



## **TOWN OF TAOS PURCHASING DIVISION**

**Changes, additions, deletions and/or any modifications  
other than those agreed upon execution of this Contract without the written consent of the Town of Taos  
shall render this document null and void**

### **AGREEMENT BETWEEN TOWN OF TAOS AND CONTRACTOR FOR TAOS REGIONAL AIRPORT WATER AND WASTEWATER UTILITIES CONSTRUCTION**

**PROJECT: TAOS REGIONAL AIRPORT WATER AND WASTEWATER UTILITIES**

**PROJECT LOCATION: TAOS COUNTY, NEW MEXICO**

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| Exhibit I – Certificate of Liability Insurance                  |
| Exhibit J – Subcontractor's Listing Form                        |
| Exhibit K– Assignment of Antitrust Claims                       |
| Exhibit L – New Mexico, Equal Employment Opportunity Compliance |
| Exhibit M – Change Order to Scope of Work                       |

Exhibit N – Application for Payment

Exhibit O – Certificate of Substantial Completion

Exhibit P – Required Federal Clauses

**AGREEMENT BETWEEN TOWN OF TAOS AND CONTRACTOR FOR TAOS  
REGIONAL AIRPORT WATER AND WASTEWATER UTILITIES CONSTRUCTION**

**PROJECT: TAOS REGIONAL AIRPORT WATER AND WASTEWATER UTILITIES  
CONSTRUCTION**

**PROJECT LOCATION: TAOS, NEW MEXICO**

**THIS AGREEMENT** is made and entered into on this \_\_\_\_ day of \_\_\_\_, 2025 by and between TOWN OF TAOS, a municipal corporation organized and existing under the Laws of the State of New Mexico (hereinafter referred to as "the Town"), and \_\_\_\_\_, a company licensed to do business in the State of New Mexico (hereinafter referred to as "the Contractor") (collectively referred to herein as "the Parties"). Terms used in this Agreement have the meanings stated in the General Conditions. The Town and the Contractor hereby agree as follows:

**RECITALS**

**WHEREAS**, the Town of Taos has received funding from the United States Economic Development Administration under contract EDA 08-79-05544 to install water and wastewater utilities at the Taos Regional Airport;

**WHEREAS**, pursuant to NMSA 1978, Sections 13-1-103 – 13-1-110, competitive sealed Bids were solicited through Invitation for Bids No. \_\_\_\_\_ for construction of water and wastewater utilities at the Taos Regional Airport. A Notice or Advertisement for Bids for that for that project was duly published in conformity with NMSA Section 13-1-104;

**WHEREAS** the CONTRACTOR timely submitted a responsive Bid, and the TOWN thereafter selected the CONTRACTOR as the lowest responsible Bidder pursuant to NMSA Section 13-1-108;

**WHEREAS**, the Town requires the services of the Contractor, and the Contractor is willing to provide these services and both parties wish to enter into this Agreement.

**NOW THEREFORE, in consideration of the premises and mutual obligations herein, the parties hereto agree to the Scope of Work and Contract Terms Identified in this Agreement and these General Terms and Conditions.**

**1. WORK**

- 1.01 The Contractor shall complete all Work as specified or indicated in Contract Documents and Attachment 1 (Scope of Work and Project Schedule). The Work is generally described as follows: construction of water and wastewater utilities at the Taos Regional Airport.

**2. THE PROJECT**

- 2.01 The Project, of which the Work under the Contract Documents is a part, is generally described as follows: construction of water and wastewater utilities at the Taos Regional Airport.

### 3. ENGINEER

- 3.01 The Project has been designed by Daniel B. Stephens & Associates, Inc. (“the Engineer”) and is authorized to act as the Town’s representative, assume all duties and responsibilities of the Engineer, and have the rights and authority assigned to the Engineer in the Contract.

### 4. CONTRACT TIMES

#### 4.01 Time is of the Essence

- A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

#### 4.02 Contract Times: Days

- A. The Work shall be substantially complete within **240** [AN1] days after the date when the Contract Times commence to run as provided in Paragraph 4.01 of the General Conditions, and completed and ready for final payment in accordance with Paragraph 15.07 of the General Conditions within **270** days after the date when the Contract Times commence to run.

#### 4.03 Liquidated Damages

- A. The Contractor and the Town recognize that time is of the essence as stated in Paragraph 4.01 and 4.02 above and that the Town will suffer financial loss if the Work is not completed within the times specified in Paragraph 4.02 above plus any extensions thereof allowed in accordance with Article 11 of the General Conditions. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by the Town if the Work is not completed on time. Accordingly, instead of requiring any such proof, the Town and the Contractor agree that as liquidated damages for delay (but not as a penalty), the Contractor shall pay the Town \$1,500.00 for each day that expires after the time specified in Paragraph 4.02 above for Substantial Completion until the Work is substantially complete. After Substantial Completion, if the Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Time or any proper extension thereof granted by the Town, the Contractor shall pay the Town \$1,500.00 for each day that expires after the time specified in Paragraph 4.02 above for completion and readiness for final payment until the Work is completed and ready for final payment.

### 5. CONTRACT PRICE

- 5.01 The Town shall pay Contractor, under this contract, a maximum of \_\_\_\_\_ plus required New Mexico Gross Receipts Taxes, as approved by the Town Council in accordance with NMSA Section 13-1-100. Gross Receipts tax shall be billed at **7.5%**. [AN2] The foregoing amount is not a guarantee but is the maximum amount that the TOWN will pay for work within the scope of work that the CONTRACTOR satisfactorily performs, except that a valid amendment or change order increasing the amount may be issued by the TOWN. Payment under this Contract is subject to the “Payment Procedures” provisions of Paragraph 6 below and contingent upon the Appropriations and Authorization provisions of Paragraph 18.10.

## **6. PAYMENT PROCEDURES**

### **6.01 Submittal and Processing of Payments**

- A. The Contractor shall submit Applications for Payment in accordance with Article 15 of the General Conditions. Applications for Payment will be processed by the Engineer as provided in the General Conditions.

### **6.02 Progress Payments**

- A. The Town shall make Progress Payments on the basis of the Contractor's Applications for Payment on or about the **25<sup>th</sup>** day of each month during performance of the Work as provided in Paragraph 6.02.A.1 below, provided that such Applications for Payment have been submitted in a timely manner and otherwise meet the requirements of the Contract. All such payments will be measured by the Schedule of Values established as provided in the General Conditions (and in the case of Unit Price Work based on the number of units completed) or, in the event there is no Schedule of Values, as provided elsewhere in the Contract.
  - 1. Prior to Substantial Completion, Progress Payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as the Town may withhold, including but not limited to liquidated damages, in accordance with the Contract.
    - a. **100** percent of the value of the Work completed.; and
    - b. **100** percent of cost of materials and equipment stored and not yet incorporated in the Work
- B. Upon Substantial Completion, the Town shall pay an amount sufficient to increase total payments to the Contractor to **100** percent of the Work completed, less such amounts set off by the Town pursuant to Paragraph 15.01.F of the General Conditions, and less **100** percent of the Engineer's estimate of the value of Work to be completed or corrected as shown on the Punch List of items to be completed or corrected prior to final payment.

### **6.03 Final Payment**

- A. Upon final completion and acceptance of the Work, the Town shall pay the remainder of the Contract Price in accordance with Paragraph 15.07 of the General Conditions.

### **6.04 Consent of Surety**

- A. The Town will not make final payment unless the Contractor submits written consent of the surety to such payment, return, or release.

### **6.05 Interest**

- A. All amounts not paid within thirty (30) days following a recommendation to pay of the Engineer shall bear interest at the rate of one and one-half percent (1½ %) per month.

## **7. CONTRACT DOCUMENTS**

### **7.01 Contents**

- A. The Contract Documents consist of all of the following:
  - 1. This Agreement
  - 2. The General Conditions.

3. The Contractor's Bid. Exhibit A - Bid Form C-410
4. Addenda (numbers [number] to [number], inclusive).<sup>[AN3]</sup>
5. Bonds:
  - a. Performance Bond (together with power of attorney). Exhibit B
  - b. Payment Bond (together with power of attorney). Exhibit C
6. Supplementary Conditions. Exhibit D
7. Specifications as listed in the table of contents of the Project manual (copy of list attached). Exhibit E
8. Drawings (not attached but incorporated by reference) consisting of **12** sheets with each sheet bearing the following general title: Taos Abeyta Settlement Mutual Benefits Water Project Installation of Municipal Supply Well #10.
9. Drawings listed on the attached sheet index. Exhibit F
10. Attachments and Exhibits to this Agreement (enumerated as follows):
  - a. Attachment 1 - Scope of Work and Project Schedule
  - b. Exhibit A – Bid Form C-410
  - c. Exhibit B – Performance Bond
  - d. Exhibit C – Labor and Material Payment Bond
  - e. Exhibit D – Supplementary conditions
  - f. Exhibit E – Technical Specifications
  - g. Exhibit F – Drawings
  - h. Exhibit G – Amendment to the Agreement
  - i. Exhibit H – Notice to Proceed
  - j. Exhibit I – Certificate of Liability Insurance
  - k. Exhibit J – Subcontractor's Listing Form
  - l. Exhibit K – Assignment of Antitrust Claims
  - m. Exhibit L – Rio Pueblo (Well 10) Drilling and Installation Project, Taos, New Mexico, Equal Employment Opportunity Compliance
  - n. Exhibit M – Change Order to Scope of Work
  - o. Exhibit N – Application for Payment
  - p. Exhibit O – Certificate of Substantial Completion
  - q. Exhibit P – Required Federal Clauses
11. The following items, which may be delivered or issued on or after the Effective Date of the Contract, and are not attached hereto:
  - a. Notice to Proceed.
  - b. Work Change Directives.
  - c. Change Orders.

- d. Field Orders.
  - e. Warranty Bond, if any.
- B. The Contract documents are to be interpreted in the order listed.
- C. The Contract Documents listed in Paragraph 7.01.A are attached to this Agreement (except as expressly noted otherwise above).
- D. There are no Contract Documents other than those listed above in this Article 7.
- E. The Contract Documents may only be amended, modified, or supplemented as provided in the Contract.

7.02. Entire Agreement.

- A. This Agreement represents the entire Contract between the parties except as otherwise provided herein and may not be amended, changed, modified, or altered without the written consent of the Parties hereto. This Agreement incorporates all of the conditions, agreements, and understandings between the Parties concerning the subject matter of this Agreement, and all such conditions, understandings, and agreements have been merged into this written Agreement. No prior condition, agreement, or understanding, verbal or otherwise, of the Parties or their agents shall be valid or enforceable unless incorporated in this written Agreement or amended, changed, modified or altered as provided herein.

7.03 Amendment to the Agreement

- A. Any amendments to the agreement shall be made on the form listed as Exhibit G.

## **8. REPRESENTATIONS, CERTIFICATIONS, AND STIPULATIONS**

8.01 The Contractor's Representations.

- A. In order to induce the Town to enter into this Contract, the Contractor makes the following representations:
  - 1. The Contractor has examined and carefully studied the Contract Documents, including Addenda.
  - 2. The Contractor has visited the Site, conducted a thorough visual examination of the Site and adjacent areas, and become familiar with the general, local, and Site conditions that may affect cost, progress, and performance of the Work.<sup>[AN4]</sup>
  - 3. The Contractor is familiar with all Laws and Regulations that may affect cost, progress, and performance of the Work.
  - 4. The Contractor has carefully studied the reports and drawings relating to Hazardous Environmental Conditions, if any, at or adjacent to the Site that have been identified in the Supplementary Conditions, with respect to Technical Data in such reports and drawings.
  - 5. The Contractor has considered the information known to the Contractor and has considered the information commonly known to contractors doing business in the locality of the Site; information and observations obtained from visits to the Site; the Contract Documents; and the Technical Data identified in the Supplementary Conditions or by definition, with respect to the effect of such information, observations, and Technical Data on (a) the cost, progress, and performance of the Work; (b) the means, methods,

techniques, sequences, and procedures of construction to be employed by the Contractor; and (c) the Contractor's safety precautions and programs.

6. Based on the information and observations referred to in the preceding paragraph, the Contractor agrees that no further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract.
7. The Contractor is aware of the general nature of work to be performed by the Town and others at the Site that relates to the Work as indicated in the Contract Documents.
8. The Contractor has given the Engineer written notice of all conflicts, errors, ambiguities, or discrepancies that the Contractor has discovered in the Contract Documents, and of discrepancies between Site conditions and the Contract Documents, and the written resolution thereof by the Engineer is acceptable to the Contractor.
9. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
10. The Contractor's entry into this Agreement constitutes an incontrovertible representation by the Contractor that without exception all prices in the Agreement are premised upon performing and furnishing the Work required by the Contract Documents.

#### 8.02 Contractor's Certifications

- A. The Contractor certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 8.02:
  1. "corrupt practice" means the offering, giving, receiving, or soliciting of anything of value likely to influence the action of a public official in the bidding process or in the Contract execution;
  2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of the Town, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive the Town of the benefits of free and open competition;
  3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of the Town, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
  4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

IN WITNESS WHEREOF, the Town and the Contractor have signed this Agreement.

This Agreement will be effective on **XXXX** [AN5](which is the Effective Date of the Contract).

Town:

Contractor:

\_\_\_\_\_  
(typed or printed name of organization)

By: \_\_\_\_\_  
(individual's signature)

Date: \_\_\_\_\_  
(date signed)

Name: \_\_\_\_\_  
(typed or printed)

Title: \_\_\_\_\_  
(typed or printed)

Attest: \_\_\_\_\_  
(individual's signature)

Title: \_\_\_\_\_  
(typed or printed)

Address for giving notices:

\_\_\_\_\_  
\_\_\_\_\_

Designated Representative:

Name: \_\_\_\_\_  
(typed or printed)

Title: \_\_\_\_\_  
(typed or printed)

Address:

**FOR SPECIFIC DETAILS, REFER TO ARTICLE**

**18 of**

**the GENERAL TERMS AND CONDITIONS OF**

**AGREEMENT**

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

(If [Type of Entity] is a corporation, attach evidence of authority to sign. If [Type of Entity] is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of this Agreement.)

\_\_\_\_\_  
(typed or printed name of organization)

By: \_\_\_\_\_  
(individual's signature)

Date: \_\_\_\_\_  
(date signed)

Name: \_\_\_\_\_  
(typed or printed)

Title: \_\_\_\_\_  
(typed or printed)

(If [Type of Entity] is a corporation, a partnership, or a joint venture, attach evidence of authority to sign.)

Attest: \_\_\_\_\_  
(individual's signature)

Title: \_\_\_\_\_  
(typed or printed)

Address for giving notices:

\_\_\_\_\_  
\_\_\_\_\_

Designated Representative:

Name: \_\_\_\_\_  
(typed or printed)

Title: \_\_\_\_\_  
(typed or printed)

Address:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

License No.: \_\_\_\_\_  
(where applicable)

State: \_\_\_\_\_

**General Terms and Conditions of the Agreement Between the Town of Taos and  
Contractor for  
TAOS REGIONAL AIRPORT WATER AND WASTEWATER CONSTRUCTION**

**ARTICLE 1 – DEFINITIONS AND TERMINOLOGY**

1.01. Defined Terms

- A. Wherever used in the Bidding Requirements or Contract Documents, a term printed with initial capital letters, including the term's singular and plural forms, will have the meaning indicated in the definitions below. In addition to terms specifically defined, terms with initial capital letters in the Contract Documents include references to identified articles and paragraphs, and the titles of other documents or forms.
1. *Addenda*—Written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Requirements or the proposed Contract Documents.
  2. *Agreement*—The written instrument described in Section 7.02 of the Agreement, executed by the Town and the Contractor, that sets forth the Contract Price and Contract Times, identifies the parties and the Engineer, and designates the specific items that are Contract Documents.
  3. *Application for Payment*—The document prepared by the Contractor to request progress or final payments, and which is to be accompanied by such supporting documentation as is required by the Contract Documents.
  4. *Bid*—The offer of a Bidder submitted on the prescribed form setting forth the prices for the Work to be performed.
  5. *Bidder*—An individual or entity that submits a Bid to the Town.
  6. *Bidding Documents*—The Bidding Requirements, the proposed Contract Documents, and all Addenda.
  7. *Bidding Requirements*—The Advertisement or Invitation to Bid, Instructions to Bidders, Bid Bond or other Bid security, if any, the Bid Form, and the Bid with any attachments.
  8. *Change Order*—A document which is signed by the Contractor and the Town and authorizes an addition, deletion, or revision in the Work or an adjustment in the Contract Price or the Contract Times, or other revision to the Contract, issued on or after the Effective Date of the Contract.
  9. *Change Proposal*—A written request by the Contractor, duly submitted in compliance with the procedural requirements set forth herein, seeking an adjustment in Contract Price or Contract Times; contesting an initial decision by the Engineer concerning the requirements of the Contract Documents or the acceptability of Work under the Contract Documents; challenging a set-off against payments due; or seeking other relief with respect to the terms of the Contract.
  10. *Claim*
    - a. A demand or assertion by the Town directly to the Contractor, duly submitted in compliance with the procedural requirements set forth herein, seeking an adjustment

- of Contract Price or Contract Times; contesting an initial decision by the Engineer concerning the requirements of the Contract Documents or the acceptability of Work under the Contract Documents; contesting the Engineer's decision regarding a Change Proposal; seeking resolution of a contractual issue that the Engineer has declined to address; or seeking other relief with respect to the terms of the Contract.
- b. A demand or assertion by the Contractor directly to the Town, duly submitted in compliance with the procedural requirements set forth herein, contesting the Engineer's decision regarding a Change Proposal, or seeking resolution of a contractual issue that the Engineer has declined to address.
  - c. A demand or assertion by the Town or the Contractor, duly submitted in compliance with the procedural requirements set forth herein, made pursuant to Paragraph 12.01.E.4, concerning disputes arising after the Engineer has issued a recommendation of final payment.
  - d. A demand for money or services by a third party is not a Claim.
11. *Constituent of Concern*—Asbestos, petroleum, radioactive materials, polychlorinated biphenyls (PCBs), lead-based paint (as defined by the HUD/EPA standard), hazardous waste, and any substance, product, waste, or other material of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to Laws and Regulations regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.
  12. *Contract*—The entire and integrated written Contract described in Section 7.02 of the Contract between the Town and the Contractor concerning the Work.
  13. *Contract Documents*—Those items described in Section 7.01 of the Contract, and which together comprise the Contract.
  14. *Contract Price*—The money that the Town has agreed to pay the Contractor for completion of the Work in accordance with the Contract Documents.
  15. *Contract Times*—The number of days or the dates by which the Contractor shall: (a) achieve Milestones, if any; (b) achieve Substantial Completion; and (c) complete the Work.
  16. *Contractor*—Is the person, firm or corporation with whom the Contract is entered into with the Town.
  17. *Day*—The word “day” means a calendar day of twenty-four (24) hours measured from midnight to 11:59 p.m. of the next day unless otherwise noted.
  18. *Drawings*—The part of the Contract that graphically shows the scope, extent, and character of the Work to be performed by the Contractor.
  19. *Effective Date of the Contract*—The date, indicated in the Agreement, on which the Contract becomes effective, which is the date of last signature by the parties hereto or the date agreed to between the Parties.
  20. *Elected Official*—The Mayor of the Town of Taos and the Town Councilors comprising the Governing Body of the Town of Taos.
  21. *Electronic Document*—Any Project-related correspondence, attachments to correspondence, data, documents, drawings, information, or graphics, including but not limited to Shop Drawings and other Submittals, that are in an electronic or digital format.

22. *Electronic Means*—Electronic mail (email), upload/download from a secure Project website, or other communications methods that allow: (a) the transmission or communication of Electronic Documents; (b) the documentation of transmissions, including sending and receipt; (c) printing of the transmitted Electronic Document by the recipient; (d) the storage and archiving of the Electronic Document by sender and recipient; and (e) the use by recipient of the Electronic Document for purposes permitted by this Contract. Electronic Means does not include the use of text messaging, or of Facebook, Twitter, Instagram, or similar social media services for transmission of Electronic Documents.
23. *Engineer*—The individual or entity named as such in the Contract.
24. *Field Order*—A written order issued by the Engineer which requires minor changes in the Work but does not change the Contract Price or the Contract Times.
25. *Hazardous Environmental Condition*—The presence at the Site of Constituents of Concern in such quantities or circumstances that may present a danger to persons or property exposed thereto.
- a. The presence at the Site of materials that are necessary for the execution of the Work, or that are to be incorporated into the Work, and that are controlled and contained pursuant to industry practices, Laws and Regulations, and the requirements of the Contract, is not a Hazardous Environmental Condition.
  - b. The presence of Constituents of Concern that are to be removed or remediated as part of the Work is not a Hazardous Environmental Condition.
  - c. The presence of Constituents of Concern as part of the routine, anticipated, and obvious working conditions at the Site, is not a Hazardous Environmental Condition.
26. *Laws and Regulations; Laws or Regulations*—Any and all applicable laws, statutes, rules, regulations, ordinances, codes, and binding decrees, resolutions, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.
27. *Milestone*—A principal event in the performance of the Work that the Contract requires the Contractor to achieve by an intermediate completion date, or by a time prior to Substantial Completion of all the Work.
28. *Notice of Award*—The written notice letter by the Town to a Bidder of the Town's acceptance of the Bid.
29. *Notice to Proceed*—The written notice by the Town to the Contractor fixing the date on which the Contract Times will commence to run and on which the Contractor shall start to perform the Work.
30. *Payment Bond*—A written form of security from a surety company to the Town on behalf of an acceptable prime contractor or subcontractor, guaranteeing payment to all persons providing labor, materials, equipment, or services in accordance with the Contract.
31. *Performance Bond*—A written form of security from a surety company to the Town, on behalf of an acceptable prime contractor or subcontractor, engineering the completion of the Work in accordance with the terms of the Contract.
32. *Progress Payment*—A payment from the Town to the Contractor determined by calculating the difference between the completed Work and materials stored and a predetermined Schedule of Values or unit costs (see "Schedule of Values," "Unit Costs").

