loss or damage to the work or to Owner property must be reported immediately to the Owner.

**11.1.10 Not Used.**

**11.1.11 Deductibles and Self-Insured Retentions.** Any deductibles or self-insured retentions must be declared to, and approved by, Owner. At the option of Owner, either: the Contractor shall reduce or eliminate such deductibles; or the Contractor shall provide a financial guarantee satisfactory to the Owner guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

**11.1.12 Claims Made Policy.** No Claims Made policies, other than Professional Liability, Cyber Liability or Pollution Legal Liability (if applicable to this Contract), will be accepted. For policies that provide claims made coverage:

- .1 The retroactive date must be shown, and this date must be before the execution date of the contract or the beginning of contract work.
- .2 Insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of the contract work.



- .3 If coverage is canceled or non-renewed, and not replaced with another claims made policy with a retroactive date prior to the contract effective date, or start of work date, the Contractor must purchase “extended reporting” coverage for a minimum of five (5) years after completion of contract work.
- .4 A copy of the claims reporting requirements must be submitted to the Owner for review.
- .5 If the services involve lead-based paint or asbestos identification/remediation, the Contractor’s Pollution Legal Liability policy shall not contain lead-based paint or asbestos exclusions. If the services involve mold identification/remediation, the Contractor’s Pollution Legal Liability policy shall not contain a mold exclusion, and the definition of Pollution shall include microbial matter, including mold.

**11.1.13 Acceptability of Insurers.** Insurance is to be placed with insurers with a current A.M. Best rating of no less than “A-” unless otherwise acceptable to the Owner.

**11.1.14 Subcontractors.** Contractor shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein, and Contractor shall ensure that Owner is an additional insured on insurance from subcontractors.

11.1.15 Special Risks or Circumstances. Owner reserves the right to modify these requirements, including limits, based on the nature of the risk, scope of services, prior experience, insurer, coverage, or other special circumstances

## **11.2 PERFORMANCE AND PAYMENT BONDS.**

**11.2.1 A.R.S. § 34-222.** Contractor shall obtain, at its own expense, performance and payment bonds as required by A.R.S. § 34-222. Contractor warrants that its payment and performance bonds fully comply with A.R.S. § 34-222.

**11.2.2 Copies to Potential Beneficiaries.** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

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

### **12.1 UNCOVERING OF WORK.**

**12.1.1 Duty to Uncover Work.** If a portion of the work is covered contrary to the Engineer's request or to requirements specifically expressed in the Contract, it must, if required in writing by the Engineer, be uncovered for its observation and be replaced at the Contractor's expense without change in the Contract Time.

**12.1.2 Cost of Uncovering Work.** If the Contractor covers a portion of the work that the Engineer has not specifically requested to observe prior to its being covered, the Engineer may request to see such work and the Contractor shall uncover it. If such work is in accordance with the Contract, an appropriate Change Order shall charge costs of uncovering and replacement to the Owner. If such work is not in accordance with the Contract, the Contractor shall pay such costs.

### **12.2 CORRECTION OF WORK.**

**12.2.1 Duty to Correct Rejected Work.** The Contractor shall promptly correct all work rejected by the Owner or Engineer as defective or failing to conform to the requirements of the Contract, whether observed before or after Substantial Completion of the work and whether or not fabricated, installed or completed. The Contractor shall bear costs of correcting such rejected work including the replacement or repair of other work affected by Contractor's performance, including additional testing and inspection and compensation for the Engineer's services made necessary thereby. Work rejected before Final Completion shall be corrected prior to Final Payment

**12.2.2 One-Year Duty to Correct Work.** Without limiting the Owner's statutory, common law, or rights arising out of this Agreement, if within one year after the date of Substantial Completion of the work, or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty or guarantee required by the Contract, any of the work is found to be defective or not in accordance with the requirements of the Contract, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so. The Contractor shall bear all costs of correcting such defective work, including replacement or repair of other work affected by the defect and any other damages resulting from such defect. The obligations under this Section 12.2.2 shall survive Final Payment to the Contractor.

**12.2.3 Removal of Nonconforming Work.** The Contractor shall remove from the Site, at no additional cost, portions of the work that are not in accordance with the requirements of the Contract and are neither corrected by the Contractor nor accepted by the Owner.

**12.2.4 Owner's Right to Correct Nonconforming Work.** If the Contractor fails to correct nonconforming work within a reasonable time, the Owner may correct it in accordance with Section 2.4. If the Contractor does not proceed with correction of such nonconforming work within a reasonable time fixed by written notice from the Owner or the Engineer, the Owner may remove it and store the salvable materials or equipment at the Contractor's expense. If the Contractor does not pay costs of such removal and storage within ten (10) days thereafter, the Owner may sell such materials and equipment at auction or at private sale and shall account for the net proceeds thereof, after deducting the costs that should have been borne by the Contractor, including compensation for the Engineer's additional services and expenses made necessary thereby. If such proceeds of sale do not cover costs that the Contractor should have borne, the

Contract Sum shall be reduced by the deficiency. If payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

**12.2.5 Cost of Correcting Other Affected Work.** The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner, Contractor or other contractors caused by the Contractor's correction or removal of work which is defective or not in accordance with the requirements of the Contract.

**12.2.6 Warranty Periods.** Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to obligations that the Contractor has under the Contract or at law, including Section 3.6. Establishment of the time period of one year as described in Section 12.2.2, or such longer period of time as may be prescribed by law or by the terms of any warranty required by the Contract, relates only to the specific obligation of the Contractor to correct the work, and has no relationship to the time within which the obligation to comply with the Contract may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations.

### **12.3 ACCEPTANCE OF NONCONFORMING WORK.**

If the Owner prefers to accept work that is not in accordance with the requirements of the Contract, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable for the difference in value together with an allowance for damage or loss of quality. Such adjustment shall be effected whether or not Final Payment has been made.

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**ARTICLE 13**    **MISCELLANEOUS PROVISIONS****13.1 GOVERNING LAW.**

The laws of the State of Arizona shall govern the Contract.

**13.2 SUCCESSORS AND ASSIGNS.**

The Owner and Contractor respectively bind themselves, their successors, assigns and legal representatives to the other party hereto and to successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract.

**13.3 THIRD PARTY BENEFICIARY.**

This Contract is not intended to benefit any third party.

**13.4 NOTICES.**

**13.4.1 Methods of Notice.** All notices under this Contract shall be in writing and sent to the appropriate person and will be deemed properly given if sent by (i) personal delivery (hand carried), (ii) facsimile transmission, (iii) express mail, postage prepaid, return receipt requested, or (iv) certified United States mail, postage prepaid, return receipt requested, addressed as follows:

Resident Engineer:    N/A

Design Professional:

Owner:                      Phoenix-Mesa Gateway Airport Authority  
5835 South Sossaman Road  
Mesa, Arizona 85212-6014  
Attn: Mr. Bob Draper, PE – Engineering and Facilities Director

With a copy to:

CMAR:                      **TBD**

Each party may by notice to the others specify a different address for subsequent notice purposes. Notice is effective on the date of actual receipt or three (3) days after the date of mailing, whichever is earlier.

**13.4.2 Authorized Persons.** Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

### 13.5 RIGHTS AND REMEDIES.

**13.5.1 Legal Rights.** Duties and obligations imposed by the Contract and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law. This clause shall not be interpreted to permit the Contractor to recover any costs or damages that are otherwise limited, prohibited or waived by the Contract.

**13.5.2 No Waiver.** No action or failure to act by the Owner, Engineer or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

### 13.6 TESTS AND INSPECTIONS.

**13.6.1 Contractor's Duty to Administer.** Tests, inspections and approvals of portions of the work required by the Contract or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at the appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory selected and paid for by the Owner or with the appropriate public authority. The Contractor shall give the Engineer timely notice of when and where tests and inspections are to be made so the Engineer may observe such procedures. Any of the work requiring testing, inspection or approval which is covered or otherwise made inaccessible without the consent of those requiring or making the inspection or test shall be uncovered or made accessible by and at the expense of the Contractor. Contractor shall be responsible for any testing, retesting or other charges resulting from Contractor's failure to perform.

**13.6.2 Additional Testing and Inspection.** If the Engineer, Owner or public authorities having jurisdiction determine that portions of the work require additional testing, inspection or approval not included under Section 13.6.1, the Engineer will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Engineer of when and where tests and inspections are to be made so the Engineer may observe such procedures. The Owner shall bear such costs except as provided in Section 13.6.3.

**13.6.3 Costs for Testing and Inspection.** If such procedures for testing, inspection or approval under Sections 13.6.1 and 13.6.2 reveal failure of the portions of the work to comply with requirements established by the Contract, the Contractor shall bear all costs made necessary by such failure including those of repeated procedures and compensation for the Engineer's services and expenses.

**13.6.4 Certificates.** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract, be secured by the Contractor and promptly delivered to the Engineer.

**13.6.5 Prompt Testing and Inspection.** Tests or inspections conducted pursuant to the Contract shall be made promptly to avoid unreasonable delay in the work.

### 13.7 MANUFACTURERS' NAMEPLATES.

Manufacturers' nameplates shall not be permanently attached to ornamental and miscellaneous metal work, doors frames, millwork, and similar factory fabricated products on which, in the Engineer's and Owner's opinion, the nameplates would be objectionable, if visible after installation of the work. This provision does

not apply to underwriters' labels when required, or to the manufacturers' name and rating plates on mechanical and electrical equipment.

### **13.8 MANUFACTURERS' INSTRUCTIONS.**

All manufactured articles, materials, and equipment shall be applied, installed, connected, erected, used, cleaned and conditioned in accordance with the manufacturers' written specifications or instructions. In case of any difference or conflicts between the requirements of the manufacturers' instructions or specifications and the technical sections of the Specifications, the Contractor shall promptly report any such difference or conflict to the Engineer.