33. *Progress Schedule*—A schedule, prepared and maintained by the Contractor, describing the sequence and duration of the activities comprising the Contractor's plan to accomplish the Work within the Contract Times.
34. *Project*—The total undertaking to be accomplished for the Town by engineers, contractors, and others, including planning, study, design, construction, testing, commissioning, and start-up, and of which the Work to be performed under the Contract Documents is a part.
35. *Punch List*—A list of items to be completed or corrected, prepared by the Town and/or the Engineer, checked and augmented as required by the Contractor or Construction Manager. The failure to include any item on such list does not relieve the Contractor of the responsibility to complete all Work in accordance with the Contract Documents.
36. *Resident Project Representative*—The authorized representative of the Engineer assigned to assist the Engineer at the Site. As used herein, the term Resident Project Representative (RPR) includes any assistants or field staff of Resident Project Representative.
37. *Samples*—Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and that establish the standards by which such portion of the Work will be judged.
38. *Schedule of Submittals*—A schedule, prepared and maintained by the Contractor, of required submittals and the time requirements for the Engineer's review of the submittals.
39. *Schedule of Values*—A statement furnished by the Contractor to the Engineer and the Town reflecting the portions of the Contract Price allotted for the various parts of the Work and used as the basis for reviewing the Contractor's Applications for Payment.
40. *Services*—Includes services performed, workmanship, and material furnished or utilized in the performance of services.
41. *Shop Drawings*—All drawings, diagrams, illustrations, schedules, and other data or information that are specifically prepared or assembled by or for the Contractor and submitted by the Contractor to illustrate some portion of the Work. Shop Drawings, whether approved or not, are not Drawings and are not Contract Documents.
42. *Site*—Lands or areas indicated in the Contract Documents as being furnished by the Town upon which the Work is to be performed, including rights-of-way and easements, and such other lands or areas furnished by the Town which are designated for the use of the Contractor.
43. *Specifications*—The part of the Contract that consists of written requirements for materials, equipment, systems, standards, and workmanship as applied to the Work, and certain administrative requirements and procedural matters applicable to the Work.
44. *Stipulated Sum Bid*—A single entry amount to cover all labor, equipment, materials, services, and overhead and profit for completing the construction of a variety of unspecified items of work without the benefit of a cost breakdown.
45. *Stipulated Sum Contract*—A written Contract between the Town and the Contractor wherein the Town agrees to pay the Contractor a specified sum of money for completing a scope of work consisting of a variety of unspecified items or work.
46. *Subcontractor*—An individual or entity having a direct contract with the Contractor or with any other Subcontractor for the performance of a part of the Work.

47. *Submittal*—A written or graphic document, prepared by or for the Contractor, which the Contract Documents require the Contractor to submit to the Engineer, or that is indicated as a Submittal in the Schedule of Submittals accepted by the Engineer. Submittals may include Shop Drawings and Samples; schedules; product data; Town-delegated designs; sustainable design information; information on special procedures; testing plans; results of tests and evaluations, source quality-control testing and inspections, and field or Site quality-control testing and inspections; warranties and certifications; Suppliers' instructions and reports; records of delivery of spare parts and tools; operations and maintenance data; Project photographic documentation; record documents; and other such documents required by the Contract Documents. Submittals, whether or not approved or accepted by the Engineer, are not Contract Documents. Change Proposals, Change Orders, Claims, notices, Applications for Payment, and requests for interpretation or clarification are not Submittals.
48. *Substantial Completion*—The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of the Engineer, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms "substantially complete" and "substantially completed" as applied to all or part of the Work refer to Substantial Completion of such Work.
49. *Supplementary Conditions*—The part of the Contract that amends or supplements these General Conditions.
50. *Supplier*—A manufacturer, fabricator, supplier, distributor, or vendor having a direct contract with the Contractor or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by the Contractor or a Subcontractor.
51. *Technical Data*
- a. Those items expressly identified as Technical Data in the Supplementary Conditions (if any), with respect to either (1) existing subsurface conditions at or adjacent to the Site, or existing physical conditions at or adjacent to the Site including existing surface or subsurface structures (except Underground Facilities) or (2) Hazardous Environmental Conditions at the Site.
  - b. If no such express identifications of Technical Data have been made with respect to conditions at the Site, then Technical Data is defined, with respect to conditions at the Site under Paragraphs 5.04, 5.05, and 5.06, as the data contained in boring logs, recorded measurements of subsurface water levels, assessments of the condition of subsurface facilities, laboratory test results, and other factual, objective information regarding conditions at the Site that are set forth in any geotechnical, environmental, or other Site or facilities conditions report prepared for the Project and made available to the Contractor.
  - c. Information and data regarding the presence or location of Underground Facilities are not intended to be categorized, identified, or defined as Technical Data, and instead Underground Facilities are shown or indicated on the Drawings.
52. *Underground Facilities*—All active or not-in-service underground lines, pipelines, conduits, ducts, encasements, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or systems at the Site, including but not limited to those facilities or systems that produce, transmit, distribute, or convey telephone or other communications, cable television, fiber optic transmissions, power, electricity, light, heat, gases, oil, crude

oil products, liquid petroleum products, water, steam, waste, wastewater, storm water, other liquids or chemicals, or traffic or other control systems. An abandoned facility or system is not an Underground Facility.

53. *Unit Price Work*—Work to be paid for on the basis of unit prices.

54. *Unit Prices*—A predetermined price for a measurement or quantity of Work to be performed within a specific contract. The designated Unit Price would include all labor materials, equipment or services associated with the measurement or quantity established.

55. *Work*—The entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction; furnishing, installing, and incorporating all materials and equipment into such construction; and may include related services such as testing, start-up, and commissioning, all as required by the Contract Documents.

56. *Work Change Directive*—A written directive to the Contractor issued on or after the Effective Date of the Contract, signed by the Town and recommended by the Engineer, ordering an addition, deletion, or revision in the Work.

57. *Working Day*—Every day except Saturday, Sunday and holidays recognized by the Town of Taos. Based on a review of weather that may adversely affect the Contractor's ability to effectively prosecute the Work, and the actual Work performed by the Contractor, the Engineer will determine (between the end of the day and noon of the next day) if the Town will charge a Working Day. If the Contractor was able to effectively prosecute for six (6) or more hours on a Saturday, Sunday or Town-recognized Holiday, the Engineer may charge a Working Day.

#### 1.02. Terminology

- A. The words and terms discussed in Paragraphs 1.02.B, C and D, are not defined terms that require initial capital letters, but, when used in the Bidding Requirements or Contract Documents, have the indicated meaning.
- B. *Intent of Certain Terms or Adjectives*: The Contract Documents include the terms “as allowed,” “as approved,” “as ordered,” “as directed” or terms of like effect or import to authorize an exercise of professional judgment by the Engineer. In addition, the adjectives “reasonable,” “suitable,” “acceptable,” “proper,” “satisfactory,” or adjectives of like effect or import are used to describe an action or determination of the Engineer as to the Work. It is intended that such exercise of professional judgment, action, or determination will be solely to evaluate, in general, the Work for compliance with the information in the Contract Documents and with the Project as a functioning whole as shown or indicated in the Contract Documents (unless there is a specific statement indicating otherwise). The use of any such term or adjective is not intended to and shall not be effective to assign to the Engineer any duty or authority to supervise or direct the performance of the Work other than set forth in the Engineer's contract with the Town, or any duty or authority to undertake responsibility contrary to the provisions of Article 10 or any other provision of the Contract Documents.
- C. *Defective*: The word “defective,” when modifying the word “Work,” refers to Work that is unsatisfactory, faulty, or deficient in that it:
  - 1. does not conform to the Contract Documents;
  - 2. does not meet the requirements of any applicable inspection, reference standard, test, or approval referred to in the Contract Documents; or

3. has been damaged prior to the Engineer's recommendation of final payment (unless responsibility for the protection thereof has been assumed by the Town at Substantial Completion in accordance with Paragraph 15.02 or Paragraph 15.03).
- D. *Furnish, Install, Perform, Provide*
1. The word "furnish," when used in connection with services, materials, or equipment, means to supply and deliver said services, materials, or equipment to the Site (or some other specified location) ready for use or installation and in usable or operable condition.
  2. The word "install," when used in connection with services, materials, or equipment, means to put into use or place in final position said services, materials, or equipment complete and ready for intended use.
  3. The words "perform" or "provide," when used in connection with services, materials, or equipment, means to furnish and install said services, materials, or equipment complete and ready for intended use.
  4. If the Contract Documents establish an obligation of the Contractor with respect to specific services, materials, or equipment, but do not expressly use any of the four words "furnish," "install," "perform," or "provide," then the Contractor shall furnish and install said services, materials, or equipment complete and ready for intended use.
- E. *Contract Price or Contract Times*: References to a change in "Contract Price or Contract Times" or "Contract Times or Contract Price" or similar, indicate that such change applies to (1) Contract Price, (2) Contract Times, or (3) both Contract Price and Contract Times, as warranted, even if the term "or both" is not expressed.
- F. Unless stated otherwise in the Contract Documents, words or phrases that have a well-known technical or construction industry or trade meaning are used in the Contract Documents in accordance with such recognized meaning.
- G. *Gender, Singular/Plural*. Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.
- H. *Captions and Section Headings*. The captions and section headings contained in this Agreement are for convenience of reference only, and in no way limit, define, or enlarge the terms, scope and conditions of this Agreement.

## ARTICLE 2 – PRELIMINARY MATTERS

### 2.01. Delivery of Performance and Payment Bonds; Evidence of Insurance

- A. *Performance and Payment Bonds*: When the Contractor delivers the signed counterparts of the Agreement to the Town, the Contractor shall also deliver to the Town the Performance Bond and Payment Bond (if the Contract requires the Contractor to furnish such bonds).
- B. *Evidence of Contractor's Insurance*: When the Contractor delivers the signed counterparts of the Agreement to the Town, the Contractor shall also deliver to the Town, with copies to each additional insured (as identified in the Contract), the certificates, endorsements, and other evidence of insurance required to be provided by the Contractor in accordance with Article 6.
- C. *Evidence of Town's Insurance*: After receipt of the signed counterparts of the Agreement and all required bonds and insurance documentation, the Town shall promptly deliver to the Contractor, with copies to each additional insured (as identified in the Contract), the

certificates and other evidence of insurance required to be provided by the Town under Article 6.

2.02. Copies of Documents

- A. The Town shall furnish to the Contractor one fully executed hard copy of the Contract and one copy in electronic portable document format (PDF). Additional printed copies will be furnished upon request at the cost of reproduction.
- B. The Town shall maintain and safeguard at least one original printed record version of the Contract, including Drawings and Specifications signed and sealed by the Engineer and other design professionals. The Town shall make such original printed record version of the Contract available to the Contractor for review. The Town may delegate the responsibilities under this provision to the Engineer.

2.03. Before Starting Construction

- A. *Preliminary Schedules*: Within 10 days after the Effective Date of the Contract (or as otherwise required by the Contract Documents), the Contractor shall submit to the Engineer for timely review:
  - 1. a preliminary Progress Schedule indicating the times (numbers of days or dates) for starting and completing the various stages of the Work, including any Milestones specified in the Contract;
  - 2. a preliminary Schedule of Submittals; and
  - 3. a preliminary Schedule of Values for all of the Work, which includes quantities and prices of items which when added together equal the Contract Price and subdivides the Work into component parts in sufficient detail to serve as the basis for Progress Payments during performance of the Work.

2.04. Preconstruction Conference; Designation of Authorized Representatives

- A. Before any Work at the Site is started, a conference attended by the Town, Contractor, Engineer, and others as appropriate will be held to establish a working understanding among the parties as to the Work, and to discuss the schedules referred to in Paragraph 2.03.A, procedures for handling Shop Drawings, Samples, and other Submittals, processing Applications for Payment, electronic or digital transmittals, and maintaining required records.
- B. At this conference the Town and the Contractor each shall designate, in writing, a specific individual to act as its authorized representative with respect to the services and responsibilities under the Contract. Such individuals shall have the authority to transmit and receive information, render decisions relative to the Contract, and otherwise act on behalf of each respective party.

2.05. Acceptance of Schedules

- A. At least 10 days before submission of the first Application for Payment a conference, attended by the Contractor, Engineer, and others as appropriate, will be held to review the schedules submitted in accordance with Paragraph 2.03.A. No Progress Payment will be made to the Contractor until acceptable schedules are submitted to the Engineer and accepted by the Town.
  - 1. The Progress Schedule will be acceptable to the Engineer if it provides an orderly progression of the Work to completion within the Contract Times. Such acceptance will not impose on the Engineer responsibility for the Progress Schedule, for sequencing,

scheduling, or progress of the Work, nor interfere with or relieve the Contractor from the Contractor's full responsibility therefor.

2. The Contractor's Schedule of Submittals will be acceptable to the Engineer if it provides a workable arrangement for reviewing and processing the required Submittals.
3. The Contractor's Schedule of Values will be acceptable to the Engineer as to form and substance if it provides a reasonable allocation of the Contract Price to the component parts of the Work.
4. If a schedule is not acceptable, the Contractor will have an additional 10 days to revise and resubmit the schedule.

2.06. Electronic Transmittals

- A. Except as otherwise stated elsewhere in the Contract, the Town, Engineer, and Contractor may send, and shall accept, Electronic Documents transmitted by Electronic Means.
- B. If the Contract does not establish protocols for Electronic Means, then the Town, Engineer, and Contractor shall jointly develop such protocols.
- C. Subject to any governing protocols for Electronic Means, when transmitting Electronic Documents by Electronic Means, the transmitting party makes no representations as to long-term compatibility, usability, or readability of the Electronic Documents resulting from the recipient's use of software application packages, operating systems, or computer hardware differing from those used in the drafting or transmittal of the Electronic Documents.

## ARTICLE 3 – THE CONTRACT DOCUMENTS

3.01. Entire Agreement.

- A. This Agreement represents the entire Contract between the parties and, except as otherwise provided herein, may not be amended, changed, modified, or altered without the written consent of the parties hereto. This Agreement incorporates all of the conditions, agreements, and understandings between the parties concerning the subject matter of this Agreement, and all such conditions, understandings, and agreements have been merged into this written Agreement. No prior condition, agreement, or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless incorporated in this written Agreement.

3.02 Relationship of Contract Documents.

- A. The Contract Documents are complementary, and any requirement of one Contract Document shall be as binding as if required by all.

3.03. Conflicting Conditions.

- A. Any provisions in any of the Contract Documents which may be in conflict or inconsistent with any of the paragraphs in these General Conditions shall be void to the extent of such conflict or inconsistency. The construction of this Project will be in accordance with Contract Documents prepared by the Town of Taos except as otherwise specified herein or in the Contract.
- B. The Engineer will issue clarifications and interpretations of the Contract Documents as provided herein.
- C. Nothing in the Contract Documents creates:

1. Any contractual relationship between the Town or the Engineer and any Subcontractor, Supplier, or other individual or entity performing or furnishing any of the Work, for the benefit of such Subcontractor, Supplier, or other individual or entity; or
2. Any obligation on the part of the Town or the Engineer to pay or to see to the payment of any money due any such Subcontractor, Supplier, or other individual or entity, except as may otherwise be required by Laws and Regulations.

### 3.04. Reference Standards

#### A. Standards Specifications, Codes, Laws and Regulations

1. Reference in the Contract Documents to standard specifications, manuals, reference standards, or codes of any technical society, organization, or association, or to Laws or Regulations, whether such reference be specific or by implication, means the standard specification, manual, reference standard, code, or Laws or Regulations in effect at the time of opening of Bids (or on the Effective Date of the Contract if there were no Bids), except as may be otherwise specifically stated in the Contract Documents.
2. No provision of any such standard specification, manual, reference standard, or code, and no instruction of a Supplier, will be effective to change the duties or responsibilities of the Town, Contractor, or Engineer from those set forth in the part of the Contract Documents prepared by or for the Engineer. No such provision or instruction shall be effective to assign to the Town or the Engineer any duty or authority to supervise or direct the performance of the Work, or any duty or authority to undertake responsibility inconsistent with the provisions of the part of the Contract Documents prepared by or for the Engineer.

### 3.05. Reporting and Resolving Discrepancies

#### A. Reporting Discrepancies

1. *Contractor's Verification of Figures and Field Measurements:* Before undertaking each part of the Work, the Contractor shall carefully study the Contract Documents, and check and verify pertinent figures and dimensions therein, particularly with respect to applicable field measurements. The Contractor shall promptly report in writing to the Engineer any conflict, error, ambiguity, or discrepancy that the Contractor discovers, or has actual knowledge of, and shall not proceed with any Work affected thereby until the conflict, error, ambiguity, or discrepancy is resolved by a clarification or interpretation by the Engineer, or by an amendment or supplement to the Contract issued pursuant to Paragraph 11.01.
2. *Contractor's Review of Contract Documents:* If, before or during the performance of the Work, the Contractor discovers any conflict, error, ambiguity, or discrepancy within the Contract Documents, or between the Contract Documents and (a) any applicable Law or Regulation, (b) actual field conditions, (c) any standard specification, manual, reference standard, or code, or (d) any instruction of any Supplier, then the Contractor shall promptly report it to the Engineer in writing. The Contractor shall not proceed with the Work affected thereby (except in an emergency as required by Paragraph 7.16) until the conflict, error, ambiguity, or discrepancy is resolved, by a clarification or interpretation by the Engineer, or by an amendment or supplement to the Contract issued pursuant to Paragraph 11.01.

B. Resolving Discrepancies

1. Except as may be otherwise specifically stated in the Contract Documents, the provisions of the part of the Contract Documents prepared by or for the Engineer take precedence in resolving any conflict, error, ambiguity, or discrepancy between such provisions of the Contract Documents and:
  - a. the provisions of any standard specification, manual, reference standard, or code, or the instruction of any Supplier (whether or not specifically incorporated by reference as a Contract Document); or
  - b. the provisions of any Laws or Regulations applicable to the performance of the Work (unless such an interpretation of the provisions of the Contract Documents would result in violation of such Law or Regulation).

3.06. Requirements of the Contract Documents

- A. During the performance of the Work and until final payment, the Contractor and the Town shall submit to the Engineer in writing all matters in question concerning the requirements of the Contract Documents (sometimes referred to as requests for information or interpretation—RFIs), or relating to the acceptability of the Work under the Contract Documents, as soon as possible after such matters arise. The Engineer will be the initial interpreter of the requirements of the Contract Documents, and judge of the acceptability of the Work.
- B. The Engineer will, with reasonable promptness, render a written clarification, interpretation, or decision on the issue submitted, or initiate an amendment or supplement to the Contract Documents. The Engineer's written clarification, interpretation, or decision will be final and binding on the Contractor, unless it appeals by submitting a Change Proposal, and on the Town, unless it appeals by filing a Claim.
- C. If a submitted matter in question concerns terms and conditions of the Contract Documents that do not involve (1) the performance or acceptability of the Work under the Contract Documents, (2) the design (as set forth in the Drawings, Specifications, or otherwise), or (3) other engineering or technical matters, then the Engineer will promptly notify the Town and the Contractor in writing that the Engineer is unable to provide a decision or interpretation. If the Town and the Contractor are unable to agree on resolution of such a matter in question, either party may pursue resolution as provided in Article 12.

3.07. Reuse of Documents

- A. The Contractor and its Subcontractors and Suppliers shall not:
  1. Have or acquire any title to or ownership rights in any of the Drawings, Specifications, or other documents (or copies of any thereof) prepared by or bearing the seal of the Engineer or its consultants, including electronic media versions, or reuse any such Drawings, Specifications, other documents, or copies thereof on extensions of the Project or any other project without written consent of the Town and the Engineer and specific written verification or adaptation by the Engineer; or
  2. Have or acquire any title or ownership rights in any other Contract Documents, reuse any such Contract Documents for any purpose without the Town's express written consent, or violate any copyrights pertaining to such Contract Documents.

- B. The prohibitions of this Article will survive final payment, or termination of the Contract. Nothing herein precludes the Contractor from retaining copies of the Contract Documents for record purposes.

## **ARTICLE 4 – COMMENCEMENT AND PROGRESS OF THE WORK**

### **4.01. Time of Commencement.**

- A. The Contract Times will commence to run on the Effective Date of the Contract or, if a Notice to Proceed is given, on the day indicated in the Notice to Proceed. The Work as defined in Attachment 1 to be performed under this Contract shall be commenced no later than ten (10) consecutive calendar days after the date of written Notice to Proceed issued by the Town, attached hereto as Exhibit H.
- B. It is hereby understood and mutually agreed, by and between the Contractor and the Town that the date of beginning and the time for completion of the Work to be done hereunder as specified in the Contract are *essential conditions* of this Contract, and it is further mutually understood and agreed that the Work outlined in this Contract shall be commenced on a date to be specified in the “Notice to Proceed.”
- C. The Contractor agrees that Work shall be prosecuted regularly, diligently and uninterruptedly at such rate of progress as will ensure full completion thereof within the time specified. It is expressly understood and agreed, by and between the Contractor and the Town, that the time for the completion of the Work described in this Contract is a reasonable time for the completion of the same, taking into consideration the average climatic range and usual industrial conditions prevailing in this locality.