### **13.9 EQUAL EMPLOYMENT.**

The Bidders are directed to Division III – *Federal Contract Provisions*, for the latest federal Equal Opportunity requirements in addition to those stated below.

**13.9.1 Equal Employment Opportunity.** Contractor shall comply with the terms of: (1) Section 503, Public Law 93-112, and the regulations at 41 CFR Part 60-741; (2) Executive Order 11246, as amended, and the regulations at 41 CFR Parts 60-1 through 60-60; and (3) Section 402, Public Law 93-508, and the regulations at 41 CFR Part 60-250.

**13.9.2 Compliance with State Executive Order No. 99-4 (Amending 75-5).** The Contractor shall comply at all times with Arizona Executive Order 75-5, as amended by Executive Order 99-4.

**13.9.2.1** Each Contractor having a contract containing the provisions prescribed in this section shall file and shall cause each Subcontractor to file compliance reports with the Owner or the Arizona Civil Rights Division (in the form the Division prescribes) as directed. Compliance reports shall be timely filed and shall contain such information as the practices, policies, programs and employment policies, programs and employment statistics of the Contractor and each Subcontractor.

**13.9.2.2** Bidders or prospective contractors or subcontractors shall state whether they have participated in any previous contract subject to the provisions of the Executive Order or any proceeding similar to the Executive Order and in that event shall submit on behalf of themselves and proposed subcontractors compliance reports before or as an initial part of contract award.

**13.9.2.3** Whenever the Contractor or Subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the compliance reports shall include this information from the labor unions or agency practices and policies affecting compliance as the Owner or the Arizona Civil Rights Division may prescribe; provided that, if such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training, and the labor union or agency refuses to furnish this information to the Contractor, the Contractor shall so certify to the Owner and shall set forth what efforts he has made to obtain such information.

**13.9.2.4** The Owner or the Arizona Civil Rights Division require that bidders submit as part of their compliance reports a statement with supporting information and in writing signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training with which the bidder deals to the effect that (a) the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and (b) the signer either will affirmatively cooperate in the implementation of the policy and provisions of this order, or it consents and agrees that recruitment, employment, and the terms and conditions of employment under the

proposed contract shall be in accordance with the Executive Order. If the union or agency refuses to execute such a statement, the bidder shall so certify and set forth what efforts have been made to secure the required statement and additional factual material as the Owner or the Arizona Civil Rights Division may require.

### **13.10 ACCESS.**

Contractor will accommodate reasonable access to the Site by third parties at the request of the Engineer or Owner.

### **13.11 HEADINGS.**

The subject headings of this Agreement are included for purposes of convenience only and shall not affect the construction or interpretation of any provision of this Agreement.

### **13.12 INTERPRETATION.**

In the interest of brevity, the Contract frequently omits modifying words such as “all” and “any” and articles such as “the” and “an” but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement. To the extent permitted by the context in which used, (a) words in the singular member shall include the plural, words in the masculine gender shall include the feminine and neuter, and vice versa; and (b) (unless specified otherwise) references to paragraphs, sections or articles are to paragraphs, sections or articles of the General Conditions to the Construction Contract.

### **13.13 RECORDS RETENTION AND INSPECTION.**

The Contractor shall make available at its office all Contractor books, documents, papers, drawings and records relating to this Project for audit, inspection, excerpt, reproduction, or transcription by any authorized representative of the Owner, the Federal Aviation Administration (FAA), the Arizona Department of Transportation (ADOT), the Office of Inspector General, or the Comptroller General of the United States. Contractors and subcontractors' books, records, correspondence, accounting procedures and practices, and any other supporting evidence relating to this Contract, including the papers of any Contractor and Subcontractor employee who works on the Contract, to ensure that the Contractor and its Subcontractor are complying with the warranty under Item 48 below (all the foregoing hereinafter referred to as the Records), shall be open to inspection and subject to audit and/or reproduction during normal working hours to the extent necessary to adequately permit (1) evaluation and verification of any invoices, payments or claims based on Contractors and its Subcontractors actual costs (including direct and indirect costs and overhead allocations) incurred, or units expended directly in the performance of work under this Contract and (2) evaluation of the Contractors and Subcontractors compliance with the Arizona employer sanctions laws referenced Paragraph 3.3.4 of the General Conditions. To the extent necessary for the audit of Records as set forth in this Section, Contractor and its Subcontractors hereby waive any rights to keep such Records confidential. For the purpose of evaluating or verifying such actual or claimed costs or units expended, the Authority shall have access to said Records from the effective date of this Contract for the duration of the work and until five years after the date of final payment by the Authority to Contractor pursuant to this Contract. The Authority shall have access, during normal working hours, to all necessary Contractor and Subcontractor facilities, and shall be provided adequate and appropriate workspace, in order to conduct audits in compliance with the provisions of this subsection. The Authority shall give Contractor or Subcontractor reasonable advance notice of intended audits. Contractor shall require its Subcontractors to

comply with the provisions of this subsection by insertion of the requirements hereof in any subcontract pursuant to this Contract. If any information required of the Contractor or a Subcontractor is in the exclusive possession of another who fails or refuses to furnish this information, the Contractor shall so certify to the Owner, FAA, ADOT Aeronautics, EDA and the Office of Inspector General, or the Comptroller General of the United States, and shall set forth what efforts it has made to obtain the information.

#### **13.14 ARCHAEOLOGICAL RESOURCE PROTECTION.**

The Contractor recognizes that portions of this project are within an Archaeological Resource area. If during the performance of its services the Contractor discovers what may be an archaeological site, Contractor shall immediately cease performance of services in the area of the potential archaeological site and promptly notify Owner & monitor of the location of such site in compliance with General Provisions Section 70.20. Contractor shall not be entitled to an increase in the Contract Sum for any discovery of an archaeological site but may be entitled to an extension of Contract Time provided Contractor strictly complies with all Section 4.2.5 provisions.

#### **13.15 HISTORIC PROPERTY.**

Hangars 24, 31, 32, 37, and 46 are eligible for nomination to the National Register of Historic Places, and consequently, the Contractor shall use all care to ensure that all characteristics of these structures and property are protected to the fullest extent and preserved during Contract performance.

#### **13.16 FOREIGN NATIONALS.**

**13.16.1 Contractor Certification.** Pursuant to Arizona Revised Statutes Section 35-397, the Contractor certifies that it does not have a scrutinized business operation in either Sudan or Iran.

#### **13.17 ADOT AERONAUTICS AND FAA REVIEW AND APPROVAL.**

On projects involving State Airport Development Agreements, ADOT-MPD Aeronautics Group shall approve all plans and specifications before bid advertisement. In addition, all change orders shall also be approved by ADOT. FAA must also approve all plans and specifications before bid advertisement, and FAA must approve all change orders.

#### **13.18 WORK HOURS AND SAFETY STANDARDS.**

With regard to the employment of mechanics and laborers, the Contractor shall comply with sections 103 and 107 of the Contract work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5).

#### **13.19 ENVIRONMENTAL COMPLIANCE.**

**13.19.1** The Contractor shall comply with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15).

**13.19.2** At its sole cost and expense, the Contractor shall at all times promptly observe and comply with all applicable federal, state, and local laws, regulations, and standards and in particular with those provisions



concerning the environment and pollution control and abatement, waste minimization and pollution prevention that are, or may become, applicable to the work.

**13.19.3** The Contractor shall be solely responsible for obtaining at its cost and expense any environmental permits required for its operations under this Contract, independent of any existing Owner permits.

**13.19.4** To the fullest extent permitted by law, the Contractor shall save, indemnify, defend and hold harmless the Owner, Engineer, and the federal government from any damages, costs, expenses, liabilities, fines, or penalties resulting from or relating to releases, discharges, emissions, spills, storage, disposal, or any other acts or omissions by the Contractor, its officers, agents, employees, or contractors, or the invitee of any of them under federal, state or local environmental laws. This provision shall survive the termination or completion of this Contract, and the Contractor's obligations under this Section 13.19.4 shall apply whenever the Owner or the federal government incurs costs or liability for the Contractor's actions of the types described in this Section 13.

**13.19.5** The Owner's rights under this Contract specifically include the right to inspect upon reasonable notice the Site for compliance with environmental, safety, and occupational health laws and regulations. The Contractor shall have no claim against the Owner or any officer, agent, employee, or contractor of the Owner on account of any entries.

**13.19.6** The Contractor shall comply with all federal, state, and local laws, regulations, and other requirements relating to occupational safety and health, the handling and storage of hazardous materials, and the proper generation, handling, accumulation, treatment, storage, disposal, and transportation of hazardous wastes. The Contractor shall be liable for the cost of proper disposal of any hazardous waste it generates or for that waste generated by Subcontractors or assigns in the event of failure by a Subcontractor or assign to properly dispose of such wastes. Where required, the Owner may act on behalf of Contractor to dispose of Contractor-derived waste, sign manifests on behalf of Contractor, and assign such disposal to Contractor's EPA ID number. Contractor shall repay the Owner the costs and fees for doing so.

**13.19.7** The Contractor shall strictly comply with the hazardous waste permit requirements under RCRA, or its state equivalent, and any other applicable laws, rules, or regulations.

**13.19.8** The Contractor shall not conduct any subsurface excavation, digging, drilling, or other disturbance of the surface without Owner's prior written approval.

### **13.20 ENERGY CONSERVATION AND POLICY ACT COMPLIANCE.**

This agreement is executed in recognition that the Contractor and Subcontractor agree to comply with mandatory standards and policies relating to energy efficiency as contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. 6201et seq).