### **4.02. Reference Points**

- A. The Town shall provide engineering surveys to establish reference points for construction which in the Engineer’s judgment are necessary to enable the Contractor to proceed with the Work. The Contractor shall be responsible for laying out the Work, shall protect and preserve the established reference points and property monuments, and shall make no changes or relocations without the prior written approval of the Town. The Contractor shall report to the Engineer whenever any reference point or property monument is lost or destroyed or requires relocation because of necessary changes in grades or locations, and shall be responsible for the accurate replacement or relocation of such reference points or property monuments by professionally qualified personnel.

### **4.03. Progress Schedule**

- A. The Contractor shall adhere to the Progress Schedule established in accordance with Paragraph 2.05 as it may be adjusted from time to time as provided below.
  - 1. If an adjustment to the Progress Schedule is required, the Contractor shall submit proposed adjustments to the Engineer for review and acceptance (to the extent indicated in Paragraph 2.05). No such adjustment may result in changing the Contract Time except as provided in 4.03(A)2).
  - 2. Any proposed adjustment in the Progress Schedule by the Contractor that will change the Contract Times must be submitted in accordance with the requirements of Article 11.
- B. The Contractor shall carry on the Work and adhere to the Progress Schedule during all disputes or disagreements with the Town. No Work will be delayed or postponed pending resolution of any disputes or disagreements or during any appeal process, except as permitted by Paragraph 16.04 or as the Town and the Contractor may otherwise agree in writing.

#### 4.04. Delays in Contractor's Progress

- A. If the Town, the Engineer, or anyone for whom the Town is responsible, delays, disrupts, or interferes with the performance or progress of the Work, then the Contractor shall be entitled to an equitable adjustment in Contract Price or Contract Times.
- B. The Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delay, disruption, or interference caused by or within the control of the Contractor. Delay, disruption, and interference attributable to and within the control of a Subcontractor or Supplier shall be deemed to be within the control of the Contractor.
- C. If the Contractor's performance or progress is delayed, disrupted, or interfered with by unanticipated causes not the fault of and beyond the control of the Town, the Contractor, and those for which they are responsible, then the Contractor shall be entitled to an equitable adjustment in Contract Times. Such an adjustment will be the Contractor's sole and exclusive remedy for the delays, disruption, and interference described in this paragraph. Causes of delay, disruption, or interference that may give rise to an adjustment in Contract Times under this paragraph include but are not limited to the following:
  - 1. Severe and unavoidable natural catastrophes such as fires, floods, epidemics, pandemics and earthquakes;
  - 2. Delays directly attributable to the Covid-19 pandemic or the effect of Public Health Orders of the State of New Mexico Department of Health and Executive Orders of the Governor of the State of New Mexico;
  - 3. Abnormal weather conditions;
  - 4. Acts or failures to act of third-party utility owners or other third-party entities (other than those third-party utility owners or other third-party entities performing other work at or adjacent to the Site as arranged by or under contract with the Town, as contemplated in Article 8); and
  - 5. Acts of war or terrorism.
- D. The Contractor's entitlement to an adjustment of Contract Times or Contract Price is limited as follows:
  - 1. The Contractor's entitlement to an adjustment of the Contract Times is conditioned on the delay, disruption, or interference adversely affecting an activity on the Progress Schedule for completion of the Work, as of the time of the delay, disruption, or interference.
  - 2. The Contractor shall not be entitled to an adjustment in the Contract Price for any delay, disruption, or interference if such delay, disruption, or interference is caused by or within the control of the Contractor. Such a delay, disruption, or interference by the Contractor shall not preclude an adjustment of Contract Times to which the Contractor is otherwise entitled.
  - 3. Adjustments of the Contract Time or the Contract Price are subject to the provisions of Article 11.
- E. The Contractor may request an increase in Contract Times or Contract Price or a Change Proposal using a Change Directive; the Change Directive must include supporting data that sets forth in detail the following:
  - 1. The circumstances that form the basis for the requested adjustment;

2. The date upon which each cause of delay, disruption, or interference began to affect the progress of the Work;
  3. The date upon which each cause of delay, disruption, or interference ceased to affect the progress of the Work;
  4. The number of days' increase in Contract Times claimed as a consequence of each such cause of delay, disruption, or interference; and
  5. The impact on Contract Price, in accordance with the provisions of Paragraph 11.07.
  6. The Contractor shall also furnish such additional supporting documentation as the Town or the Engineer may require including, where appropriate, a revised Progress Schedule indicating all the activities affected by the delay, disruption, or interference, and an explanation of the effect of the delay, disruption, or interference on the critical path to completion of the Work.
- F. Delays, disruption, and interference to the performance or progress of the Work resulting from the existence of a differing subsurface or physical condition, an Underground Facility that was not shown or indicated by the Contract Documents, or not shown or indicated with reasonable accuracy, and those resulting from Hazardous Environmental Conditions, are governed by Article 5, together with the provisions of Paragraphs 4.05.D and 4.05.E.
- G. Paragraph 8.03 addresses delays, disruption, and interference to the performance or progress of the Work resulting from the performance of certain other work at or adjacent to the Site.

## **ARTICLE 5 – SITE; SUBSURFACE AND PHYSICAL CONDITIONS; HAZARDOUS ENVIRONMENTAL CONDITIONS**

### **5.01. Availability of Lands**

- A. The Town shall furnish the Site. The Town shall notify the Contractor in writing of any encumbrance or restriction specifically related to use of the Site with which the Contractor must comply in performing the Work. The Town shall obtain all lands and rights-of-way or access agreements necessary for the carrying out and completing the Work to be performed under this Contract.
- B. The Contractor shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.

### **5.02. Use of Site and Other Areas. The Contractor expressly undertakes at its own expense:**

- A. To take every precaution against injuries to persons or damage to property;
- B. To store apparatus, materials, supplies and equipment in such orderly fashion at the Site of the Work as will not unduly interfere with the progress of its work or the work of any other subcontractors;
- C. To place upon the Work or any part thereof only such loads as are consistent with the safety of the portion of the Work; to clean up frequently all refuse, rubbish, scrap materials, and debris caused by its operations, to the end that at all times the Site of the Work shall present a neat, orderly and workmanlike appearance;

- D. Before final payment to remove all surplus material, false-work, temporary structures, including foundations thereof, plant of any description and debris of every nature resulting from its operations, and to put the Site in a neat, orderly condition;

5.03. Limitation on Use of Site and Other Areas

- A. The Contractor shall confine construction equipment, temporary construction facilities, the storage of materials and equipment, and the operations of workers to the Site, to adjacent areas that the Contractor has arranged to use through construction easements or otherwise, and other adjacent areas permitted by Laws and Regulations, and shall not unreasonably encumber the Site and such other adjacent areas with construction equipment or other materials or equipment. The Contractor shall assume full responsibility for (a) damage to the Site; (b) damage to any such other adjacent areas used for the Contractor's operations; (c) damage to any other adjacent land or areas, or to improvements, structures, utilities, or similar facilities located at such adjacent lands or areas; and (d) for injuries and losses sustained by the owners or occupants of any such land or areas.
- B. If a damage or injury claim is made by the owner or occupant of any such land or area because of the performance of the Work, or because of other actions or conduct of the Contractor or those for which the Contractor is responsible, the Contractor shall (a) take immediate corrective or remedial action as required by Paragraph 8.03, or otherwise; (b) promptly attempt to settle the claim as to all parties through negotiations with such owner or occupant, or otherwise resolve the claim by arbitration or other dispute resolution proceeding, or in a court of competent jurisdiction; and (c) shall indemnify and hold harmless the Town, its Elected Officials, employees, agents, insurers, Engineer, contractors, and the officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them, from and against any such claim, and against all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to any claim or action, legal or equitable, brought by any such owner or occupant against the Town, the Engineer, or any other party indemnified hereunder to the extent caused directly or indirectly, in whole or in part by, or based upon, the Contractor's performance of the Work, or because of other actions or conduct of the Contractor or those for which the Contractor is responsible.
- C. During the progress of the Work the Contractor shall keep the Site and other adjacent areas free from accumulations of waste materials, rubbish, and other debris. Removal and disposal of such waste materials, rubbish, and other debris will conform to applicable Laws and Regulations.
- D. Prior to Substantial Completion of the Work the Contractor shall clean the Site and the Work and make it ready for utilization by the Town. At the completion of the Work the Contractor shall remove from the Site and adjacent areas all tools, appliances, construction equipment and machinery, and surplus materials and shall restore to original condition all property not designated for alteration by the Contract Documents.
- E. The Contractor shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall the Contractor subject any part of the Work or adjacent structures or land to stresses or pressures that will endanger them.

5.04. Subsurface and Physical Conditions

- A. *Reports and Drawings*: As identified in the Contract Documents.
- B. *Underground Facilities*: Underground Facilities are shown or indicated on the Drawings, pursuant to Paragraph 5.05. Information and data regarding the presence or location of Underground Facilities are not intended to be categorized, identified, or defined as Technical Data.
- C. *Reliance by Contractor on Technical Data*: The Contractor may rely upon the accuracy of the Technical Data identified in the Supplementary Conditions (if any) with respect to reports identified in the Supplementary Conditions and drawings, but such reports and drawings are not Contract Documents.
- D. *Limitations of Other Data and Documents*: Except for such reliance on Technical Data, the Contractor may not rely upon or make any Claim against the Town, its Elected Officials, employees, agents, insurers, or Engineer and its officers, directors, members, partners, employees, agents, consultants, or subcontractors, with respect to:
  - 1. the completeness of such reports and drawings for the Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by the Contractor, and safety precautions and programs incident thereto;
  - 2. other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings;
  - 3. the contents of other Site-related documents made available to the Contractor, such as record drawings from other projects at or adjacent to the Site, or the Town's archival documents concerning the Site; or
  - 4. any Contractor interpretation of or conclusion drawn from any Technical Data or any such other data, interpretations, opinions, or information.

5.05. Differing Subsurface or Physical Conditions

- A. *Notice by Contractor*: If the Contractor believes that any subsurface or physical condition that is uncovered or revealed at the Site:
  - 1. is of such a nature as to establish that any Technical Data on which the Contractor is entitled to rely as provided in Paragraph 5.04 is materially inaccurate;
  - 2. is of such a nature as to require a change in the Drawings or Specifications;
  - 3. differs materially from that shown or indicated in the Contract Documents; or
  - 4. is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract Documents;

then the Contractor shall, promptly after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 7.16), notify the Town and Engineer in writing about such condition. The Contractor shall not further disturb such condition or perform any Work in connection therewith (except with respect to an emergency) until receipt of a written statement permitting the Contractor to do so.

- B. *Engineer's Review*: After receipt of written notice as required by the preceding paragraph, the Engineer will promptly review the subsurface or physical condition in question; determine

whether it is necessary for the Town to obtain additional exploration or tests with respect to the condition; conclude whether the condition falls within any one or more of the differing site condition categories in Paragraph 5.05.A; obtain any pertinent cost or schedule information from the Contractor; prepare recommendations to the Town regarding the Contractor's resumption of Work in connection with the subsurface or physical condition in question and the need for any change in the Drawings or Specifications; and advise the Town in writing of the Engineer's findings, conclusions, and recommendations.

- C. *Town's Statement to Contractor Regarding Site Condition:* After receipt of the Engineer's written findings, conclusions, and recommendations, the Town shall issue a written statement to the Contractor (with a copy to the Engineer) regarding the subsurface or physical condition in question, addressing the resumption of the Work in connection with such condition, indicating whether any change in the Drawings or Specifications will be made, and adopting or rejecting the Engineer's written findings, conclusions, and recommendations, in whole or in part.
- D. *Early Resumption of Work:* If at any time the Engineer determines that Work in connection with the subsurface or physical condition in question may resume prior to completion of the Engineer's review or the Town's issuance of its statement to the Contractor, because the condition in question has been adequately documented, and analyzed on a preliminary basis, then the Engineer may at its discretion instruct the Contractor to resume such Work.
- E. Possible Price and Times Adjustments

- 1. The Contractor shall be entitled to an equitable adjustment in the Contract Price or the Contract Times to the extent that the existence of a differing subsurface or physical condition, or any related delay, disruption, or interference, causes an increase or decrease in the Contractor's cost of, or time required for, performance of the Work; subject, however, to the following:
  - a. Such condition must fall within any one or more of the categories described in Paragraph 5.05.A;
  - b. With respect to the Work that is paid for on a Unit Price basis, any adjustment in the Contract Price shall be subject to Paragraph 13.03; and,
  - c. The Contractor's entitlement to an adjustment of the Contract Times is subject to Paragraphs 4.04.D and 4.04.E.
- 2. The Contractor shall not be entitled to any adjustment in the Contract Price or the Contract Times with respect to a subsurface or physical condition if:
  - a. The Contractor knew or should have known of the existence of such condition at the time the Contractor delivered its Bid to the Town or at the time it entered into this Contract;
  - b. The existence of such condition reasonably could have been discovered or revealed as a result of any examination, investigation, exploration, test, or study of the Site; or
  - c. The Contractor failed to give the written notice required by Paragraph 5.05.A.
- 3. If the Town and the Contractor agree regarding the Contractor's entitlement to and the amount or extent of any adjustment in the Contract Price or Contract Times, then any such adjustment shall be documented in a Change Order.
- 4. The Contractor may submit a Change Proposal regarding its entitlement to or the amount or extent of any adjustment in the Contract Price or Contract Times no later than thirty

(30) days after the Town's issuance of the Town's written statement to the Contractor regarding the subsurface or physical condition in question.

- F. *Underground Facilities; Hazardous Environmental Conditions*: Paragraph 5.06 governs rights and responsibilities regarding the presence or location of Underground Facilities. Paragraph 5.07 governs rights and responsibilities regarding Hazardous Environmental Conditions. The provisions of Paragraphs 5.03 and 5.04 are not applicable to the presence or location of Underground Facilities, or to Hazardous Environmental Conditions.

5.06. Underground Facilities

- A. *Contractor's Responsibilities*: The costs of all of the following are included in the Contract Price, and the Contractor shall have full responsibility for:
1. reviewing and checking all information and data regarding existing Underground Facilities at the Site;
  2. complying with applicable state and local utility damage prevention and "blue stake" Laws and Regulations;
  3. verifying the actual location of those Underground Facilities shown or indicated in the Contract Documents as being within the area affected by the Work, by exposing such Underground Facilities during the course of construction;
  4. coordination of the Work with the owners (including the Town) of such Underground Facilities, during construction; and
  5. the safety and protection of all existing Underground Facilities at the Site, and repairing any damage thereto resulting from the Work.
- B. *Notice by Contractor*: If the Contractor believes that an Underground Facility that is uncovered or revealed at the Site was not shown or indicated on the Drawings, or was not shown or indicated on the Drawings with reasonable accuracy, then the Contractor shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by Paragraph 7.16), notify the Town and the Engineer in writing regarding such Underground Facility.
- C. *Engineer's Review*: The Engineer shall:
1. promptly review the Underground Facility and determine whether such Underground Facility was shown or indicated on the Drawings, or whether the Underground Facility was not shown or indicated with reasonable accuracy;
  2. identify and communicate with the owner of the Underground Facility; prepare recommendations to the Town (and if necessary, issue any preliminary instructions to the Contractor) regarding the Contractor's resumption of the Work in connection with the Underground Facility in question;
  3. obtain any pertinent cost or schedule information from the Contractor; determine the extent, if any, to which a change is required in the Drawings or Specifications to reflect and document the consequences of the existence or location of the Underground Facility; and
  4. advise the Town in writing of the Engineer's findings, conclusions, and recommendations.

5. During such time, the Contractor shall be responsible for the safety and protection of such Underground Facility.
- D. *Town's Statement to Contractor Regarding Underground Facility:* After receipt of the Engineer's written findings, conclusions, and recommendations, the Town shall issue a written statement to the Contractor (with a copy to the Engineer) regarding the Underground Facility in question. The written statement shall address the resumption of the Work in connection with such Underground Facility, indicating whether any change in the Drawings or Specifications will be made, and adopting or rejecting the Engineer's written findings, conclusions, and recommendations in whole or in part.
- E. *Early Resumption of Work:* If at any time the Engineer determines that the Work in connection with the Underground Facility may resume prior to completion of the Engineer's review or the Town's issuance of its statement to the Contractor, because the Underground Facility in question and conditions affected by its presence have been adequately documented and analyzed on a preliminary basis, then the Engineer may in its discretion instruct the Contractor to resume such Work.
- F. *Possible Price and Times Adjustments*
  1. The Contractor shall be entitled to an equitable adjustment in the Contract Price or Contract Times, to the extent that any existing Underground Facility at the Site that was not shown or indicated on the Drawings, or was not shown or indicated with reasonable accuracy, and any related delay, disruption, or interference, caused an increase or decrease in the Contractor's cost of, or the time required for, performance of the Work, subject, however, to the following:
    - a. With respect to Work that is paid for on a Unit Price basis, any adjustment in Contract Price will be subject to the provisions of Paragraph 13.03;
    - b. The Contractor's entitlement to an adjustment of the Contract Times is subject to the provisions of Paragraphs 4.04.D and 4.04.E; and
    - c. The Contractor gave the notice required in Paragraph 5.05.A.
  2. If the Town and the Contractor agree regarding the Contractor's entitlement to and the amount or extent of any adjustment in the Contract Price or Contract Times, then any such adjustment shall be set forth in a Change Order.
  3. The Contractor may submit a Change Proposal regarding its entitlement to or the amount or extent of any adjustment in the Contract Price or Contract Times, no later than thirty (30) days after the Town's issuance of the Town's written statement to the Contractor regarding the Underground Facility in question.
  4. The information and data shown or indicated on the Drawings with respect to existing Underground Facilities at the Site is based on information and data (a) furnished by the owners of such Underground Facilities, or by others, (b) obtained from available records, or (c) gathered in an investigation conducted in accordance with the current edition of ASCE 38, Standard Guideline for the Collection and Depiction of Existing Subsurface Utility Data, by the American Society of Civil Engineers. If such information or data is incorrect or incomplete, the Contractor's remedies are limited to those set forth in this Paragraph 5.05.E.

5.07. Hazardous Environmental Conditions at Site

- A. *Reports and Drawings*: See Supplementary Conditions (if any)
- B. *Reliance by Contractor on Technical Data Authorized*: The Contractor may rely upon the accuracy of the Technical Data expressly identified in the Supplementary Conditions (if any) with respect to such reports and drawings, but such reports and drawings are not Contract Documents. Except for such reliance on Technical Data, the Contractor may not rely upon or make any Claim against the Town, and shall indemnify, defend and hold harmless its Elected Officials or Engineer, or any of their officers, directors, members, partners, employees, insurers, agents, consultants, or subcontractors, with respect to:
  - 1. the completeness of such reports and drawings for the Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences and procedures of construction to be employed by the Contractor, and safety precautions and programs incident thereto;
  - 2. other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or
  - 3. any Contractor interpretation of or conclusion drawn from any Technical Data or any such other data, interpretations, opinions or information.
- C. The Contractor shall not be responsible for removing or remediating any Hazardous Environmental Condition encountered, uncovered, or revealed at the Site unless such removal or remediation is expressly identified in the Contract Documents to be within the scope of the Work.
- D. The Contractor shall be responsible for controlling, containing, and duly removing all Constituents of Concern brought to the Site by the Contractor, Subcontractors, Suppliers, or anyone else for whom the Contractor is responsible, and for any associated costs; and for the costs of removing and remediating any Hazardous Environmental Condition created by the presence of any such Constituents of Concern.
- E. If the Contractor encounters, uncovers, or reveals a Hazardous Environmental Condition whose removal or remediation is not expressly identified in the Contract Documents as being within the scope of the Work, or if the Contractor or anyone for whom the Contractor is responsible creates a Hazardous Environmental Condition, then the Contractor shall immediately: (1) secure or otherwise isolate such condition; (2) stop all Work in connection with such condition and in any area affected thereby (except in an emergency as required by Paragraph 7.16); and (3) notify the Town and the Engineer (and promptly thereafter confirm such notice in writing). The Town shall promptly consult with the Engineer concerning the necessity for the Town to retain a qualified expert to evaluate such condition or take corrective action, if any. Promptly after consulting with the Engineer, the Town shall take such actions as are necessary to permit the Town to timely obtain required permits and provide the Contractor the written notice required by Paragraph 5.07.F. If the Contractor or anyone for whom the Contractor is responsible created the Hazardous Environmental Condition in question, then the Town, at its election, may remove and remediate the Hazardous Environmental Condition, and impose a set-off against payments to account for the associated costs.
- F. The Contractor shall not resume the Work in connection with such Hazardous Environmental Condition or in any affected area until after the Town has obtained any required permits related thereto, and delivered written notice to the Contractor either (1) specifying that such

condition and any affected area is or has been rendered safe for the resumption of Work, or (2) specifying any special conditions under which such Work may be resumed safely.