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**ARTICLE 14    TERMINATION OR SUSPENSION OF THE CONTRACT****14.1    TERMINATION BY THE OWNER FOR CAUSE.**

**14.1.1** Criteria for Termination for Cause. The Contractor shall be considered in default of his or her contract and such default will be considered as cause for the Owner to terminate the contract for any of the following reasons if the Contractor:

- .1 Fails to begin the work under the contract within the time specified in the Notice to Proceed, or
- .2 Fails to perform the work or fails to provide sufficient workers, equipment and/or materials to assure completion of work in accordance with the terms of the contract, or
- .3 Performs the work unsuitably or neglects or refuses to remove materials or to perform anew such work as may be rejected as unacceptable and unsuitable, or
- .4 Discontinues the execution of the work, or
- .5 Fails to resume work which has been discontinued within a reasonable time after notice to do so, or
- .6 Becomes insolvent or is declared bankrupt, or commits any act of bankruptcy or insolvency, or
- .7 Allows any final judgment to stand against the Contractor unsatisfied for a period of 10 days, or
- .8 Makes an assignment for the benefit of creditors, or
- .9 Disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction, or
- .10 Breaches any provision of the contract, or
- .11 For any other cause whatsoever, fails to carry on the work in an acceptable manner.

Should the Engineer consider the Contractor in default of the contract for any reason above, the Engineer shall immediately give written notice to the Contractor and the Contractor's surety as to the reasons for considering the Contractor in default and the Owner's intentions to terminate the contract.

**14.1.2 Effect of Termination for Cause.** When any of the above conditions exist, the Owner, after consultation with and certification by the Engineer that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's Surety, if any, ten (10) days' written notice, terminate the Contract and may, subject to any prior rights of the Surety:

- .1 take possession of the Site and all materials, equipment, tools, and construction equipment machinery thereon owned by the Contractor;
- .2 accept assignment of subcontracts pursuant to Section 5.4; and
- .3 finish the work by whatever reasonable method the Owner may deem expedient.

**14.1.3 Contractor Right to Receive Payment.** When the Owner terminates the Contract for one of the reasons stated in Section 14.1.1, the Contractor shall not be entitled to receive further payment until the work is finished.

**14.1.4 Costs for Finishing Work.** If the unpaid balance of the Contract Sum exceeds costs of finishing the work, including compensation for Engineer's services and expenses made necessary thereby and other costs and charges incurred by the Owner, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall, upon application, be certified by the Engineer, and this obligation for payment shall survive termination of the Contract.

**14.2 NOT USED.**

**14.3 OWNER'S TERMINATION FOR CONVENIENCE.**

**14.3.1 Effect of Termination for Convenience.** The Owner reserves the right to terminate the Contract for convenience and without cause even if Contractor has not failed to perform any part of the Contract. Termination of the work hereunder shall be affected by written notice to the Contractor. Upon receipt of such notice, Contractor shall, unless the notice otherwise directs:

- .1 Immediately discontinue the work and the placing of all orders and subcontracts in connection with this Contract;
- .2 Immediately cancel all of the existing orders and subcontracts made hereunder;
- .3 Immediately transfer to the Owner all materials, supplies, work in progress, appliances, facilities, machinery and tools acquired by the Contractor in connection with the performance of the Contract, and take such action as may be necessary or as the Owner may direct for protection and preservation of the work relating to this Contract; and
- .4 Deliver all plans, Drawings, Specifications and other necessary information to the Owner.
- .5 Complete performance of the work not terminated by the notice.

**14.3.2 Contractor's Exclusive Remedy.** If the Owner terminates the Contract for convenience, the following shall be the Contractor's exclusive remedy:

- .1 Reimbursement of all actual expenditures and costs approved by the Owner as having been made or incurred in performing the work;
- .2 Reimbursement of expenditures made and costs incurred with the Owner's prior written approval in settling or discharging outstanding commitments entered into by the Contractor in performing the Contract; and
- .3 Reasonable and substantiated claims, costs, and damages incurred in settlement of terminated contracts with Subcontractors and Suppliers; and
- .4 Reasonable and substantiated expenses to the Contractor directly attributable to Owner's termination action.

Owner will not pay Contractor for loss of anticipated profits or revenue or other economic loss arising out of or resulting from the Owner's termination action.

The rights and remedies this clause provides are in addition to any other rights and remedies provided by law or under this contract.

**14.3.3 Warranties, Guarantees and Indemnified Parties to Remain in Effect.** All obligations of the Contractor under the Contract with respect to completion of the work, including but not limited to all warranties, guarantees and indemnities, shall apply to all work completed or substantially completed by the Contractor prior to a convenience termination by the Owner. Notwithstanding the above, any convenience termination by the Owner or payments to the Contractor shall be without prejudice to any claims or legal remedies that the Owner may have against the Contractor for any cause, including liquidated damages assessed for Contractor's delays to any work Milestone Dates.

**14.3.4 Conversion of Termination for Cause to Termination for Convenience.** Upon a determination that a termination of this Contract other than a termination for convenience under this Article was wrongful or improper for any reason, such termination shall automatically be deemed converted to a convenience termination under this Article 14, and the Contractor's remedy for such wrongful termination shall be limited to the recoveries specified under this Article 14.

**14.3.5 Remedy Limited to Damages.** In the event that Contractor is terminated, whether for cause or convenience, the Contractor's sole remedy shall be for damages. In no event shall the Contractor be entitled to reinstatement or other equitable relief from a court or through alternative dispute resolution.

**14.3.6 Notice that Contract is Subject to Termination Provisions of A.R.S. § 38-511.** The parties acknowledge, and as required by law, notice is hereby given that this Contract is subject to A.R.S. § 38-511.

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## **ARTICLE 15 DISADVANTAGED BUSINESS ENTERPRISES**

**DBE Program** Phoenix-Mesa Gateway Airport Authority's DBE program is race-neutral.

Owner encourages prime contractors to create subcontracting opportunities, especially for small businesses. Owner does not have a specific SBE goal, however, reporting on SBE utilization is required.

### **15.1 CONTRACTOR'S DBE PERFORMANCE PLAN.**

Contractor shall utilize its DBEPP as submitted under solicitation 2024-016-RFQ, throughout the duration of the project. Failure to fulfill the plan's terms and the plan's intent, shall be a material breach of the contract.

### **15.2 CONTRACT ASSURANCE.**

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as the Owner deems appropriate, which may include, but is not limited to: (1) withholding monthly progress payments; (2) assessing sanctions; (3) liquidated damages; and/or (4) disqualifying the contractor from future bidding as non-responsible.

### **15.3 SUBCONTRACTS.**

**15.3.1** Contractor is required to insert the paragraph in Article 15.2 in all subcontracts or agreements it enters into, and all lower tier subcontracts and agreements, as a result of this contract, regardless of whether or not the subcontractor is a DBE.

**15.3.2** Contractor is required to make available a copy of all subcontracts, DBE, SBE, and non-DBE/SBE, prior to any commencement of work by Contractor or any of Contractor's subcontractors. The contractor shall ensure that all subcontracts or agreements with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors contain the required contract clauses and be performed in accordance with this part's provisions.

### **15.4 REQUIRED OUTREACH.**

The following documentation is required to demonstrate that sufficient outreach efforts have been made to engage DBE subcontractors in the performance of this contract:

**15.4.1** Detailed evidence that the Contractor's DBE Performance Plan (DBEPP), as submitted under solicitation 2024-016-RFQ, was and will continue to be utilized in obtaining DBE participation. This should include such things as the following, depending on the Contractor's DBEPP:

- .1 Copy of notification(s) sent to DBE firms of subcontracting opportunities

- .2 Documentation of each DBE firms contacted and their response or other action taken as a result of the contact.
- .3 Documentation of bid responses and/or quotes from all subcontractors who bid to perform work on the project in the areas that DBE firms were also bidding on, including information regarding the reasons why DBE bids were not considered or chosen if applicable).
- .4 Dates and times of outreach events held and a list of attendees.

**15.4.1.2** The following are examples of factors that are illustrative of whether or not the Contractor implemented its DBEPP in good faith:

- .1 The number of contacts attempted or made with DBE firms that perform in trade areas where subcontracting work was identified.
- .2 The timeliness of contacts made with DBE firms so as to allow the firms a reasonable amount of time to respond
- .3 Attempts made to break down portions of the project into economically feasible units to facilitate DBE participation.
- .4 Whether the bidder negotiated in good faith with interested DBEs and did not reject a bid as unqualified without sound reason.

**15.4.2** Division VII, **Attachment A:** Subcontracting and Outreach Efforts Summary.

The Contractors' proposed subcontracting and summary of outreach efforts form (Attachment A) must reflect the scope(s) of work that was identified to be potentially subcontracted and the result of the outreach efforts conducted by the Contractor for each scope of work. The Contractor shall clearly list the scope(s) of work to be subcontracted. The firms contacted in consideration for contracting the scope of work must be listed with the DBE/SBE status noted. The Contractor must indicate which firm(s), if any, were selected for the opportunity identified. Contractor must complete one Attachment A for each scope of work (NAISC or group of NAISC codes) that has been identified to potentially be subcontracted. **Note:** It is the responsibility of the Contractor to ensure that the scope of work to be performed by the subcontractor(s) is consistent with the area in which the firm is qualified, and in the case of a DBE subcontractor, that the firm has been granted DBE certification. The Contractor can confirm what NAICS code(s) a DBE is certified for by visiting: <https://utracs.azdot.gov/> **DBE scopes of work listed on the form that fall outside the trade or performance area in which a DBE has been granted certification shall not be counted as work subcontracted to a DBE firm.** If there are questions, the Contractor should contact the Phoenix-Mesa Gateway Airport Authority Procurement Department for verification. Owner reserves the right to validate information on the form with the DBE subcontractor and/or other certifying entities or licensing agents as part of the verification process.