- G. If the Town and the Contractor cannot agree as to entitlement to or on the amount or extent, if any, of any adjustment in Contract Price or Contract Times as a result of such Work stoppage, such special conditions under which Work is agreed to be resumed by the Contractor, or any costs or expenses incurred in response to the Hazardous Environmental Condition, then, within 30 days of the Town's written notice regarding the resumption of the Work, the Contractor may submit a Change Proposal, or the Town may impose a set-off. Entitlement to any such adjustment is subject to the provisions of Paragraphs 4.04.D, 4.04.E, 11.07, and 11.08.
- H. If, after receipt of such written notice, the Contractor does not agree to resume the Work based on a reasonable belief it is unsafe, or does not agree to resume such Work under such special conditions, then the Town may order the portion of the Work that is in the area affected by such condition to be deleted from the Work, following the contractual change procedures in Article 11. The Town may have such deleted portion of the Work performed by the Town's own forces or others in accordance with Article 8.
- I. To the fullest extent permitted by Laws and Regulations, the Contractor shall indemnify, defend and hold harmless the Town, its Elected Officials, employees, agents and insurers, or Engineer and its officers, directors, members, partners, employees, insurers, agents, consultants, or subcontractors from and against all claims, lawsuits, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the failure to control, contain, or remove a Constituent of Concern brought to the Site by the Contractor or by anyone for whom the Contractor is responsible, or to a Hazardous Environmental Condition created by the Contractor or by anyone for whom the Contractor is responsible. Nothing in this Paragraph 5.07.I obligates the Contractor to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence.
- J. The provisions of Paragraphs 5.03, 5.04, and 5.05 do not apply to the presence of Constituents of Concern or to a Hazardous Environmental Condition uncovered or revealed at the Site.

## **ARTICLE 6 – BONDS AND INSURANCE**

### **6.01. Performance, Payment, and Other Bonds**

- A. *Performance Bond.* The Contractor shall furnish a Performance Bond in an amount at least equal to one hundred percent (100%) of the Contract Price as security for the faithful performance of this Contract. The Performance Bond shall be substantially in the form attached (Exhibit B).
- B. *Payment Bond.* The Contractor shall provide Payment Bond in an amount not less than one hundred percent (100%) of the Contract Price as security for the payment of all persons performing labor on the Project under this Contract, or furnishing materials in connection with this Contract and all of the Contractor's requirements as specified in the Contract Documents. The Payment Bond shall remain in effect until one year after the date when final payment becomes due. The Payment Bond shall be substantially in the form attached (Exhibit C).

- C. The Contractor shall also furnish such other bonds (if any) as are required by any Supplementary Conditions (if any), bidding instructions, or other provisions of the Contract.
- D. All bonds must be substantially in the form included in the Bidding Documents or as otherwise specified by the Town prior to execution of the Contract, except as provided otherwise by Laws or Regulations, and must be issued and signed by a surety named in "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" as published in Department Circular 570 (as amended and supplemented) by the Bureau of the Fiscal Service, U.S. Department of the Treasury. A bond signed by an agent or attorney-in-fact must be accompanied by a certified copy of that individual's authority to bind the surety. The evidence of authority must show that it is effective on the date the agent or attorney-in-fact signed the accompanying bond.
- E. The Contractor shall obtain the required bonds from surety companies that are duly licensed or authorized, in New Mexico or jurisdiction in which the Project is located, to issue bonds in the required amounts.
- F. If the surety on a bond furnished by the Contractor is declared bankrupt or becomes insolvent, or the surety ceases to meet the requirements above, the Contractor shall promptly notify the Town and the Engineer in writing and shall, within twenty (20) days after the event giving rise to such notification, provide a replacement bond and surety, both of which must comply with the bond and surety requirements above.
- G. If the Contractor has failed to obtain a required bond, hereunder, the Town may exclude the Contractor from the Site and exercise the Town's termination rights under Article 16.
- H. Upon request to the Town from any Subcontractor, Supplier, or other person or entity claiming to have furnished labor, services, materials, or equipment used in the performance of the Work, the Town shall provide a copy of the Payment Bond to such person or entity.
- I. Upon request to the Contractor from any Subcontractor, Supplier, or other person or entity claiming to have furnished labor, services, materials, or equipment used in the performance of the Work, the Contractor shall provide a copy of the Payment Bond to such person or entity.

#### 6.02 Insurance - General Provisions

- A. The Contractor shall, at its sole cost and expense, procure and maintain at all times during the Term of this Agreement the following policies of insurance:
  - 1. Commercial general liability insurance or public liability insurance coverage, including automobile coverage, insuring against personal injury, bodily injury, sickness or disease, death, and providing broad form property damage coverage insuring against injury to or destruction of tangible personal property wherever located (including loss of use therefrom), premises/operations coverage, underground explosion and collapse coverage, blanket contractual liability (including coverage for the Contractor's contractual indemnity provisions hereunder), products and completed operations coverage, which policy or policies shall insure broadly against claims and liability arising, in any way, from this Contract and the activities of the Contractor hereunder and the use or occupancy of the Premises, with limits not less than \$5,000,000 combined single limits, or a combination of direct coverage and umbrella coverage. The policy shall not contain provisions that result in an erosion of insurance limits by defense costs other than those incorporated into ISO CG 00 01.

2. At all times during the Term of this Contract, the Contractor shall procure and maintain Workers' Compensation Insurance that is fully in accordance with the Laws of the State of New Mexico, and Employer's Liability insurance with a limit not less than \$1,000,000 Bodily Injury Each Accident; \$1,000,000 Bodily Injury by Disease - Each Person; and \$1,000,000 Bodily Injury by Disease - Policy Limit.
- B. All insurance required to be maintained by the Contractor shall be issued by insurance companies authorized to do insurance business in the State of New Mexico and rated not less than A VIII in A.M. Best's Insurance Guide. Self-insurance is not satisfactory to meet the insurance requirements of this Section, nor is an "Occupational Accident and Excess Employer's Indemnity Policy." All policies shall name the Town, its Elected Officials, employees and agents, and insurers as additional insureds utilizing the ISO endorsement form or a certificate acceptable to the Town, and the general liability policy shall contain cross-liability endorsements. Such commercial general liability insurance policies shall insure the performance by the Contractor of the indemnity agreements set forth herein subject to the terms, conditions and exclusions of the policy.
  - C. All such insurance policies shall be written as primary policies, not excess or contributing with or secondary to any other insurance as may be available to the Contractor or to any additional insured except for claims caused by willful misconduct. A certificate of insurance evidencing the insurance required under this Section shall be delivered to the Town not less than ten (10) days following final execution of this Contract (Exhibit I). The Contractor shall furnish the Town with a replacement certificate with respect to any insurance policy not less than thirty (30) days prior to the expiration of any policy.
  - D. The Town may request that the Contractor provide additional documentation to evidence compliance with the insurance requirements of this Section and may request copies of policies, documentation of deductibles, copies of exclusions and endorsements, and evidence of insurance required to be obtained pursuant to this Section. Failure of the Town to demand or inspect such certificates or obtain evidence of the Contractor's compliance with the insurance requirements of this Section shall not be construed as a waiver or release of the Contractor's obligation to obtain and maintain such insurance.
  - E. The Contractor shall have the right to provide the insurance required by this Section with blanket Contract without regard to claims made under such policies with respect to other persons. The Town makes no representation that the insurance coverage specified to be carried by the Contractor pursuant to this Section is adequate to protect the Contractor against liability under this Contract or otherwise; the Contractor shall provide, at its own expense, any additional insurance as Licensee deems adequate or necessary.
  - F. The Contractor shall not do or permit to be done any act or things upon or about the Premises or in connection with the Work under this Contract which results in the assertion of any defense by the insurer to any claim; invalidates, or is in conflict with, the insurance policies of the Town or the Contractor, or which would tend to increase the rates to an amount higher than it otherwise would be; and the Contractor shall neither do and shall not permit to be done any act or thing in connection with the Project or upon the Property which shall or might subject the Town to any liability or responsibility for injury to any person or persons or to property. The Contractor agrees that it will not keep, use, sell or offer for sale in or upon the premises any article which may be prohibited by any insurance policy in force from time to time covering the premises.
  - G. The Contractor shall require each subcontractor to purchase and maintain in force through the duration of the Project workers' compensation insurance in statutory limits, commercial

general liability insurance consistent with that required for the Contractor pursuant to this Agreement, and other insurance that is appropriate for the Project, and shall name the Town, its Elected Officials, employees, agents and insurers, and the Engineer and its officials, employees, agents and insurers, as additional insureds on the subcontractor's commercial general liability policy.

- H. If the Contractor fails to purchase and maintain in force all of the insurance required by this Agreement, the Contractor shall cease work and vacate the Site, and the Town may purchase required insurance and set-off the cost of the insurance against payment and may exercise the Town's termination rights in this Contract.
- I. All insurance policies shall contain a provision or endorsement that the coverage afforded will not be cancelled until at least ten (10) days prior written notice has been given to the Town and other persons additionally insured.

6.03. Builder's Risk and Other Property Insurance

- A. Until the Project is completed and accepted by the Town, the Contractor shall maintain Builder's Risk Insurance (fire and extended coverage) on a one hundred percent (100%) completed value basis on the insurable portion of the Project for the benefit of the Town, the Contractor, and subcontractors as their interests may appear. The Contractor shall not include any costs for Builder's Risk Insurance (fire and extended coverage) premiums during construction unless the Contractor is required to provide such insurance; however, this provision shall not release the Contractor from its obligation to complete, according to plans and specifications, the Project covered by the Contract, and the Contractor and his Surety shall be obligated to full performance of the Contractor's undertaking. As set forth in 15.03.D, upon Substantial Completion and prior to occupancy of the substantially completed portion of the Project, the Town and Contractor will confer regarding property insurance.
- B. *Property Insurance for Facilities of Town Where Work Will Occur:* The Town shall obtain and maintain in force during the period in which this Contract is in effect property insurance covering each existing structure, building, or facility in which any part of the Work will occur, or to which any part of the Work will attach or be adjoined.
- C. *Partial Occupancy or Use by Town:* If the Town will occupy or use a portion or portions of the Work prior to Substantial Completion of all the Work, as provided in Paragraph 15.03, then the Town (directly, if it is the purchaser of the builder's risk policy, or through the Contractor) will provide advance notice of such occupancy or use to the builder's risk insurer, and obtain an endorsement consenting to the continuation of coverage prior to commencing such partial occupancy or use.
- D. *Insurance of Other Property; Additional Insurance:* If the express insurance provisions of the Contract do not require or address the insurance of a property item or interest, then the entity or individual owning such property item shall be responsible for insuring it. If the Contractor elects to obtain other special insurance to be included in or supplement the builder's risk or property insurance policies provided under this Paragraph 6.04, it may do so at the Contractor's expense.

6.04. Property Losses; Subrogation

- A. The builder's risk insurance policy purchased and maintained in accordance with Paragraph 6.03, shall contain provisions to the effect that in the event of payment of any loss or damage the insurer will have no rights of recovery against any insureds thereunder, or against the Engineer or its consultants, or their officers, directors, members, partners, employees, agents, consultants, or subcontractors.

- B. The Contractor shall be responsible for assuring that each Subcontract contains provisions whereby the Subcontractor waives all rights against the Town, its Elected Officials, employees, agents and insurers, or the Engineer and its officers, directors, members, partners, employees, insurers, agents, consultants, or subcontractors, for all losses and damages caused by, and arising out of, relating to, or resulting from fire or other peril, risk, or cause of loss covered by builder's risk insurance, an installation floater, and any other property insurance applicable to the Work.

6.05. Receipt and Application of Property Insurance Proceeds

- A. Any insured loss under the builder's risk and other policies of property insurance required by Paragraph 6.04 shall be adjusted and settled with the named insured that purchased the policy. Such named insured shall act as fiduciary for the other insureds, and give notice to such other insureds that adjustment and settlement of a claim is in progress. Any other insured may state its position regarding a claim for insured loss in writing within fifteen (15) days after notice of such claim.
- B. Proceeds for such insured losses may be made payable by the insurer either jointly to multiple insureds, or to the named insured that purchased the policy in its own right and as fiduciary for other insureds, subject to the requirements of any applicable mortgage clause. A named insured receiving insurance proceeds under the builder's risk and other policies of insurance required by Paragraph 6.04 shall maintain such proceeds in a segregated account, and distribute such proceeds in accordance with such agreement as the parties in interest may reach, or as otherwise required under the dispute resolution provisions of this Contract or applicable Laws and Regulations.
- C. If no other agreement is reached, the Contractor shall repair or replace the damaged Work, using allocated insurance proceeds.

## ARTICLE 7 – CONTRACTOR'S RESPONSIBILITIES

7.01. Contractor's Obligations

- A. The Contractor shall observe, comply with, and be subject to all terms, conditions, requirements, and limitations of the Contract and Specifications, and shall do, carry on, and complete the entire Work to the satisfaction of the Engineer and the Town.
- B. The Contractor shall and will, in good workmanlike manner, do and perform all work and furnish all supplies and materials, machinery, equipment, facilities and means, except as herein otherwise expressly specified, necessary or proper to perform and complete all the Work required by this Contract, within the time herein specified. The Contractor will perform the Work in accordance with the provisions of this Contract and said Specifications and in accordance with the Drawings covered by this Contract and all supplemental plans in accordance with the directions of the Engineer/Town as given from time to time during the progress of the Work. The Contractor shall furnish, erect, maintain, and remove such construction plans and such temporary works as may be required.

7.02. Contractor's Means and Methods of Construction

- A. The Contractor shall be solely responsible for the means, methods, techniques, sequences, and procedures of construction.
- B. If the Contract Documents require, or the Contractor determines, that professional engineering or other design services are needed to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences, and procedures, or for Site safety,

then the Contractor shall cause such services to be provided by a properly licensed design professional, at the Contractor's expense. The Contractor shall notify the Town and Engineer should if such services are required. These services are not Town-delegated professional design services under this Contract and neither the Town nor the Engineer has any responsibility with respect to (1) the Contractor's determination of the need for such services, (2) the qualifications or licensing of the design professionals retained or employed by the Contractor, (3) the performance of such services, or (4) any errors, omissions, or defects in such services.

7.03. Supervision and Superintendence

- A. At the Site of the Work the Contractor shall employ a construction superintendent or foreman who shall have full authority to act for the Contractor. It is understood that such representative shall be acceptable to the Engineer/Town and shall be a person who can continue in that capacity for the particular job involved unless he/she ceases to be on the Contractor's payroll.
- B. The Contractor shall supervise, inspect, and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents.

7.04. Labor; Working Hours

- A. The Contractor represents that it has, or will secure at its own expense, all personnel required to discharge its obligations under this Contract. Such personnel (i) shall not be employees of or have any contractual relationships with the Town, and (ii) shall be fully qualified and licensed or otherwise authorized or permitted under federal, state, and local law to perform such work. All work performed under this Agreement shall be performed by the Contractor or under its supervision.
- B. Except as otherwise required for the safety or protection of persons or the Work or property at the Site or adjacent thereto, and except as otherwise stated in the Contract Documents, all Work at the Site will be performed during regular working hours, Monday through Friday. The Contractor shall not perform Work on a Saturday, Sunday, or any legal holiday. The Contractor may perform Work outside regular working hours or on Saturdays, Sundays, or legal holidays only with the Town's written consent, which will not be unreasonably withheld.

7.05. Services, Materials, and Equipment

- A. It is understood that except unless otherwise specifically stated in the Contract Documents, the Contractor shall provide, assume full responsibility, and pay for all materials, labor, tools, equipment, water, light, power, transportation, superintendence, temporary construction of every nature, incidentals and all other services and facilities of every nature whatsoever necessary to execute, complete, and deliver the Work within the specified time.
- B. No materials or supplies for the Work may be subject to a chattel mortgage or purchased under a conditional sale contract or other agreement by which an interest is retained by the seller. The Contractor warrants that he/she has good title to all materials and supplies used by him/her in the Work, free from all liens, claims or encumbrances.
- C. All materials and equipment incorporated into the Work must be new and of good quality, except as otherwise provided in the Contract Documents. All warranties and guarantees required by the Specifications will expressly run to the benefit of the Town. If required by the

Engineer, the Contractor shall furnish satisfactory evidence (including reports of required tests) as to the source, kind, and quality of materials and equipment.

- D. All materials and equipment must be stored, applied, installed, connected, erected, protected, used, cleaned, and conditioned in accordance with instructions of the applicable Supplier, except as otherwise may be provided in the Contract Documents.
- E. All materials and equipment used in the construction of the Work shall be subject to adequate inspection and testing in accordance with accepted standards. If testing not otherwise covered by the Contract is required by the Town or the Engineer, the laboratory or inspection agency shall be selected by the Town or the Engineer. The Town shall pay for the additional laboratory inspection service.
- F. Materials of construction, particularly those upon which the strength and durability of the structure may depend, shall be subject to inspection and testing to establish conformance with Specifications and suitability for uses intended.

7.06. “Or Equals”

- A. Whenever a material, article or piece of equipment is identified on the plans or in the Specifications by reference to manufacturers or vendors' names, trade names, catalogue numbers, etc., it is intended merely to establish a standard, not a particular brand; and, any material, article, or equipment or other manufacturers and vendors which will perform adequately the duties imposed by the general design will be considered equally acceptable provided the material, article, or equipment so proposed, is, in the opinion of the Engineer/Town, of equal substance and function. It shall not be purchased or installed by the Contractor without the Engineer/Town's written approval. The Contractor may request that the Engineer authorize the use of other items of equipment or material, or items from other proposed Suppliers, under the circumstances described below.
  - 1. If the Engineer in its sole discretion determines that an item of equipment or material proposed by the Contractor is functionally equal to that named and sufficiently similar so that no change in related Work will be required, the Engineer may deem it an “or equal” item. For the purposes of this paragraph, a proposed item of equipment or material will be considered functionally equal to an item so named if:
    - a. in the exercise of reasonable judgment the Engineer determines that the proposed item:
      - 1) is at least equal in materials of construction, quality, durability, appearance, strength, and design characteristics;
      - 2) will reliably perform at least equally well the function and achieve the results imposed by the design concept of the completed Project as a functioning whole;
      - 3) has a proven record of performance and availability of responsive service; and
      - 4) is not objectionable to the Town.
    - b. the Contractor certifies that, if the proposed item is approved and incorporated into the Work:
      - 1) there will be no increase in cost to the Town or increase in Contract Times; and
      - 2) the item conforms substantially to the detailed requirements of the item named in the Contract Documents.

- B. *Contractor's Expense*: The Contractor shall provide all data in support of any proposed "or equal" item at the Contractor's sole cost and expense.
- C. *Engineer's Evaluation and Determination*: The Engineer shall be allowed a reasonable time to evaluate each "or-equal" request. The Engineer may require the Contractor to furnish additional data about the proposed "or-equal" item. The Engineer will be the sole judge of acceptability. No "or-equal" item will be ordered, furnished, installed, or utilized until the Engineer's review of such substitution. When the Engineer's review is complete and the Engineer has determined that the proposed item is an "or-equal," its approval will be evidenced by an approved Shop Drawing or other written communication. The Engineer will advise the Contractor in writing of any negative determination.
- D. *Effect of Engineer's Determination*: Neither approval nor denial of an "or-equal" request will result in any change in the Contract Price. The Engineer's denial of an "or-equal" request will be final and binding, and may not be reversed through an appeal under any provision of the Contract.
- E. *Treatment as a Substitution Request*: If the Engineer determines that an item of equipment or material proposed by the Contractor does not qualify as an "or-equal" item, the Contractor may request that the Engineer consider the item a proposed substitute pursuant to Paragraph 7.07.

7.07. Substitutes

- A. *Contractor's Request; Governing Criteria*: Unless the specification or description of an item of equipment or material required to be furnished under the Contract Documents contains or is followed by words that state that no substitution is permitted, the Contractor may request that the Engineer authorize the use of other items of equipment or material under the circumstances described below. To the extent possible such requests must be made before commencement of related construction at the Site.
  - 1. The Contractor shall submit sufficient information as provided below to allow the Engineer to determine if the item of material or equipment proposed is functionally equivalent to that named and an acceptable substitute therefor. The Engineer shall not accept requests for review of proposed substitute items of equipment or material from anyone other than the Contractor.
  - 2. The requirements for review by the Engineer will be as set forth in Paragraph 7.07.B, as supplemented by the Specifications, and as the Engineer may decide is appropriate under the circumstances.
  - 3. The Contractor shall make written application to the Engineer for review of a proposed substitute item of equipment or material that the Contractor seeks to furnish or use. The application:
    - a. shall certify that the proposed substitute item will:
      - 1) perform adequately the functions and achieve the results called for by the general design;
      - 2) be similar in substance to the item specified; and
      - 3) be suited to the same use as the item specified.
    - b. will state:
      - 1) the extent, if any, to which the use of the proposed substitute item will necessitate a change in Contract Times;

- 2) whether use of the proposed substitute item will require a change in any of the Contract Documents (or in the provisions of any other direct contract with the Town for other work on the Project) to adapt the design to the proposed substitute item; and
  - 3) whether incorporation or use of the proposed substitute item in connection with the Work is subject to payment of any license fee or royalty.
  - c. will identify:
    - 1) all variations of the proposed substitute item from the item specified; and
    - 2) available engineering, sales, maintenance, repair, and replacement services.
  - d. will contain an itemized estimate of all costs or credits that will result directly or indirectly from use of such substitute item, including but not limited to changes in Contract Price, shared savings, costs of redesign, and claims of other contractors affected by any resulting change.
- B. *Engineer's Evaluation and Determination:* The Engineer shall be allowed a reasonable time to evaluate each substitute request and to obtain comments and direction from the Town. The Engineer may require the Contractor to furnish additional data about the proposed substitute item. The Engineer will be the sole judge of acceptability. No substitute will be ordered, furnished, installed, or utilized until the Engineer's review is complete and the Engineer determines that the proposed item is an acceptable substitute. The Engineer's determination will be evidenced by a Field Order or a proposed Change Order accounting for the substitution itself and all related impacts, including changes in the Contract Price or Contract Times. The Engineer will advise the Contractor in writing of any negative determination.
- C. *Special Guarantee:* The Town may require the Contractor to furnish at the Contractor's expense a special performance guarantee or other surety with respect to any substitute.
- D. *Reimbursement of Engineer's Cost:* The Engineer will record the Engineer's costs in evaluating a substitute proposed or submitted by the Contractor. Whether or not the Engineer approves a substitute so proposed or submitted by the Contractor, the Contractor shall reimburse the Town for the reasonable charges of the Engineer for evaluating each such proposed substitute. The Contractor shall also reimburse the Town for the reasonable charges of the Engineer for making changes in the Contract Documents (or in the provisions of any other direct contract with the Town) resulting from the acceptance of each proposed substitute.
- E. *Contractor's Expense:* The Contractor shall provide all data in support of any proposed substitute at the Contractor's expense.
- F. *Effect of Engineer's Determination:* If the Engineer approves the substitution request, the Contractor shall execute the proposed Change Order and proceed with the substitution. The Engineer's denial of a substitution request will be final and binding, and may not be reversed through an appeal under any provision of the Contract. The Contractor may challenge the scope of reimbursement costs imposed under Paragraph 7.06.D, by timely submittal of a Change Proposal.

7.08. Concerning Subcontractors and Suppliers

- A. The Contractor shall provide to the Town a listing of Subcontractors (Exhibit J). within ten (10) days of the Contract award.

- B. The Contractor shall adhere to all provisions of the Subcontractor's Fair Practices Act (NMSA 1978, §§ 13-4-31 to 13-4-42).
- C. The Contractor shall provide to the Town completed an Assignment of Antitrust Claims (Exhibit K) and Certification of Subcontractor Regarding Equal Employment Opportunity form (Exhibit L) for each Subcontractor listed herein.
- D. The Contractor shall be fully responsible to the Town and the Engineer for all acts and omissions of the Contractor's employees; of Suppliers and Subcontractors and their employees; and of any other individuals or entities performing or furnishing any of the Work, just as the Contractor is responsible for the Contractor's own acts and omissions.
- E. The Contractor shall insert provisions in each subcontract that binds the Subcontractor to the terms of the Contract.
- F. Any subcontract shall provide that any remedy or claim for nonpayment of sums due or owing to the Subcontractor or a Supplier for services performed or materials provided is against the Contractor and not the Town, subject to any remedy or rights Subcontractor or Supplier may have under the terms of the Contractor's Performance and Payment Bond and NMSA 1978, § 13-4-19 (the New Mexico "Little Miller Act").
- G. The Contractor shall restrict Subcontractors and Suppliers from communicating with the Engineer or the Town except through the Contractor, except in an emergency.
- H. The Contractor may retain Subcontractors and Suppliers for the performance of parts of the Work. The Contractor's retention of a Subcontractor or Supplier for the performance of parts of the Work will not relieve the Contractor from its obligation to the Town to perform and complete the Work in accordance with the Contract Documents.
- I. The Contractor shall retain specific Subcontractors and Suppliers for the performance of designated parts of the Work if required by the Contract to do so.
- J. Prior to entry into any binding subcontract above \$5,000 or one-half of one percent of the architect's or Engineer's estimate of the total Project cost, not including alternates, whichever is greater, the Contractor shall submit to the Town the identity of the proposed Subcontractor or Supplier.
- K. No acceptance by the Town of any such Subcontractor or Supplier, whether initially or as a replacement, will constitute a waiver of the right of the Town to the completion of the Work in accordance with the Contract Documents.
- L. On a monthly basis, the Contractor shall submit to the Engineer a complete list of all Subcontractors and Suppliers.
- M. The Contractor shall be solely responsible for scheduling and coordinating the work of Subcontractors and Suppliers.
- N. The divisions and sections of the Specifications and the identifications of any Drawings do not control the Contractor in dividing the Work among Subcontractors or Suppliers, or in delineating the Work to be performed by any specific trade.
- O. The Town may furnish to any Subcontractor or Supplier, to the extent practicable, information about amounts paid to the Contractor for Work performed for the Contractor by the Subcontractor or Supplier.

7.09. Patent Fees and Royalties

- A. The Contractor shall indemnify, hold harmless, and save the Town, its Elected officials, employees, agents, insurers, from and against liability or claims of any nature or kind, including the cost and expenses for, or on account of, any patented or unpatented invention, process, article, or appliance manufactured or used in the performance of the Contract, including its use by the Town.
- B. If the Contractor uses any design, device or materials covered by letters, patent or copyright, the Contractor shall provide for such use by suitable agreement with the Town of such patented or copyrighted design, device or material. It is mutually agreed and understood, that, without exception, the Contract Price shall include all reasonable royalties or costs arising from the use of such design, device or materials which is in any way involved in the Work. The Contractor shall indemnify, hold harmless, and save the Town from and against any and all liability or claims for infringement by reason of the use of such patented or copyrighted design, device or materials, or any trademark or copyright in connection with Work agreed to be performed under this Contract.

7.10. Permits

- A. Unless otherwise expressly provided for in the Specifications, the Contractor shall procure and pay for all permits, licenses and approvals necessary for the execution of the Work. The Town shall assist the Contractor, when necessary, in obtaining such permits and licenses. The Contractor shall pay all governmental charges and inspection fees necessary for the prosecution of the Work. The Town shall pay all charges of utility owners for connections for providing permanent service to the Work.

7.11. Taxes

- A. The Contractor shall comply with federal, state and local tax laws including social security laws and unemployment compensation laws and workers' compensation laws insofar as applicable to the performance of the Contract.

7.12. Compliance with Applicable Law, Choice of Law

- A. *Minimum wage rates.* The Contractor, all Subcontractors and sub-subcontractors warrant and agree to comply with all applicable provisions of the New Mexico Public Works Minimum Wage Act.
- B. *Choice of Law.* This Contract shall be construed in accordance with the substantive laws of the State of New Mexico, without regard to its choice of law rules. The Contractor and the Town agree that the exclusive forum for any litigation arising out of or related to this Contract shall be the Eighth Judicial District Court of New Mexico sitting in Taos, New Mexico.
- C. *New Mexico Procurement Code.* Pursuant to NMSA 1978, §13-1-191, reference is hereby made to the criminal laws of New Mexico, including NMSA 1978 §§ 30-14-1, 30-24-2, and 30-41-1 through 30-42-3, which prohibit bribes, kickbacks, and gratuities, violation of which may constitute a felony. Further, the Procurement Code, NMSA 1978, §§ 13-1-28 through 13-1-199, imposes civil and criminal penalties for its violation.
- D. *New Mexico Tort Claims Act.* By entering into this Contract, neither party shall be responsible for liability incurred as a result of the other party's acts or omissions in connection with this Contract. Any liability incurred in connection with this Contract is subject to the immunities and limitations of the New Mexico Tort Claims Act, Sections 41-4-1, et seq. NMSA 1978. The Town and its "public employees" as defined in the New Mexico

Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to Law. No provision in this Contract modifies or waives any provision of the New Mexico Tort Claims Act.

- E. *Incorporation of Law.* Each and every clause required by Law to be inserted in this Contract shall be deemed to be inserted herein and the Contract shall be read and enforced as though it were included herein, and if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon the application of either party the Contract shall forthwith be physically amended to make such insertion or correction.
- F. The Contractor shall comply with all laws, ordinances, rules, orders, and regulations relating to performance of the Work, the protection of adjacent property, and the maintenance of passageways, guard fences or other protective facilities.
- G. The Contractor shall give all notices required by Law and this Contract, and shall comply with all Laws and Regulations applicable to the performance of the Work. Neither the Town nor the Engineer shall be responsible for monitoring the Contractor's compliance with any Laws or Regulations.
- H. If the Contractor performs any work or takes any other action knowing or having reason to know that it is contrary to Laws or Regulations, the Contractor shall bear all resulting costs and losses, and shall indemnify, defend and hold harmless the Town, its Elected Officials, employees, agents and insurers, Engineer and its officers, directors, members, partners, employees, agents, consultants, and subcontractors, from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the Work.
- I. The Town or the Contractor may give written notice to the other Party of any changes in Laws or Regulations having an effect on the performance of the Work, including but not limited to changes in Laws or Regulations having an effect on procuring permits and on sales, use, value-added, consumption, and other similar taxes. If the Town and the Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or the Contract Times resulting from such changes, then within thirty (30) days of such written notice the Contractor may submit a Change Proposal, or the Town may initiate a Claim.

#### 7.13. Record Documents

- A. The Contractor shall maintain in a safe place at the Site one printed record copy of all Drawings, Specifications, Addenda, Change Orders, Work Change Directives, Field Orders, written interpretations and clarifications and approved Shop Drawings. The Contractor shall keep such record documents in good order and annotate them to show changes made during construction. These record documents, together with all approved Samples, shall be available to the Engineer for reference. Upon completion of the Work, the Contractor shall deliver these record documents to the Engineer.

#### 7.14. Safety and Protection

- A. The Contractor shall be solely responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. Such responsibility does not relieve Subcontractors of their responsibility for the safety of persons or property in the performance of the Work, nor for compliance with applicable safety Laws and Regulations.

- B. The Contractor shall designate a qualified and experienced safety representative whose duties and responsibilities are the prevention of work-related accidents and the maintenance and supervision of safety precautions and programs.
- C. The Contractor shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury, or loss to:
  - 1. all persons on the Site or who may be affected by the Work;
  - 2. all the Work and materials and equipment to be incorporated therein, whether in storage on or off the Site; and
  - 3. other property at the Site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, other work in progress, utilities, and Underground Facilities not designated for removal, relocation, or replacement in the course of construction.
- D. All damage, injury, or loss to any property referred to in Paragraph 7.14.C.2 or 7.14.C.3 caused, directly or indirectly, in whole or in part, by the Contractor, any Subcontractor, Supplier, or any other individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, shall be remedied by the Contractor at its expense (except damage or loss attributable to the fault of Drawings or Specifications or to the acts or omissions of the Town or Engineer or anyone employed by any of them, or anyone for whose acts any of them may be liable, and not attributable, directly or indirectly, in whole or in part, to the fault or negligence of the Contractor or any Subcontractor, Supplier, or other individual or entity directly or indirectly employed by any of them).
- E. The Contractor shall comply with all applicable Laws and Regulations relating to the safety of persons or property, or to the protection of persons or property from damage, injury, or loss; and shall erect and maintain all necessary safeguards for such safety and protection.
- F. The Contractor shall notify the Town and the Engineer, the owners of adjacent property, the owners of Underground Facilities and other utilities and other contractors and utility owners performing work at or adjacent to the Site, in writing, when the Work may affect adjoining property.
- G. The Contractor shall inform the Town and the Engineer of the specific requirements of the Contractor's safety program with which the Town's and the Engineer's Elected Officials, employees, agents, insurers, subcontractors and representatives must comply while at the Site.
- H. The Contractor's duties and responsibilities for safety and protection of property shall continue in force until all the Work is completed, the Engineer has issued a written notice to the Town and the Contractor in accordance with Paragraph 15.03.C that the Work is acceptable, and the Contractor has left the Site (except as otherwise expressly provided in connection with Substantial Completion).
- I. The Contractor's duties and responsibilities for safety and protection will resume whenever the Contractor or any Subcontractor or Supplier returns to the Site to fulfill warranty or correction obligations, or to conduct other tasks arising from the Contract Documents.

7.15. Hazard Communication Programs

- A. The Contractor shall be responsible for posting and coordinating any exchange of safety data sheets (formerly known as material safety data sheets) or other hazard communication

information required to be made available to or exchanged between or among employers at the Site in accordance with Laws or Regulations.

7.16. Emergencies

- A. In emergencies affecting the safety or protection of persons or the Work or property at the Site or adjacent thereto, the Contractor shall first address the emergency and prevent damage, personal injury, death, property damage, or other loss. The Contractor shall, when such can be done consistent with the requirements of the previous sentence, give the Engineer and the Owner prompt written notice of the emergency. If the Contractor believes that any significant changes in the Work or variations from the Contract Documents are necessary as a result of the emergency or as a result of the Contractor's response to an emergency, the Contractor shall notify the Engineer and the Town. If the Engineer determines that a change in the Contract Documents is required because of the emergency or the Contractor's response, a Work Change Directive or Change Order shall be issued.
- B. Where the Contractor has not taken action but has notified the Engineer/Town of an emergency threatening injury to persons or to damage to the Work or any adjoining property, the Contractor shall act as instructed or authorized by the Engineer/Town.

7.17. Submittals

A. Shop Drawing and Sample Requirements

- 1. Before submitting a Shop Drawing or Sample, the Contractor shall:
  - a. review and coordinate the Shop Drawing or Sample with other Shop Drawings and Samples and with the requirements of the Work and the Contract Documents;
  - b. determine and verify:
    - 1) all field measurements, quantities, dimensions, specified performance and design criteria, installation requirements, materials, catalog numbers, and similar information with respect to the Submittal;
    - 2) the suitability of all materials and equipment offered with respect to the indicated application, fabrication, shipping, handling, storage, assembly, and installation pertaining to the performance of the Work; and
    - 3) all information relative to the Contractor's responsibilities for means, methods, techniques, sequences, and procedures of construction, and safety precautions and programs incident thereto;
  - c. confirm that the Submittal is complete with respect to all related data included in the Submittal.
- 2. Each Shop Drawing or Sample must bear a stamp or specific written certification that the Contractor has satisfied the Contractor's obligations under the Contract Documents with respect to the Contractor's review of that Submittal, and that the Contractor approves the Submittal.
- 3. With each Shop Drawing or Sample, the Contractor shall give the Engineer specific written notice of any variations that the Submittal may have from the requirements of the Contract Documents. This notice must be set forth in a written communication separate from the Submittal; and, in addition, in the case of a Shop Drawing by a specific notation made on the Shop Drawing itself.

B. *Submittal Procedures for Shop Drawings and Samples:* The Contractor shall label and submit Shop Drawings and Samples to the Engineer for review and approval in accordance with the accepted Schedule of Submittals.

1. Shop Drawings

- a. The Contractor shall submit the number of copies required in the Specifications.
- b. Data shown on the Shop Drawings must be accurate and complete, and shall be complete with respect to quantities, dimensions, specified performance and design criteria, materials, and similar data to show the Engineer the services, materials, and equipment the Contractor proposes to provide, and to enable the Engineer to review the information for the limited purposes required by Paragraph 7.17.C.

2. Samples

- a. The Contractor shall submit the number of the Samples required in the Specifications.
- b. The Contractor shall clearly identify each Sample as to material, Supplier, pertinent data such as catalog numbers, the use for which intended and other data as the Engineer may require to enable the Engineer to review the Submittal for the limited purposes required by Paragraph 7.17.C.

3. Where a Shop Drawing or Sample is required by the Contract Documents or the Schedule of Submittals, any related Work performed prior to the Engineer's review and approval of the pertinent Submittal will be at the sole expense and responsibility of the Contractor.

C. Engineer's Review of Shop Drawings and Samples

1. The Engineer shall provide timely review of the Shop Drawings and Samples in accordance with the accepted Schedule of Submittals. The Engineer shall determine if the items covered by the Submittals will, after installation or incorporation in the Work, comply with the requirements of the Contract Documents and be compatible with the Work as a functioning whole as indicated by the Contract Documents.
2. The Engineer's review and approval will not extend to means, methods, techniques, sequences, or procedures of construction, or to safety precautions or programs incident thereto.
3. The Engineer's review and approval of a separate item as such will not indicate approval of the assembly in which the item functions.
4. The Engineer's review and approval of a Shop Drawing or Sample will not relieve the Contractor from responsibility for any variation from the requirements of the Contract Documents unless the Contractor has complied with the requirements of Paragraph 7.17.A.3 and the Engineer has given written approval of each such variation by specific written notation thereof incorporated in or accompanying the Shop Drawing or Sample. The Engineer shall document any such approved variation from the requirements of the Contract Documents in a Field Order or other appropriate Contract modification.
5. The Engineer's review and approval of a Shop Drawing or Sample shall not relieve the Contractor from responsibility for complying with the requirements of Paragraphs 7.17.A and 7.17.B.
6. The Engineer's review and approval of a Shop Drawing or Sample or of a variation from the requirements of the Contract Documents will not, under any circumstances, change

the Contract Times or Contract Price unless such changes are included in a Change Order.

7. Neither the Engineer's receipt, review, acceptance, or approval of a Shop Drawing or Sample shall result in such item becoming a Contract Document.
8. The Contractor shall perform the Work in compliance with the requirements and commitments set forth in approved Shop Drawings and Samples, subject to the provisions of Paragraph 7.17.C.4.

D. Resubmittal Procedures for Shop Drawings and Samples

1. The Contractor shall make corrections required by the Engineer and shall return the required number of corrected copies of Shop Drawings and submit, as required, new Samples for review and approval. The Contractor shall direct specific attention in writing to revisions other than the corrections called for by the Engineer on previous Submittals.
2. The Contractor shall furnish required Shop Drawing and Sample Submittals with sufficient information and accuracy to obtain required approval of an item with no more than two resubmittals. The Engineer shall record the Engineer's time for reviewing a third or subsequent resubmittal of a Shop Drawing or Sample, and the Contractor shall be responsible for the Engineer's charges to the Town for such time. The Town may impose a set-off against payments due the Contractor to secure reimbursement for such charges.

E. Submittals Other than Shop Drawings, Samples, and Town-Delegated Designs

1. The following provisions apply to all Submittals other than Shop Drawings, Samples, and Town-delegated designs:
  - a. The Contractor shall submit all such Submittals to the Engineer in accordance with the Schedule of Submittals and pursuant to the applicable terms of the Contract Documents.
  - b. The Engineer shall provide timely review of all such Submittals in accordance with the Schedule of Submittals and shall return such Submittals with a notation of either "Accepted" or "Not Accepted." Any such Submittal that is not returned within the time established in the Schedule of Submittals shall be deemed accepted.
  - c. The Engineer's review shall be limited to determining if the Submittal is acceptable under the requirements of the Contract Documents as to general form and content of the Submittal.
  - d. If any such Submittal is not accepted, the Contractor shall confer with the Engineer regarding the reason for the non-acceptance, and resubmit an acceptable document.
2. Procedures for the Submittal and acceptance of the Progress Schedule, the Schedule of Submittals, and the Schedule of Values are set forth in Paragraphs 2.03, 2.04, and 2.05.

F. *Town-Delegated Designs*: Submittals pursuant to Town-delegated designs are governed by the provisions of Paragraph 7.17.

7.18. Contractor's General Warranty and Guarantee

- A. In addition to any other warranties in this Contract, the Contractor warrants that the Work performed under this Contract conforms to the Contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any Subcontractor or Supplier. The Engineer is entitled to rely on the

Contractor's warranty and the manufacturer's warranty of any equipment of materials furnished in performance of this Contract.

- B. The Contractor's warranty shall continue for a period of one (1) year from the date of final acceptance of the Work under this Contract. Manufacturer's warranties shall continue for the time period identified in the warranty. If the Town takes possession of any part of the Work before final acceptance, the Contractor's warranty shall continue for a period of one (1) year from the date the Town takes possession.
- C. The Town's rights under this warranty are in addition to, and are not limited by, the Town's rights under the correction period provisions of Paragraph 15.10. The time in which the Town may enforce its warranty under this Paragraph 7.18 is limited only by applicable Laws and Regulations restricting actions to enforce such rights; provided, however, that after the end of the correction period under Paragraph 15.10:
  - 1. The Town shall give the Contractor written notice of any defective Work.; and
  - 2. Such notice will be deemed the start of an event giving rise to a Claim under Paragraph 12.01.E, such that any related Claim must be brought within 30 days of the notice.
- D. The Contractor's warranty hereunder excludes defects or damage caused by:
  - 1. abuse, or improper modification, maintenance, or operation, by persons other than the Contractor, the Subcontractors or Suppliers, or any other individual or entity for whom the Contractor is responsible; or
  - 2. normal wear and tear under normal usage.
- E. The Contractor's obligation to perform and complete the Work in accordance with the Contract Documents is absolute. None of the following will constitute an acceptance of the Work that is not in accordance with the Contract Documents:
  - 1. A release of the Contractor's obligation to perform the Work in accordance with the Contract Documents,
  - 2. A release of the Town's warranty and guarantee rights under this Paragraph 7.18:
  - 3. Observations by the Engineer;
  - 4. Recommendation by the Engineer or payment by the Town of any progress or final payment;
  - 5. The issuance of a certificate of Substantial Completion by the Engineer or any payment related thereto by the Town;
  - 6. Use or occupancy of the Work or any part thereof by the Town;
  - 7. Any review and approval of a Shop Drawing or Sample Submittal;
  - 8. The issuance of a notice of acceptability by the Engineer;
  - 9. The end of the correction period established in Paragraph 15.10;
  - 10. Any inspection, test, or approval by others; or
  - 11. Any correction of defective Work by the Town.
- F. If the Contract requires the Contractor to accept the assignment of a contract entered into by the Town, then the specific warranties, guarantees, and correction obligations contained in the

assigned contract will govern with respect to the Contractor's performance obligations to the Town for the Work described in the assigned contract.