**15.4.3** Division VII, **Attachment B:** Letter of Intent to Perform as a Subcontractor/Supplier.

The dollar value and the scope of work **EVERY** subcontractor, regardless of DBE/SBE status, is bidding to perform must be completed in full on the form.

For scopes of work where a total contract amount cannot be determined, the Letter of Intent to Perform as a Subcontractor/Supplier should reflect the minimum amount agreed upon between the Contractor and the

subcontractor that will be paid to the subcontractor. When the form contains scopes of work where all of the dollars that will be paid to a DBE cannot be counted towards achieving the DBE program goal, the form should reflect the amount that is applicable to the program goal. **Example:** A DBE firm will provide uniformed officers on the job. The DBE pays the officers \$21 per hour but has bid the contract to the prime contractor at \$30 per hour. Only the \$9 per hour that the DBE maintains as a fee/commission should be reflected on Attachment B.

## 15.5 ENFORCEMENT.

This contract and all subsequent subcontracts entered into as a result of this contract, are subject to the requirements, provisions, and enforcement actions of 49 CFR Part 26, Subpart F, *Compliance and Enforcement*, § 26.107. Further, Contractor is required to insert the below clause from § 26.107 in all subcontracts entered into with a DBE as a result of this Contract.

§ 26.107 Enforcement Actions for firms participating as a DBE:

(a) If you are a firm that does not meet the eligibility criteria of 49 CFR Part 26, Subpart D, Certification Standards, and that attempts to participate in a Department of Transportation (DOT)-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the DOT may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of 49 CFR Part 26, Subpart D, the DOT may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the DOT from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The DOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The DOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

## 15.6 DBE PARTICIPATION CALCULATION.

**15.6.1 Subcontracts with DBE Firms:** DBE participation on the contract will be calculated based on that portion (dollar value) of the contract that DBEs actually perform with their own forces. This includes the cost of supplies and materials obtained by the DBE for the work on the contract, *except* when supplies and/or equipment is purchased or leased from the prime contractor or its affiliate. Special emphasis and care should be taken to ensure that the following types of participation are handled properly when preparing your bid packet.

**15.6.2 Fees & Commissions:** DBE firms that supply a bona fide service for a fee or commission may be counted only to the extent of the fees or commissions charged by the DBE. This includes, but is not limited to, providing professional, technical, consultant, or managerial services, and bonds or insurance specifically required for the performance of a contract. The fees must be reasonable and not excessive as compared with fees customarily allowed for similar services. **Example:** *A DBE firm that supplies uniformed officers for security or traffic control may count only the amounts shared as a commission. The hourly amount paid to the officers may not be counted. If the “per hour” bid amount to the prime contractor is \$30, and \$21 per hour will be paid to the officers, only \$9 per hour can be counted towards achieving the DBE program goal. If the firm estimates that there will be 200 hours of work, only \$2,700 of the total \$6,000 bid could be counted.*

**15.6.3 Trucking & Hauling:** The amount of a trucking/hauling subcontract that may be counted towards the DBE utilization may be limited. A DBE must itself own and operate at least one fully licensed, insured, and operational truck that will be used on the contract. The DBE subcontractor may lease trucks from another DBE firm and receive full credit for the services of those leased vehicles. Non-DBE trucks may also be leased to perform work on the contract, but non-DBE leased trucks can be counted fully **only up to the value of transportation services provided by all DBE-owned trucks on the contract.** Any additional non-DBE leased trucks may only be credited for the fees or commissions the DBE subcontractor retains over and above the cost of the lease arrangement. **Example:** *A DBE trucking firm uses seven trucks on a job. Two are owned by the DBE and one is leased from another certified DBE firm. Four trucks are leased from a non-DBE. The amounts paid to the DBE for the services of three of the non-DBE trucks can be counted in full towards meeting the DBE requirement. Only the amount that the DBE subcontractor receives that is over and above the cost of leasing the fourth truck may be counted as DBE utilization.*

**15.6.4 DBE Prime Contractor:** A DBE prime contractor will be credited with DBE participation for that portion of the contract that they themselves perform, in addition to any portion of the contract that is subcontracted and performed by an eligible DBE subcontractor. **Example:** *If a DBE prime contractor proposes to perform 60 percent of the contract with the firm’s equipment and workforce, and subcontracts 20 percent to a DBE firm and 20 percent to a non-DBE firm, DBE participation will be credited as being 80 percent.*

**15.6.5 DBE/Non-DBE Joint Ventures:** A DBE/non-DBE joint venture, functioning as the prime contractor or as a subcontractor on a Phoenix-Mesa Gateway Airport Authority project, will be credited with DBE participation on the basis of the percentage of profit accruing to the DBE firm. **Example:** *A joint venture made up of one DBE and one non-DBE proposes to perform 60 percent of a project quoted at \$400,000. A total of 50 percent of the profits for performing the work will go to the DBE partner in the joint venture. DBE participation will be credited at 30 percent, or \$120,000.*

**15.6.6 Lower Tier Non-DBE Participation:** Subcontract dollars paid by DBE primes and/or qualifying joint ventures to non-DBE subcontractors will not be considered when determining the percentage of DBE participation on this contract. Amounts subcontracted to a non-DBE by a DBE subcontractor (2<sup>nd</sup> tier or lower) may not be counted.