- G. The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to Town-owned or -controlled real or personal property, when that damage is the result of the Contractor's failure to conform to Contract requirements or any defect of equipment, material, workmanship, or design furnished.
- H. The Contractor shall restore any Work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for one (1) year from the date of repair or replacement. If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Town shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.
- I. With respect to all warranties, express or implied, from Subcontractors, manufacturers, or Suppliers for Work performed and materials furnished under this Contract, the Contractor shall obtain all warranties, require all warranties to be executed, in writing and enforce all warranties for the benefit of the Town.
- J. In the event the Contractor's warranty under this clause has expired, the Town may bring suit at its expense to enforce a Subcontractor's, manufacturer's, or Supplier's warranty.

#### 7.19. Indemnification

- A. The Contractor shall indemnify, defend and hold harmless the Town, its Elected Officials, employees, agents, insurers, the Engineer and its officers, directors, members, partners, employees, agents, consultants and subcontractors from losses, claims or expenses (including but not limited to court costs and attorneys' fees), damages, demands, suits, causes of action, costs, and judgments (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) arising out of the Contract and the Work or caused by any negligent act or omission of the Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, including but not limited to the Contractor's breach of any representation or warranty made herein or arising from third-party claims or actions relating to or resulting from the performance or furnishing of the Work.
- B. In any and all claims against the Town, its Elected Officials, employees, agents and insurers, the Engineer, its officers, directors, members, partners, employees, agents, consultants, or subcontractors, by any employee (or the survivor or personal representative of such employee) of the Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, the indemnification obligation under Paragraph 7.19.A will 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 such Subcontractor, Supplier, or other individual or entity under workers' compensation acts, disability benefit acts, or other employee benefit acts.
- C. The Town shall have the right to control and participate in the defense of any demand, suit, or cause of action concerning matters that relate to the Town and that any such suit shall not be settled without the Town's consent. If a conflict exists between the interests of the Town and

the Contractor in such demand, suit, or cause of action, the Town may retain its own counsel to represent the Town 's interest, at the Contractor's expense.

**7.20 Delegation of Professional Design Services**

- A. The Town may require the Contractor to provide professional design services for a portion of the Work by express delegation in the Contract Documents. Such delegation will specify the performance and design criteria that such services must satisfy, and the Submittals that the Contractor must furnish to the Engineer with respect to the Town-delegated design.
- B. The Contractor shall cause such Town-delegated professional design services to be provided pursuant to the professional standard of care by a properly licensed design professional, whose signature and seal must appear on all drawings, calculations, specifications, certifications, and Submittals prepared by such design professional. Such design professional must issue all certifications of design required by Laws and Regulations.
- C. If a Shop Drawing or other Submittal related to the Town-delegated design is prepared by the Contractor, a Subcontractor, or others for submittal to the Engineer, then such Shop Drawing or other Submittal must bear the written approval of the Contractor's design professional when submitted by the Contractor to the Engineer.
- D. The Town and the Engineer shall be entitled to rely upon the adequacy, accuracy, and completeness of the services, certifications, and approvals performed or provided by the design professionals retained or employed by the Contractor under a Town-delegated design, subject to the professional standard of care and the performance and design criteria stated in the Contract Documents.
- E. Pursuant to this Paragraph 7.20, the Engineer's review, approval, and other determinations regarding design drawings, calculations, specifications, certifications, and other Submittals furnished by the Contractor pursuant to a Town-delegated design will be only for the following limited purposes:
  - 1. Checking for conformance with the requirements of this Paragraph 7.20;
  - 2. Confirming that the Contractor (through its design professionals) has used the performance and design criteria specified in the Contract Documents; and
  - 3. Establishing that the design furnished by the Contractor is consistent with the design concept expressed in the Contract Documents.
- F. The Contractor shall not be responsible for the adequacy of performance or design criteria specified by the Town or the Engineer.
- G. The Contractor is not required to provide professional services in violation of applicable Laws and Regulations.

**ARTICLE 8 – OTHER WORK AT THE SITE**

**8.01. Other Work**

- A. In addition to and apart from the Work under the Contract Documents, the Town may perform other work at or adjacent to the Site. Such other work may be performed by the Town's employees, or through contracts between the Town and third parties. The Town may also arrange to have third-party utility owners perform work on their utilities and facilities at or adjacent to the Site.

- B. If the Town performs other work at or adjacent to the Site with the Town's employees, or through contracts for such other work, then the Town shall give the Contractor written notice thereof prior to starting any such other work. If the Town has advance information regarding the start of any third-party utility work that the Town has arranged to take place at or adjacent to the Site, the Town shall provide such information to the Contractor.
- C. The Contractor shall afford proper and safe access to the Site to each contractor that performs such other work, each utility owner performing other work, and the Town, if the Town is performing other work with the Town's own employees, and shall provide a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such other work.
- D. The Contractor shall do all cutting, fitting, and patching of the Work that may be required to properly connect or otherwise make its several parts come together and properly integrate with such other work. The Contractor shall not endanger any work of others by cutting, excavating, or otherwise altering such work; provided, however, that the Contractor may cut or alter others' work with the written consent of the Engineer and the others whose work will be affected.
- E. If the proper execution or results of any part of the Contractor's Work depends upon work performed by others, the Contractor shall inspect such other work and promptly report to the Engineer in writing any delays, defects, or deficiencies in such other work that render it unavailable or unsuitable for the proper execution and results of the Contractor's Work. The Contractor's failure to so report will constitute an acceptance of such other work as fit and proper for integration with the Contractor's Work except for latent defects and deficiencies in such other work.
- F. The provisions of this article are not applicable to work that is performed by third-party utilities or other third-party entities without a contract with the Town, or that is performed without having been arranged by the Town. If such work occurs, then any related delay, disruption, or interference incurred by the Contractor is governed by the provisions of Paragraph 4.04.C.3.

#### 8.02. Coordination with Utilities

- A. If the Town intends to contract with others for the performance of other work at or adjacent to the Site, to perform other work at or adjacent to the Site with the Town's employees, or to arrange to have utility owners perform work at or adjacent to the Site, the following will be provided to the Contractor prior to the start of any such other work:
  - 1. The identity of the individual or entity that will have authority and responsibility for coordination of the activities among the various contractors;
  - 2. An itemization of the specific matters to be covered by such authority and responsibility; and
  - 3. The extent of such authority and responsibilities.
- B. The Town shall have sole authority and responsibility for such coordination.
- C. The Contractor shall coordinate its operations with those of other contractors. Cooperation will be required in the arrangement for the storage of materials and in the detailed execution of the Work. The Contractor, including its subcontractors, shall keep informed of the progress and the detail work of other contractors and shall notify the Engineer/Town immediately of lack of progress or defective workmanship on the part of other contractors. Failure of a Contractor to keep informed of the work progressing on the Site and failure to give notice of

lack of progress or defective workmanship by others shall be construed as acceptance by the Contractor of the status of the work as being satisfactory for proper coordination with its own work.

- D. All work on Airport Property must be conducted in compliance with the Construction Safety and Phasing Plan. Contractor shall coordinate and communicate with the Engineer and the Airport Manager (Colton Rapstine) regarding compliance with the plan. [AN6]

#### 8.03. Legal Relationships

- A. If, in the course of performing other work for the Town at or adjacent to the Site, the Town's employees, any other contractor working for the Town, or any utility owner that the Town has arranged to perform work, causes damage to the Work or to the property of the Contractor or its Subcontractors, or delays, disrupts, interferes with, or increases the scope or cost of the performance of the Work, through actions or inaction, the Contractor must submit a Change Proposal seeking an adjustment in the Contract Price or the Contract Times under this paragraph within thirty (30) days of the damaging, delaying, disrupting, or interfering event. The entitlement to, and extent of, any such adjustment will take into account information (if any) regarding such other work that was provided to the Contractor in the Contract Documents, and any remedies available to the Contractor under Laws or Regulations. When applicable, any such adjustment in the Contract Price will be conditioned on the Contractor assigning to the Town all of the Contractor's rights against such other contractor or utility owner with respect to the damage, delay, disruption, or interference that is the subject of the adjustment. The Contractor's entitlement to an adjustment of the Contract Times or Contract Price is subject to the provisions of Paragraphs 4.04.D and 4.04.E.
- B. The Contractor shall take reasonable and customary measures to avoid damaging, delaying, disrupting, or interfering with the work of the Town, any other contractor, or any utility owner performing other work at or adjacent to the Site.
1. If the Contractor fails to take such measures and as a result damages, delays, disrupts, or interferes with the work of any such other contractor or utility owner, then the Town may impose a set-off against payments due the Contractor and assign to such other contractor or utility owner the Town's contractual rights against the Contractor with respect to the breach of the obligations set forth in this Paragraph 8.03.B.
  2. When the Town is performing other work at or adjacent to the Site with the Town's employees, the Contractor shall be liable to the Town for damage to such other work, and for the reasonable direct delay, disruption, and interference costs incurred by the Town as a result of the Contractor's failure to take reasonable and customary measures with respect to the Town's other work. In response to such damage, delay, disruption, or interference, the Town may impose a set-off against payments due the Contractor.
- C. If the Contractor damages, delays, disrupts, or interferes with the work of a third-party or a utility owner performing other work at or adjacent to the Site through the Contractor's failure to take reasonable and customary measures to avoid such impacts, or if any claim arising out of the Contractor's actions, inactions, or negligence in performance of the Work at or adjacent to the Site is made by any such other contractor or utility owner against the Contractor, Town, or Engineer, then the Contractor shall (1) promptly attempt to settle the claim as to all parties through negotiations with such other contractor or utility owner, or otherwise resolve the claim by arbitration or other dispute resolution proceeding or at law, and (2) indemnify and hold harmless the Town, its Elected Officials, employees, agents and

insurers or the Engineer, its officers, directors, members, partners, employees, insurers, agents, consultants, or subcontractors from and against any such claims, and against all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such damage, delay, disruption, or interference.

## **ARTICLE 9 – TOWN’S RESPONSIBILITIES**

### **9.01. Communications to Contractor**

- A. Except as otherwise provided in these General Conditions, the Town shall communicate to the Contractor solely through the Engineer, except in an emergency as described herein.

### **9.02. Replacement of Engineer**

- A. The Town may at its discretion appoint an engineer to replace the Engineer. The replacement engineer’s status under the Contract Documents will be that of the former Engineer.

### **9.03. Furnish Data**

- A. The Town shall promptly furnish the data required of the Town under the Contract Documents.

### **9.04. Pay When Due**

- A. The Town shall make payments to the Contractor when due as provided in the Contract.

### **9.05. Lands and Easements; Reports, Tests, and Drawings**

- A. The Town’s duties with respect to providing lands and easements are set forth in Paragraph 5.01.
- B. The Town’s duties with respect to providing engineering surveys to establish reference points are set forth in Paragraph 4.02.
- C. Article 5 refers to the Town’s identifying and making available to the Contractor copies of reports of explorations and tests of conditions at the Site, and drawings of physical conditions relating to existing surface or subsurface structures at the Site.

### **9.06. Insurance**

- A. The Town’s responsibilities, if any, with respect to purchasing and maintaining liability and property insurance are set forth in Article 6.

### **9.07. Change Orders**

- A. The Town’s responsibilities with respect to Change Orders are set forth in Article 11.

### **9.08. Inspections, Tests, and Approvals**

- A. The Town’s responsibility with respect to certain inspections, tests, and approvals is set forth in Paragraph 14.02.B.

### **9.09. Limitations on Town’s Responsibilities**

- A. The Town shall not supervise, direct, or have control or authority over, nor be responsible for, the Contractor’s means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of the Contractor to comply with Laws and Regulations applicable to the performance of the Work. The Town

shall not be responsible for the Contractor's failure to perform the Work in accordance with the Contract Documents.

9.10. Undisclosed Hazardous Environmental Condition

- A. The Town's responsibility in respect to an undisclosed Hazardous Environmental Condition is set forth in Paragraph 5.07.

9.11. Evidence of Financial Arrangements

- A. Upon request of the Contractor, the Town shall furnish the Contractor reasonable evidence that financial arrangements have been made to satisfy the Town's obligations under the Contract (including obligations under proposed changes in the Work).

9.12. Safety Programs

- A. While at the Site, the Town's employees and representatives shall comply with the specific applicable requirements of the Contractor's safety programs of which the Town has been informed.

## **ARTICLE 10 – ENGINEER'S STATUS DURING CONSTRUCTION**

10.01. Town's Representative

- A. The Engineer will be the Town's representative during the construction period. The duties and responsibilities and the limitations of authority of the Engineer as the Town's representative during construction are set forth in the Contract.

10.02. Visits to Site

- A. The Engineer will make visits to the Site at intervals appropriate to the various stages of construction as the Engineer deems necessary in order to observe, as an experienced and qualified design professional, the progress that has been made and the quality of the various aspects of the Contractor's executed Work. Based on information obtained during such visits and observations, the Engineer, for the benefit of the Town, will determine, in general, if the Work is proceeding in accordance with the Contract Documents. The Engineer will not be required to make exhaustive or continuous inspections on the Site to check the quality or quantity of the Work. The Engineer's efforts will be directed toward providing for the Town a greater degree of confidence that the completed Work will conform generally to the Contract Documents. On the basis of such visits and observations, the Engineer will keep the Town informed of the progress of the Work and will endeavor to guard the Town against defective Work.
- B. The Engineer's visits and observations are subject to all the limitations on the Engineer's authority and responsibility set forth in Paragraph 10.07 and in the Engineer's contract with the Town. Particularly, but without limitation, during or as a result of the Engineer's visits or observations of the Contractor's Work, the Engineer will not supervise, direct, control, or have authority over or be responsible for the Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of the Contractor to comply with Laws and Regulations applicable to the performance of the Work.

10.03. Resident Project Representative

- A. If the Town and the Engineer have agreed that the Engineer will furnish a Resident Project Representative to represent the Engineer at the Site and assist the Engineer in observing the progress and quality of the Work, then the authority and responsibilities of any such Resident

Project Representative will be as provided in the Supplementary Conditions, and limitations on the responsibilities thereof will be as provided in the Supplementary Conditions and in Paragraph 10.07.

- B. If the Town designates an individual or entity who is not the Engineer's consultant, agent, or employee to represent the Town at the Site, then the responsibilities and authority of such individual or entity will be as provided in the Supplementary Conditions.

#### 10.04. Engineer's Authority

- A. The Engineer shall give all orders and directions contemplated under this Contract and Specifications, relative to the execution of the Work. The Engineer shall determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for under this Contract and shall decide all questions which may arise in relation to said work and the construction thereof. The Engineer estimates and decisions shall be final and conclusive, except as herein otherwise expressly provided. In case any question shall arise between the Parties hereto relative to said Contract or the Specifications, the determination or decision of the Engineer shall be a condition precedent to the right of the Contractor to receive any money or payment for Work under this Contract.
- B. The Engineer has the authority to reject the Work or any portion thereof in accordance with Article 14.
- C. The Engineer's authority as to Submittals is set forth in Paragraph 7.17.
- D. The Engineer's authority as to design drawings, calculations, specifications, certifications and other Submittals from the Contractor in response to the Town's delegation (if any) to the Contractor of professional design services, is set forth in Paragraph 7.20.
- E. The Engineer's authority as to changes in the Work is set forth in Article 11.
- F. The Engineer's authority as to Applications for Payment is set forth in Article 15.
- G. Neither the Engineer's review of the Contractor's Work for the purposes of recommending payments nor the Engineer's recommendation of any payment, including final payment, will impose responsibility on the Engineer:
  - 1. to supervise, direct, or control the Work;
  - 2. for the means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto;
  - 3. for the Contractor's failure to comply with Laws and Regulations applicable to the Contractor's performance of the Work;
  - 4. to make any examination to ascertain how or for what purposes the Contractor has used the money paid by the Town; or
  - 5. to determine that title to any of the Work, materials, or equipment has passed to the Town free and clear of any liens.

#### 10.05. Determinations for Unit Price Work

- A. The Engineer shall determine the actual quantities and classifications of Unit Price Work performed by the Contractor as set forth in Paragraph 13.03.

#### 10.06. Decisions on Requirements of Contract Documents and Acceptability of Work

- A. The Engineer will render decisions regarding the requirements of the Contract Documents and judge the acceptability of the Work pursuant to the specific procedures set forth herein

for initial interpretations, Change Proposals, and acceptance of the Work. In rendering such decisions and judgments, the Engineer shall not show partiality to the Town or the Contractor, and shall not be liable to the Town, the Contractor, or others in connection with any proceedings, interpretations, decisions, or judgments conducted or rendered in good faith.

**10.07. Limitations on Engineer's Authority and Responsibilities**

- A. Neither the Engineer's authority or responsibility under this Article 10 or under any other provision of the Contract, nor any decision made by the Engineer in good faith either to exercise or not exercise such authority or responsibility or the undertaking, exercise, or performance of any authority or responsibility by the Engineer, will create, impose, or give rise to any duty in contract, tort, or otherwise owed by the Engineer to the Contractor, any Subcontractor, any Supplier, any other individual or entity, or to any surety for or employee or agent of any of them.
- B. The Engineer will not supervise, direct, control, or have authority over or be responsible for the Contractor's means, methods, techniques, sequences, or procedures of construction or the safety precautions and programs incident thereto, or for any failure of the Contractor to comply with Laws and Regulations applicable to the performance of the Work. The Engineer shall not be responsible for the Contractor's failure to perform the Work in accordance with the Contract Documents.
- C. The Engineer shall not be responsible for the acts or omissions of the Contractor or of any Subcontractor, any Supplier, or of any other individual or entity performing any of the Work.
- D. The Engineer's review of the final Application for Payment and accompanying documentation, and all maintenance and operating instructions, schedules, guarantees, bonds, certificates of inspection, tests and approvals, and other documentation required to be delivered by the Contractor under Paragraph 15.07.A, shall only be to determine generally that the content complies with the requirements of, and in the case of certificates of inspections, tests, and approvals, that the results certified indicate compliance with the Contract Documents.
- E. The limitations upon authority and responsibility set forth in this Paragraph 10.07 also apply to the Resident Project Representative, if any.

**10.08. Compliance with Safety Program**

- A. While at the Site, the Engineer's employees and representatives shall comply with the specific applicable requirements of the Town's and the Contractor's safety programs of which the Engineer has been informed.

**ARTICLE 11 – CHANGES TO THE CONTRACT**

**11.01. Amending and Supplementing the Contract**

- A. The Contract may be amended or supplemented by a Change Order (Exhibit M), a Work Change Directive, or a Field Order.
- B. If an amendment or supplement to the Contract includes a change in the Contract Price or the Contract Times, such amendment or supplement must be set forth in a Change Order.
- C. All changes to the Contract that involve (1) the performance or acceptability of the Work, (2) the design (as set forth in the Drawings, Specifications, or otherwise), or (3) other engineering or technical matters, must be supported by the Engineer's recommendation. The

Town and the Contractor may amend other terms and conditions of the Contract without the recommendation of the Engineer.

11.02. Change Orders

- A. Without invalidating the Contract or the Scope of Work, the Town may order extra work or make changes by altering, adding to or deducting from the Work, the Contract Price being adjusted accordingly, and the consent of the Surety being first obtained where necessary.
- B. The Town and the Contractor shall execute appropriate Change Orders covering:
  - 1. Changes in the Contract Price or the Contract Times which are agreed to by the Parties, including any undisputed sum or amount of time for the Work actually performed in accordance with a Work Change Directive;
  - 2. Changes in the Contract Price resulting from a Town set-off, unless the Contractor has duly contested such set-off;
  - 3. Changes in the Work which are: (a) ordered by the Town pursuant to Paragraph 11.05, (b) required because of the Town's acceptance of defective Work under Paragraph 14.04 or the Town's correction of defective Work under Paragraph 14.07, or (c) agreed to by the parties, subject to the need for the Engineer's recommendation if the change in the Work involves the design (as set forth in the Drawings, Specifications, or otherwise) or other engineering or technical matters; and
  - 4. Changes that embody the substance of any final and binding results under: Paragraph 11.03.B, resolving the impact of a Work Change Directive; Paragraph 11.09, concerning Change Proposals; Article 12, Claims; Paragraph 13.02.D, final adjustments resulting from allowances; Paragraph 13.03.D, final adjustments relating to determination of quantities for Unit Price Work; and similar provisions.
- C. If the Town or the Contractor refuses to execute a Change Order that is required to be executed under the terms of Paragraph 11.02.A, it will be deemed to be of full force and effect, as if fully executed.

11.03. Work Change Directives

- A. A Work Change Directive will not change the Contract Price or the Contract Times but is evidence that the parties expect that the modification ordered or documented by a Work Change Directive will be incorporated in a subsequently issued Change Order, following negotiations by the Parties as to the Work Change Directive's effect, if any, on the Contract Price and Contract Times; or, if negotiations are unsuccessful, by a determination under the terms of the Contract Documents governing adjustments, expressly including Paragraph 11.07 regarding change of the Contract Price.
- B. If the Town has issued a Work Change Directive and:
  - 1. If the Contractor reasonably believes that an adjustment in the Contract Times or the Contract Price is necessary, then the Contractor may submit a Change Proposal seeking such an adjustment no later than thirty (30) days after the completion of the Work set out in the Work Change Directive.
  - 2. If the Town reasonably believes that an adjustment in the Contract Times or the Contract Price is necessary, then the Town may submit a Claim seeking such an adjustment no later than 60 days after issuance of the Work Change Directive.

#### 11.04. Field Orders

- A. The Engineer may authorize minor changes in the Work so long as the changes do not involve an adjustment in the Contract Price or the Contract Times and are compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. Such changes shall be accomplished by a Field Order and shall be binding on the Town and also on the Contractor, which shall perform the Work involved promptly.
- B. If the Contractor believes that a Field Order justifies an adjustment in the Contract Price or Contract Times, then before proceeding with the Work at issue, the Contractor may submit a Change Proposal as provided herein.

#### 11.05. Town-Authorized Changes in the Work

- A. Without invalidating the Contract, the Town may, at any time or from time to time, order additions, deletions, or revisions in the Work. Changes involving the design (as set forth in the Drawings, Specifications, or otherwise) or other engineering or technical matters shall be supported by the Engineer's recommendation.
- B. Such changes in the Work shall be accomplished by a Change Order, if the Town and the Contractor have agreed as to the terms of the Change Order, or by a Work Change Directive. Upon receipt of any such document, the Contractor shall promptly proceed with the Work involved; or, in the case of a deletion in the Work, promptly cease construction activities with respect to such deleted Work. Added or revised Work must be performed under the applicable conditions of the Contract Documents.

#### 11.06. Unauthorized Changes in the Work

- A. The Contractor shall not be entitled to an increase in the Contract Price or an extension of the Contract Times with respect to Work performed that is not required by the Contract Documents, as amended, modified, or supplemented, except in the case of an emergency as provided in Paragraph 7.16 or in the case of uncovering Work as provided in Paragraph 14.05.C.2.

#### 11.07. Change of Contract Price

- A. The Contract Price may only be changed by a Change Order. Any Change Proposal for an adjustment in the Contract Price must comply with the provisions of Paragraph 11.09. Any Claim for an adjustment of Contract Price must comply with the provisions of Article 12.
- B. An adjustment in the Contract Price will be determined as follows:
  - 1. Where the Work involved is covered by Unit Prices contained in the Contract Documents, then by application of such Unit Prices to the quantities of the items involved (subject to the provisions of Paragraph 13.03);
  - 2. Where the Work involved is not covered by Unit Prices contained in the Contract Documents, then by a mutually agreed lump sum (which may include an allowance for overhead and profit not necessarily in accordance with Paragraph 11.07.C.2); or
  - 3. Where the Work involved is not covered by Unit Prices contained in the Contract Documents and the parties do not reach mutual agreement to a lump sum, then on the basis of the Cost of the Work (determined as provided in Paragraph 13.01) plus a Contractor's fee for overhead and profit (determined as provided in Paragraph 11.07.C).

C. Contractor's Fee: When applicable, the Contractor's fee for overhead and profit will be determined as follows:

1. A mutually acceptable fixed fee; or
2. If a fixed fee is not agreed upon, then a fee based on the following percentages of the various portions of the Cost of the Work:
  - a. For costs incurred under Paragraphs 13.01.B.1 and 13.01.B.2, the Contractor's fee will be 15 percent;
  - b. For costs incurred under Paragraph 13.01.B.3, the Contractor's fee will be 5 percent;
  - c. Where one or more tiers of subcontracts are on the basis of cost of the work plus a fee and no fixed fee is agreed upon, the intent of Paragraphs 11.07.C.2.a and 11.07.C.2.b is that the Contractor's fee will be based on: (1) a fee of fifteen percent (15%) of the costs incurred under Paragraphs 13.01.B.1 and 13.01.B.2 by the Subcontractor that actually performs the Work, and (2) with respect to the Contractor itself and to any Subcontractors of a tier higher than that of the Subcontractor that actually performs the Work, a fee of five percent (5%) of the amount (fee plus the underlying costs incurred); provided, however, that for any such subcontracted Work the maximum total fee to be paid by the Town shall be no greater than twenty-seven percent (27%) of the costs incurred by the Subcontractor that actually performs the Work;
  - d. No fee will be payable on the basis of costs itemized under Paragraphs 13.01.B.4, 13.01.B.5, and 13.01.C;
  - e. The amount of credit to be allowed by the Contractor to the Town for any change which results in a net decrease in the Cost of the Work will be the amount of the actual net decrease in Cost of the Work and a deduction of an additional amount equal to five percent (5%) of such actual net decrease in the Cost of the Work; and
  - f. When both additions and credits are involved in any one change or Change Proposal, the adjustment in the Contractor's fee will be computed by determining the sum of the costs in each of the cost categories in Paragraph 13.01.B (specifically, payroll costs, Paragraph 13.01.B.1; incorporated materials and equipment costs, Paragraph 13.01.B.2; Subcontract costs, Paragraph 13.01.B.3; special consultants costs, Paragraph 13.01.B.4; and other costs, Paragraph 13.01.B.5) and applying to each such cost category sum the appropriate fee from Paragraphs 11.07.C.2.a through 11.07.C.2.e, inclusive.

#### 11.08. Change of Contract Times

- A. The Contract Times may only be changed by a Change Order. Any Change Proposal for an adjustment in the Contract Times must comply with the provisions of Paragraph 11.08. Any Claim for an adjustment in the Contract Times must comply with the provisions of Article 12.
- B. Delay, disruption, and interference in the Work, and any related changes in Contract Times, are addressed in and governed by Paragraph 4.04.

#### 11.09. Change Proposals

- A. *Purpose and Content:* The Contractor may submit a Change Proposal to the Engineer to request an adjustment in the Contract Times or the Contract Price; contest an initial decision by the Engineer concerning the requirements of the Contract Documents or relating to the acceptability of the Work under the Contract Documents; challenge a set-off against payment

due; or seek other relief under the Contract. The Change Proposal shall specify any proposed change in Contract Times or Contract Price, or other proposed relief, and explain the reason for the proposed change, with citations to any governing or applicable provisions of the Contract Documents. Each Change Proposal will address only one issue, or a set of closely related issues.

**B. Change Proposal Procedures**

1. *Submittal*: The Contractor shall submit each Change Proposal to the Engineer within thirty (30) days after the start of the event giving rise thereto, or after such initial decision.
2. *Supporting Data*: The Contractor shall submit supporting data, including the proposed change in the Contract Price or the Contract Time (if any), to the Engineer and the Town within fifteen (15) days after the submittal of the Change Proposal.
  - a. Change Proposals based on or related to delay, interruption, or interference must comply with the provisions of Paragraphs 4.04.D and 4.04.E.
  - b. Change Proposals related to a change of the Contract Price must include full and detailed accounts of materials incorporated into the Work and labor and equipment used for the Work.

The supporting data must be accompanied by a written statement that the supporting data are accurate and complete, and that any requested time or price adjustment is the entire adjustment to which the Contractor believes it is entitled as a result of said event.

3. *Engineer's Initial Review*: The Engineer will advise the Town regarding the Change Proposal, and the Engineer shall consider any comments or response from the Town regarding the Change Proposal. If, in its discretion, the Engineer concludes that additional supporting data is needed before conducting a full review and making a decision regarding the Change Proposal, then the Engineer may request that the Contractor submit such additional supporting data by a date specified by the Engineer, prior to the Engineer beginning its full review of the Change Proposal.
  4. *Engineer's Full Review and Action on the Change Proposal*: Upon receipt of the Contractor's supporting data (including any additional data requested by the Engineer), the Engineer shall conduct a full review of each Change Proposal and, within 30 days after such receipt of the Contractor's supporting data, either approve the Change Proposal in whole, deny it in whole, or approve it in part and deny it in part. Such actions must be in writing, with a copy provided to the Town and the Contractor. If the Engineer does not take action on the Change Proposal within 30 days, then either the Town or the Contractor may at any time thereafter submit a letter to the other Party indicating that as a result of the Engineer's inaction the Change Proposal is deemed denied, thereby commencing the time for appeal of the denial under Article 12.
  5. *Binding Decision*: The Engineer's decision is final and binding upon the Town and the Contractor, unless the Town or the Contractor appeals the decision by filing a Claim under Article 12.
- C. *Resolution of Certain Change Proposals*: If the Change Proposal does not involve the design (as set forth in the Drawings, Specifications, or otherwise), the acceptability of the Work, or other engineering or technical matters, then the Engineer will notify the parties in writing that the Engineer is unable to resolve the Change Proposal. For purposes of further resolution of

such a Change Proposal, such notice will be deemed a denial, and the Contractor may choose to seek resolution under the terms of Article 12.

- D. *Post-Completion*: The Contractor shall not submit any Change Proposals after the Engineer issues a written recommendation of final payment pursuant to Paragraph 15.07.B.

11.10. Notification to Surety

- A. If the provisions of any surety bond require notice to be given of any change affecting the general scope of the Work or the provisions of the Contract Documents (including, but not limited to, Contract Price or Contract Times), the giving of any such notice will be the Contractor's responsibility. The amount of each applicable bond shall be adjusted to reflect the effect of any such change.

## ARTICLE 12 – CLAIMS

12.01. Claims

- A. Any Claims, disputes, or other matters in question between the Contractor and the Town shall be addressed as required in this Article.
- B. Acceptance of final payment waives any Claims pursuant to this Article.
- C. A settlement agreement signed by the Town and the Contractor shall supersede and cancel any other dispute resolution proceedings regarding the same matter.
- D. Unless work is stopped or payment withheld in accordance with the conditions of the Contract, or unless otherwise agreed in writing, the Contractor shall carry on with the Work and maintain progress during any dispute resolution proceedings, and the Town shall continue to make payments to the Contractor in accordance with the Contract Documents.
- E. *Disputes Subject to Claims Process*: The following disputes between the Town and the Contractor are subject to the Claims process set forth in this article:
1. Appeals by the Town or the Contractor of the Engineer's decisions regarding the disposition of a Change Proposal;
  2. Demands by the Town for an adjustment in the Contract Price or the Contract Times, or other relief under the Contract Documents;
  3. Disputes that the Engineer has been unable to address because they do not involve the design (as set forth in the Drawings, Specifications, or otherwise), the acceptability of the Work, or other engineering or technical matters; and
  4. Subject to the waiver provisions of Paragraph 15.08, any dispute arising after the Engineer has issued a written recommendation of final payment pursuant to Paragraph 15.07.B.
- F. *Submittal of Claim*: A Claim must be presented in the form of a written request accompanied by supporting data to the Town or the Engineer for formal decision, with a copy to the other Party.
1. The Party submitting a Claim shall deliver it to the other Party promptly but in no event later than thirty (30) days after the start of the event giving rise thereto; in the case of appeals regarding Change Proposals within thirty (30) days of the decision under appeal. The Party submitting the Claim shall also furnish a copy to the Engineer, for its information only. The responsibility to substantiate a Claim rests with the party making the Claim. In the case of a Claim by the Contractor seeking an increase in the Contract

Times or the Contract Price, the Contractor shall certify that the Claim is made in good faith, that the supporting data are accurate and complete, and that to the best of the Contractor's knowledge and belief the amount of time or money requested accurately reflects the full amount to which the Contractor is entitled.

2. The Party receiving a Claim shall review it thoroughly, giving full consideration to its merits. The Parties shall seek to resolve the Claim through the exchange of information and direct negotiations. The Parties may extend the time for resolving the Claim by mutual agreement. All actions taken on a Claim will be stated in writing and submitted to the other Party, with a copy to the Engineer. If no agreement is reached within fifteen (15) days, the Engineer will render a formal decision to resolve the Claim. Such formal decision of the Engineer shall be binding upon the Contractor and the Town unless either or both notify each other and the Engineer in writing within fifteen (15) days of receipt of the decision that the Party is unwilling to abide by the Engineer's decision and are thereby aggrieved in connection with the decision, and are separately exercising such rights as either may have under the Contract Documents or by Law and Regulation. If the Engineer fails to provide a written decision or a reasonable schedule to issue a written decision within ten (10) days after the Town or the Contractor has presented its request, that Party may consider itself aggrieved and may proceed to exercise its rights hereunder.
3. Mediation
  - a. At any time after initiation of a Claim, the Town and the Contractor may mutually agree to mediation of the underlying dispute. The agreement to mediate will stay the Claim. Either Party may request mediation pursuant to the New Mexico Public Works Mediation Act, 13-4C-1 NMSA 1978, of any Claim before such decision becomes final and binding. The request for mediation shall be submitted in writing to the other Party. Timely submission of the request shall stay the effect of Paragraph 12.1.
  - b. The Contractor shall participate in the mediation process in good faith. The process shall be completed within sixty (60) days of filing of the request. If the Town and the Contractor agree to mediation, then after sixty (60) days from such agreement, the Parties may unilaterally terminate the mediation process, and the Claim submittal and decision process will resume as of the date of the termination. If the mediation proceeds but is unsuccessful in resolving the dispute, the Claim submittal and decision process will resume as of the date of the conclusion of the mediation, as determined by the mediator. The mediation shall be governed by the rules for mediation pursuant to the New Mexico Public Works Mediation Act.
  - c. The Town and the Contractor shall each pay one-half of the mediator's fees and costs.
4. *Partial Approval*: If the Party receiving a Claim approves the Claim in part and denies it in part, such action will be final and binding unless within thirty (30) days of such action the other party invokes the procedure set forth in Article 17 for final resolution of disputes.
5. *Denial of Claim*: If efforts to resolve a Claim are not successful, the Party receiving the Claim may deny it by giving written notice of denial to the other Party. If the receiving Party does not take action on the Claim within ninety (90) days, then either Party may at any time thereafter submit a letter to the other Party indicating that as a result of the inaction, the Claim is deemed denied, thereby commencing the time for appeal of the denial. A denial of the Claim will be final and binding unless within thirty (30) days of

the denial the other party invokes the procedure set forth in Article 17 for the final resolution of disputes.

6. *Final and Binding Results:* If the Parties reach a mutual agreement regarding a Claim, whether through approval of the Claim, direct negotiations, mediation, or otherwise; or if a Claim is approved in part and denied in part, or denied in full, and such actions become final and binding; then the results of the agreement or action on the Claim will be incorporated in a Change Order or other written document to the extent they affect the Contract, including the Work, the Contract Times, or the Contract Price.

## **ARTICLE 13 – COST OF THE WORK; ALLOWANCES; UNIT PRICE WORK**

### **13.01. Cost of the Work**

- A. The provisions of this Paragraph 13.01 are used when needed to determine the value of a Change Order, Change Proposal, Claim, set-off, or other adjustment in Contract Price. When the value of any such adjustment is determined on the basis of Cost of the Work, the Contractor is entitled only to those additional or incremental costs required because of the change in the Work or because of the event giving rise to the adjustment.
- B. *Costs Included:* Except as otherwise may be agreed to in writing by the Town, costs included in the Cost of the Work will be in amounts no higher than those commonly incurred in the locality of the Project, will not include any of the costs itemized in Paragraph 13.01.C, and will include only the following items:
  1. Payroll costs for employees in the direct employ of the Contractor in the performance of the Work under schedules of job classifications agreed upon by the Town and Contractor in advance of the subject Work. Such employees include, without limitation, superintendents, foremen, safety managers, safety representatives, and other personnel employed full time on the Work. Payroll costs for employees not employed full time on the Work will be apportioned on the basis of their time spent on the Work. Payroll costs include, but are not limited to, salaries and wages plus the cost of fringe benefits, which include social security contributions, unemployment, excise, and payroll taxes, workers' compensation, health and retirement benefits, sick leave, and vacation and holiday pay applicable thereto. The expenses of performing Work outside of regular working hours, on Saturday, Sunday, or legal holidays, will be included in the above to the extent authorized by the Town.
  2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and Suppliers' field services required in connection therewith. All cash discounts accrue to the Contractor unless the Town deposits funds with the Contractor with which to make payments, in which case the cash discounts will accrue to the Town. All trade discounts, rebates, and refunds and returns from sale of surplus materials and equipment will accrue to the Town, and the Contractor shall make provisions so that they may be obtained.
  3. Payments made by the Contractor to Subcontractors for Work performed by Subcontractors. If required by the Town, the Contractor shall obtain competitive bids from Subcontractors acceptable to the Town and the Contractor and shall deliver such bids to the Town, which will then determine, with the advice of the Engineer, which bids, if any, will be acceptable. If any subcontract provides that the Subcontractor is to be paid on the basis of Cost of the Work plus a fee, the Subcontractor's Cost of the Work and fee

will be determined in the same manner as the Contractor's Cost of the Work and fee as provided in this Paragraph 13.01.

4. Costs of special consultants (including but not limited to engineers, architects, testing laboratories, surveyors, attorneys, and accountants) employed or retained for services specifically related to the Work.
5. Other costs consisting of the following:
  - a. The proportion of necessary transportation, travel, and subsistence expenses of the Contractor's employees incurred in discharge of duties connected with the Work.
  - b. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office, and temporary facilities at the Site, which are consumed in the performance of the Work, and cost, less market value, of such items used but not consumed which remain the property of the Contractor.
    - 1) In establishing included costs for materials such as scaffolding, plating, or sheeting, consideration will be given to the actual or the estimated life of the material for use on other projects; or rental rates may be established on the basis of purchase or salvage value of such items, whichever is less. The Contractor will not be eligible for compensation for such items in an amount that exceeds the purchase cost of such item.
  - c. Construction Equipment Rental
    - 1) Rentals of all construction equipment and machinery, and the parts thereof, in accordance with rental agreements approved by the Town as to price (including any surcharge or special rates applicable to overtime use of the construction equipment or machinery), and the costs of transportation, loading, unloading, assembly, dismantling, and removal thereof. All such costs will be in accordance with the terms of said rental agreements. The rental of any such equipment, machinery, or parts must cease when the use thereof is no longer necessary for the Work.
    - 2) With respect to Work that is the result of a Change Order, Change Proposal, Claim, set-off, or other adjustment in Contract Price ("changed Work"), included costs will be based on the time the equipment or machinery is in use on the changed Work and the costs of transportation, loading, unloading, assembly, dismantling, and removal when directly attributable to the changed Work. The cost of any such equipment or machinery, or parts thereof, must cease to accrue when the use thereof is no longer necessary for the changed Work.
  - d. Sales, consumer, use, and other similar taxes related to the Work, and for which the Contractor is liable, as imposed by Laws and Regulations.
  - e. Deposits lost for causes other than negligence of the Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, and royalty payments and fees for permits and licenses.
  - f. Losses and damages (and related expenses) caused by damage to the Work, not compensated by insurance or otherwise, sustained by the Contractor in connection with the performance of the Work (except losses and damages within the deductible amounts of builder's risk or other property insurance established in accordance with Paragraph 6.04), provided such losses and damages have resulted from causes other than the negligence of the Contractor, any Subcontractor, or anyone directly or

indirectly employed by any of them or for whose acts any of them may be liable. Such losses include settlements made with the written consent and approval of the Town. No such losses, damages, and expenses will be included in the Cost of the Work for the purpose of determining the Contractor's fee.

- g. The cost of utilities, fuel, and sanitary facilities at the Site.
- h. Minor expenses such as communication service at the Site, express and courier services, and similar petty cash items in connection with the Work.
- i. The costs of premiums for all bonds and insurance that the Contractor is required by the Contract Documents to purchase and maintain.

C. *Costs Excluded:* The term Cost of the Work does not include any of the following items:

- 1. Payroll costs and other compensation of the Contractor's officers, executives, principals, general managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, expeditors, timekeepers, clerks, and other personnel employed by the Contractor, whether at the Site or in the Contractor's principal or branch office for general administration of the Work and not specifically included in the agreed upon schedule of job classifications referred to in Paragraph 13.01.B.1 or specifically covered by Paragraph 13.01.B.4. The payroll costs and other compensation excluded here are to be considered administrative costs covered by the Contractor's fee.
- 2. The cost of purchasing, renting, or furnishing small tools and hand tools.
- 3. Expenses of the Contractor's principal and branch offices other than the Contractor's office at the Site.
- 4. Any part of the Contractor's capital expenses, including interest on the Contractor's capital employed for the Work and charges against the Contractor for delinquent payments.
- 5. Costs due to the negligence of the Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective Work, disposal of materials or equipment wrongly supplied, and making good any damage to property.
- 6. Expenses incurred in preparing and advancing Claims.
- 7. Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in Paragraph 13.01.B.

D. Contractor's Fee

- 1. When the Work as a whole is performed on the basis of cost-plus-a-fee, then:
  - a. The Contractor's fee for the Work set forth in the Contract Documents as of the Effective Date of the Contract will be determined as set forth in the Agreement.
  - b. for any Work covered by a Change Order, Change Proposal, Claim, set-off, or other adjustment in Contract Price on the basis of Cost of the Work, the Contractor's fee will be determined as follows:
    - 1) When the fee for the Work as a whole is a percentage of the Cost of the Work, the fee will automatically adjust as the Cost of the Work changes.
    - 2) When the fee for the Work as a whole is a fixed fee, the fee for any additions or deletions will be determined in accordance with Paragraph 11.07.C.2.

2. When the Work as a whole is performed on the basis of a stipulated sum, or any other basis other than cost-plus-a-fee, then the Contractor's fee for any Work covered by a Change Order, Change Proposal, Claim, set-off, or other adjustment in Contract Price on the basis of Cost of the Work will be determined in accordance with Paragraph 11.07.C.2.
- E. *Documentation and Audit*: Whenever the Cost of the Work for any purpose is to be determined pursuant to this Article 13, the Contractor and pertinent Subcontractors will establish and maintain records of the costs in accordance with generally accepted accounting practices. Subject to prior written notice, the Town will be afforded reasonable access, during normal business hours, to all the Contractor's accounts, records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda, and similar data relating to the Cost of the Work and the Contractor's fee. The Contractor shall preserve all such documents for a period of three years after the final payment by the Town. Pertinent Subcontractors will afford such access to the Town, and preserve such documents, to the same extent required of the Contractor.