**15.6.7 Lower Tier DBE Participation:** Contractor is obligated and must report all utilization of DBEs of lower tier subcontracts and ensure subcontractors comply with all applicable DBE reporting requirements.

**15.6.8 DBE Suppliers:** Purchases from DBE suppliers may be counted towards the program goal as follows:

**15.6.8.1 Manufacturers:** Amounts paid to a DBE supplier that manufactures or substantially alters the material or product it supplies will be credited at 100% of the expenditure when determining the percentage of DBE participation.



**15.6.8.2 Regular Dealer:** Purchases from a DBE firm that is an established, regular business that engages, as its principal business, in the purchase, sale, or lease of the products being supplied **may be credited towards the DBE program goal at sixty percent (60%) of the sale price** when determining the percentage of DBE participation.

**15.6.8.3 Packagers, Brokers, Manufacturers' Representatives:** Purchases from a DBE firm who arranges or expedites transactions not as regular dealers, **may not be counted in full** when determining DBE participation. Only the fees or commissions charged in the procurement of the materials or supplies, or fees or transportation charges for the delivery of the materials or supplies may be credited towards achievement of the DBE program goal.

## **15.7 DEFINITIONS.**

**15.7.1 Disadvantaged Business Enterprise (DBE)** means a small business concern that has successfully completed a DBE certification process and been granted DBE status by the Arizona Unified Certification Program or by a U.S. Department of Transportation (USDOT) recognized agency who certifies DBE applicants pursuant to the criteria contained in 49 CFR Part 26.

**15.7.2 Small Business Enterprise (SBE)** means a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. A small business concern shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual(s) that has annual average gross receipts in excess of the cap established by federal regulation. The Secretary shall adjust this figure from time to time for inflation.

**15.7.3 Socially and Economically Disadvantaged Individuals** means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans. Membership in one of the above-mentioned groups does not qualify the firm to be considered a DBE for purposes of this contract. Only firms that have completed a DBE certification process and been granted DBE status shall be considered socially and economically disadvantaged individuals for purposes of this contract.

**15.7.4 DBE Joint Venture** is an association between two or more persons, partnerships, corporations, or any combination thereof, formed to carry on a single business activity. One participant in the joint venture arrangement must hold DBE status from a recognized certifying entity. The joint venture is limited in scope and duration to this contract, and resources, assets and labor of the participants must be combined in an effort to accrue profit.

**15.7.5 Sole Proprietorship** is a DBE for purposes of this contract, if it is 100 percent owned, operated, and controlled by a socially and economically disadvantaged individual.

**15.7.6 Corporation** is a DBE, for purposes of this contract, if the ownership, operation, and control of the business is conditioned upon the control of its shares of stock or other equitable securities, at least 51 percent of which (of all shares) is legally and equitably owned by socially and economically disadvantaged individuals.

**15.7.7 Partnership** is a DBE, for purposes of this contract, if one or more socially and economically disadvantaged individuals own more than 51 percent of the assets or interest in the partnership's property.

**15.7.8 Purchaser** for purposes of this contract, means the Phoenix-Mesa Gateway Airport Authority.

**15.7.9 Bidder** is an individual, partnership, joint venture, corporation or firm submitting a proposal or bid to the Phoenix-Mesa Gateway Airport Authority to perform services required by the contract. The submittal may be direct or through an authorized representative.

**15.7.10 Contract** is a written agreement obligating the seller or business enterprise to furnish goods or services as proposed and the Purchaser or Buyer to pay for such goods or services.

**15.7.11 Subcontract** is any contract at any tier below the prime contract, including purchase orders.

**15.7.12 Supplier** is a business enterprise that manufactures the goods or materials it sells.

**15.7.13 Wholesaler, Distributor, Broker, or Jobber** is a business enterprise that does not manufacture the goods or materials it sells or does not perform the essential work of the contract. **Example:** 1) A trucking company who does not own or operate the trucks necessary to perform the work, but brokers the work to another trucking firm; 2) A distributor who supplies goods or materials as a pass through from the manufacturer, without substantial alteration of the goods or materials; and, 3) A sub-tier bidder who purchases and supplies the goods and materials on behalf of the prime bidder, and delivers the goods and materials to the prime bidder without substantial alteration of the goods and materials.

**END GENERAL CONDITIONS TO THE CMAR CONTRACT**