#### 13.02. Allowances

- A. It is understood that the Contractor has included in the Contract Price all allowances so named in the Contract Documents and shall cause the Work so covered to be performed for such sums and by such persons or entities as may be acceptable to the Town and the Engineer.
- B. *Cash Allowances*: The Contractor agrees that:
  1. the cash allowances include the cost to the Contractor (less any applicable trade discounts) of materials and equipment required by the allowances to be delivered at the Site, and all applicable taxes; and
  2. The Contractor's costs for unloading and handling on the Site, labor, installation, overhead, profit, and other expenses contemplated for the cash allowances have been included in the Contract Price and not in the allowances, and no demand for additional payment for any of the foregoing will be valid.
- C. *Town's Contingency Allowance*: The Contractor agrees that the Town's contingency allowance, if any, is for the sole use of the Town to cover unanticipated costs.
- D. Prior to final payment, an appropriate Change Order will be issued as recommended by the Engineer to reflect actual amounts due the Contractor for Work covered by allowances, and the Contract Price will be correspondingly adjusted.

#### 13.03. Unit Price Work

- A. Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, initially the Contract Price will be deemed to include for all Unit Price Work an amount equal to the sum of the Unit Price for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Agreement.
- B. The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Price. Payments to the Contractor for Unit Price Work will be based on actual quantities.
- C. Each Unit Price will be deemed to include an amount considered by the Contractor to be adequate to cover the Contractor's overhead and profit for each separately identified item.
- D. The Engineer will determine the actual quantities and classifications of Unit Price Work performed by the Contractor. The Engineer will review with the Contractor the Engineer's

preliminary determinations on such matters before rendering a written decision thereon (by recommendation of an Application for Payment or otherwise). The Engineer's written decision thereon will be final and binding (except as modified by the Engineer to reflect changed factual conditions or more accurate data) upon the Town and the Contractor, and the final adjustment of Contract Price will be set forth in a Change Order, subject to the provisions of the following paragraph.

E. Adjustments in Unit Price

1. The Contractor or the Town shall be entitled to an adjustment in the Unit Price with respect to an item of Unit Price Work if:
  - a. the quantity of the item of Unit Price Work performed by the Contractor differs materially and significantly from the estimated quantity of such item indicated in the Agreement; and
  - b. The Contractor's unit costs to perform the item of Unit Price Work have changed materially and significantly as a result of the quantity change.
2. The adjustment in Unit Price will account for and be coordinated with any related changes in quantities of other items of Work, and in the Contractor's costs to perform such other Work, such that the resulting overall change in Contract Price is equitable to the Town and the Contractor.
3. Adjusted Unit Prices will apply to all units of that item.

**ARTICLE 14 – TESTS AND INSPECTIONS; CORRECTION, REMOVAL, OR ACCEPTANCE OF DEFECTIVE WORK**

14.01. Access to Work

- A. The Town and the Engineer, independent testing laboratories, and authorities having jurisdiction shall have access to the Site and the Work at reasonable times. The Contractor shall provide proper and safe conditions for access and inspection of the Site and shall advise persons on Site of the Contractor's safety procedures and programs so that they may comply with such procedures and programs as applicable.

14.02. Tests, Inspections, and Approvals

- A. The Contractor shall give the Engineer timely notice of readiness of the Work (or specific parts thereof) for required inspections and tests, and shall cooperate with inspection and testing personnel to facilitate required inspections and tests.
- B. The Town shall retain and pay for the services of an independent inspector, testing laboratory, or other qualified individual or entity to perform all inspections and tests expressly required by the Contract Documents to be furnished and paid for by the Town, except that costs incurred in connection with tests or inspections of the Work shall be governed by the provisions of Paragraph 14.05.
- C. If Laws or Regulations require any Work (or part thereof) specifically to be inspected, tested, or approved, the Contractor shall assume full responsibility for arranging and obtaining such inspections, tests, or approvals, pay all costs in connection therewith, and furnish the Engineer the required certificates of inspection or approval.

- D. The Contractor shall be responsible for arranging, obtaining, and paying for all inspections and tests required:
1. by the Contract Documents, unless the Contract Documents expressly allocate responsibility for a specific inspection or test to the Town;
  2. to obtain acceptance of the Town and the Engineer of materials or equipment to be incorporated in the Work;
  3. by manufacturers of equipment furnished under the Contract Documents;
  4. for testing, adjusting, and balancing of mechanical, electrical, and other equipment to be incorporated into the Work; and
  5. for acceptance of materials, mix designs, or equipment submitted for approval prior to the Contractor's purchase thereof for incorporation in the Work.

Such inspections and tests will be performed by independent inspectors, testing laboratories, or other qualified individuals or entities acceptable to the Town and the Engineer.

- E. If the Contract Documents require the Work (or part thereof) to be approved by Owner, Engineer, or another designated individual or entity, then Contractor shall assume full responsibility for arranging and obtaining such approvals.
- F. If any Work (or the work of others) that is to be inspected, tested, or approved is covered by the Contractor without written concurrence of the Engineer, the Contractor shall, if requested by the Engineer, uncover such Work for observation. Such uncovering will be at the Contractor's expense unless the Contractor had given the Engineer timely notice of the Contractor's intention to cover the same and the Engineer had not acted with reasonable promptness in response to such notice.

#### 14.03. Defective Work

- A. Contractor's Obligation: It is the Contractor's obligation to assure that the Work is not defective.
- B. Engineer's Authority: The Engineer has the authority to determine whether the Work is defective and has the authority to reject defective Work.
- C. Notice of Defects: Prompt written notice of all defective Work of which the Town or the Engineer have actual knowledge shall be delivered to the Contractor.
- D. Correction, or Removal and Replacement: Promptly after receipt of written notice of defective Work, the Contractor shall correct all such defective Work, whether or not fabricated, installed, or completed, or, if the Engineer has rejected the defective Work, remove it from the Project and replace it with Work that is not defective.
- E. Preservation of Warranties: When correcting defective Work, the Contractor shall take no action that would void or otherwise impair the Town's warranty or any manufacturer's warranty.
- F. Costs and Damages: In addition to its correction, removal, and replacement obligations with respect to defective Work, the Contractor shall pay all Claims, costs, losses, and damages arising out of or relating to defective Work, including but not limited to the cost of the inspection, testing, correction, removal, replacement, or reconstruction of such defective Work, fines levied against the Town by governmental authorities because the Work is defective, and the costs of repair or replacement of work of others resulting from the defective Work. Prior to final payment, if the Town and the Contractor are unable to agree as

to the measure of such Claims, costs, losses, and damages resulting from defective Work, then the Town may impose a reasonable set-off against payments due under Article 15.

- G. If the Contractor fails to promptly perform the Work again or to take the necessary action to ensure future performance in conformity with Contract requirements, the Town may by contract or otherwise, perform the Work and charge to the Contractor any cost incurred by the Town that is directly related to the performance of such service by set off or otherwise, or terminate the Contract for default.

#### 14.04. Acceptance of Defective Work

- A. If, instead of requiring correction or removal and replacement of defective Work, the Town prefers to accept it, the Town may do so (subject, if such acceptance occurs prior to final payment, to the Engineer's confirmation that such acceptance is in general accord with the design intent and applicable engineering principles, and will not endanger the safety of any person). The Contractor shall pay all Claims, costs, losses, and damages attributable to the Town's evaluation of and determination to accept such defective Work (such costs to be approved by the Engineer as to reasonableness), and for the diminished value of the Work to the extent not otherwise paid by the Contractor. If any such acceptance occurs prior to final payment, the necessary revisions in the Contract Documents with respect to the Work will be incorporated in a Change Order. If the Parties are unable to agree as to the decrease in the Contract Price, reflecting the diminished value of Work so accepted, then the Town may impose a reasonable set-off against payments due under Article 15. If the acceptance of defective Work occurs after final payment, the Contractor shall pay an appropriate amount to the Town.

#### 14.05. Uncovering Work

- A. The Engineer has the authority to require additional inspection or testing of the Work, whether or not the Work is fabricated, installed, or completed.
- B. If any Work is covered contrary to a written request of the Engineer to keep the Work uncovered, then the Contractor shall, if requested by the Engineer, uncover such Work for the Engineer's observation, and then replace the covering, all at the Contractor's expense.
- C. If the Engineer considers it necessary or advisable that covered be observed by the Engineer or inspected or tested by others, then the Contractor, at the Engineer's request, shall uncover, expose, or otherwise make available for observation, inspection, or testing as the Engineer may require, that portion of the Work in question, and provide all necessary labor, material, and equipment.
  - 1. If it is found that the uncovered Work is defective, the Contractor shall be responsible for all Claims, costs, losses, and damages arising out of or relating to such uncovering, exposure, observation, inspection, and testing, and of satisfactory replacement or reconstruction (including but not limited to all costs of repair or replacement of work of others); and pending the Contractor's full discharge of this responsibility the Town shall be entitled to impose a reasonable set-off against payments due under Article 15.
  - 2. If the uncovered Work is not found to be defective, the Contractor shall be allowed an increase in the Contract Price or an extension of the Contract Times, directly attributable to such uncovering, exposure, observation, inspection, testing, replacement, and reconstruction. If the parties are unable to agree as to the amount or extent thereof, then the Contractor may submit a Change Proposal within 30 days of the determination that the Work is not defective.

#### 14.06. Town May Stop the Work

- A. If any Work is defective, or the Contractor fails to supply sufficient skilled workers or suitable materials or equipment, or fails to perform the Work in such a way that the completed Work will conform to the Contract Documents, then the Town may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of the Town to stop the Work will not give rise to any duty on the part of the Town to exercise this right for the benefit of the Contractor, any Subcontractor, any Supplier, any other individual or entity, or any surety for, or employee or agent of any of them.

#### 14.07. Town May Correct Defective Work

- A. If the Contractor fails within a reasonable time after written notice from the Engineer to correct defective Work, or to remove and replace defective Work as required by the Engineer, then the Town may, after seven (7) days' written notice to the Contractor, correct or remedy any such deficiency.
- B. In exercising the rights and remedies under this Paragraph 14.07, the Town shall proceed expeditiously. In connection with such corrective or remedial action, the Town may exclude the Contractor from all or part of the Site, take possession of all or part of the Work and suspend the Contractor's services related thereto, and incorporate in the Work all materials and equipment stored at the Site or for which the Town has paid the Contractor but which are stored elsewhere. The Contractor shall allow the Town, the Town's representatives, agents and employees, the Town's other contractors, and the Engineer and the Engineer's consultants access to the Site to enable the Town to exercise the rights and remedies under this paragraph.
- C. All Claims, costs, losses, and damages incurred or sustained by the Town in exercising the rights and remedies under this Paragraph 14.07 shall be charged against the Contractor as set-offs against payments due under Article 15 or independent Claims. Such Claims, costs, losses and damages will include but not be limited to all costs of repair, or replacement of the work of others destroyed or damaged by correction, removal, or replacement of the Contractor's defective Work.
- D. The Contractor shall not be allowed an extension of the Contract Times because of any delay in the performance of the Work attributable to the exercise by the Town of the Town's rights and remedies under this Paragraph 14.07.

### **ARTICLE 15 – PAYMENTS TO CONTRACTOR; SET-OFFS; COMPLETION; CORRECTION PERIOD**

#### 15.01. Progress Payments.

- A. Based upon an Application for Payment submitted to the Town by the Contractor in which the Contractor certifies for payment, the Town shall make Progress Payments as specified in the Contract on account of the Contract Price to the Contractor for the period ending the last day of the month as follows:
  - 1. The Town, shall make prompt payment no later than thirty (30) Working Days following receipt by the Town of an undisputed Application for Payment, one hundred percent (100%) of the portion of the Contract Price properly allocable to labor, materials, and equipment incorporated in the Work and one hundred percent (100%) of the portion of the Contract Price properly allocable to materials and equipment suitably stored at the Site or

some other location agreed upon in writing between the Parties for the period covered by the Application for Payment, less the aggregate of previous payments made by the Town; less such amounts as the Engineer shall determine for all incomplete Work and unsettled Claims as provided in the Contract Documents (see NMSA 1978, § 57-28-5). The Contractors and Subcontractors shall make prompt payment to their Subcontractors and Suppliers for amounts owed for work performed on the construction Project within thirty (30) days after receipt of payment from the Town. If the Contractor or Subcontractor fails to pay its Subcontractor and Suppliers by first-class mail, electronic funds transfer or hand delivery within thirty (30) days after receipt of an undisputed request for payment, the Contractor or Subcontractor shall pay interest to its Subcontractors and Suppliers beginning on the thirtieth (30th) day after payment was due, computed at one and one-half percent (1½%) of the undisputed amount per month or fraction of a month until payment is issued. These payment provisions apply to all tiers of contractors, subcontractors and suppliers (NMSA 1978, § 57-28-1 *et seq.*).

2. When making payments, the Town, the Contractor or a Subcontractor shall not retain, withhold, hold back or in any other manner fail to pay amounts owed for work performed. For additional information regarding retainage and the Prompt Payment Act refer to NMSA 1978, § 57-28-5.
  3. In preparing estimates, the material delivered on the Site and preparatory work done may be taken into consideration.
  4. All material and Work covered by partial payments made shall thereupon become the sole property of the Town, but this provision shall not be construed as relieving the Contractor from the sole responsibility for the care and protection of materials and Work upon which payments have been made or the restoration of any damaged Work, or as a waiver of the right of the Town to require the fulfillment of all of the terms of the Contract.
  5. The Contractor shall indemnify and hold harmless the Town, its Elected Officials, employees, agents, insurers, and the Engineer from and against all claims growing out of the demands of Subcontractors, laborers, workmen, mechanics, materialmen, and furnishers of machinery and parts thereof, equipment, power tools, and all supplies, including commissary, incurred in the furtherance of the performance of this Contract. The Contractor shall, at the Town's request, furnish satisfactory evidence that all obligations of the nature herein above designated have been paid, discharged, or waived. If the Contractor fails to do so, then the Town may, after having served written notice on said Contractor, either pay unpaid bills of which the Town has written notice, direct, withhold and set off from the Contractor's unpaid compensation a sum of money deemed reasonably sufficient to pay any and all such lawful claims until satisfactory evidence is furnished that all liabilities have been fully discharged, whereupon payment to the Contractor shall be resumed, in accordance with the terms of this Contract, but in no event shall the provisions of this sentence be construed to impose any obligations upon the Town to either the Contractor or its surety. In paying any unpaid obligations of the Contractor, the Town shall be deemed the agent of the Contractor, and any payment so made by the Town shall be considered as a payment made under the Contract by the Town to the Contractor and the Town shall not be liable to the Contractor for any such payments made in good faith.
- B. *Basis for Progress Payments:* The Schedule of Values established as provided in Article 2 will serve as the basis for Progress Payments and will be incorporated into Exhibit N (Application for Payment) and Progress Payments for Unit Price Work will be based on the

number of units completed during the pay period, as determined under the provisions of Paragraph 13.03. Progress Payments for cost-based Work will be based on Cost of the Work completed by the Contractor at the time of the submission of an Application for Payment.

C. Applications for Payments

1. At least twenty (20) days before the date established in the Contract for a Progress Payment (but not more often than once a month), the Contractor shall submit to the Engineer a complete Application for Payment covering the Work completed as of the date of the Application and accompanied by such supporting documentation as is required by the Contract Documents.
2. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the Site or at another location agreed to in writing, the Application for Payment must also be accompanied by: (a) a bill of sale, invoice, copies of subcontract or purchase order payments, or other documentation establishing full payment by the Contractor for the materials and equipment; (b) at the Town's request, documentation warranting that the Town has received the materials and equipment free and clear of all liens; and (c) evidence that the materials and equipment are covered by appropriate property insurance, a warehouse bond, or other arrangements to protect the Town's interest therein, all of which must be satisfactory to the Town.
3. Beginning with the second Application for Payment, each Application shall include a certification of the Contractor stating that all previous Progress Payments received by the Contractor have been applied to discharge the Contractor's legitimate obligations associated with prior Applications for Payment.

D. Review of Applications

1. The Engineer will, within ten (10) days after receipt of an Application for Payment, recommend payment, recommend against payment, or recommend modifications to the Application for Payment. If the Engineer recommends that payment not be made, the Engineer shall return the Application for Payment to the Contractor indicating in writing the Engineer's reasons for refusing to recommend payment. The Contractor may make the necessary corrections and resubmit the Application for Payment. The Town's obligation to pay based on the Application for Payment shall not arise until and unless the Engineer recommends payment.
2. The Engineer's recommendation of any payment requested in an Application for Payment will constitute a representation by the Engineer to the Town, based on the Engineer's observations of the executed Work as an experienced and qualified design professional, and on the Engineer's review of the Application for Payment and the accompanying data and schedules, that to the best of the Engineer's knowledge, information and belief:
  - a. the Work has progressed to the point claimed on the Application for Payment;
  - b. the quality of the Work is in accordance with the Contract Documents (subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, the results of any subsequent tests called for in the Contract Documents, a final determination of quantities and classifications for Unit Price Work under Paragraph 13.03, and any other qualifications stated in the recommendation); and
  - c. the conditions precedent to the Contractor's being entitled to such payment have been fulfilled.

3. By recommending any such payment, the Engineer will not thereby be deemed to have represented that:
  - a. inspections made to check the quality or the quantity of the Work as it has been performed have been exhaustive, extended to every aspect of the Work in progress, or involved detailed inspections of the Work; or
  - b. there may not be other matters or issues between the parties that might entitle the Contractor to be paid additionally by the Town or entitle the Town to withhold payment to the Contractor.
4. The Engineer may refuse to recommend the whole or any part of any payment if, in the Engineer's opinion, it would be incorrect to make the representations to the Town stated in Paragraph 15.01.D.2.
5. The Engineer shall recommend reductions in payment (set-offs) necessary in the Engineer's opinion to protect the Town from loss because:
  - a. the Work is defective, requiring correction or replacement;
  - b. the Contract Price has been reduced by Change Orders;
  - c. the Town has been required to correct defective Work in accordance with Paragraph 14.07, or has accepted defective Work pursuant to Paragraph 14.04;
  - d. the Town has been required to remove or remediate a Hazardous Environmental Condition for which the Contractor is responsible; or
  - e. the Engineer has actual knowledge of the occurrence of any of the events that would constitute a default by the Contractor and therefore justify termination for cause under the Contract Documents.

**E. Payment Becomes Due**

1. Twenty-one (21) days after presentation of the Application for Payment to the Town with the Engineer's recommendation, the amount recommended (subject to any Town set-offs) will become due, and when due will be paid by the Town to the Contractor.

**F. Reductions in Payment by Town**

1. In addition to any reductions in payment (set-offs) recommended by the Engineer, the Town is entitled to impose a set-off against payment incurred based on any of the following:
  - a. Claims have been made against the Town based on the Contractor's conduct in the performance or furnishing of the Work, or the Town has incurred costs, losses, or damages resulting from the Contractor's conduct in the performance or furnishing of the Work, including but not limited to claims, costs, losses, or damages from workplace injuries, adjacent property damage, non-compliance with Laws and Regulations, or patent infringement;
  - b. the Contractor has failed to take reasonable and customary measures to avoid damage, delay, disruption, and interference with other work at or adjacent to the Site;
  - c. the Contractor has failed to provide and maintain required bonds or insurance;
  - d. the Town has been required to remove or remediate a Hazardous Environmental Condition for which the Contractor is responsible;

- e. the Town has incurred extra charges or engineering costs related to Submittal reviews, evaluations of proposed substitutes, tests and inspections, or return visits to manufacturing or assembly facilities;
  - f. the Work is defective, requiring correction or replacement;
  - g. the Town has been required to correct defective Work in accordance with Paragraph 14.07, or has accepted defective Work pursuant to Paragraph 14.04;
  - h. the Contract Price has been reduced by Change Orders;
  - i. an event has occurred that would constitute a default by the Contractor and therefore justify a termination for cause;
  - j. liquidated or other damages have accrued as a result of the Contractor's failure to achieve Milestones, Substantial Completion, or final completion of the Work;
  - k. unlawful liens have been filed in connection with the Work; or
  - l. other items entitle the Town to a set-off against the amount recommended.
2. If the Town imposes any set-off against payment, whether based on its own knowledge or on the written recommendations of the Engineer, the Town will give the Contractor immediate written notice (with a copy to the Engineer) stating the reasons for such action and the specific amount of the reduction, and promptly pay the Contractor any amount remaining after deduction of the amount so withheld. The Town shall promptly pay the Contractor the amount so withheld, or any adjustment thereto agreed to by the Town and the Contractor, if the Contractor remedies the reasons for such action. The reduction imposed will be binding on the Contractor unless it duly submits a Change Proposal contesting the reduction.
  3. Upon a subsequent determination that the Town's refusal of payment was not justified, the amount wrongfully withheld will be treated as an amount due as determined by Paragraph 15.01.E.1 and subject to interest as provided in the Contract.

#### 15.02. Contractor's Warranty of Title

- A. The Contractor warrants that title to all Work, materials, and equipment furnished under the Contract shall pass to the Town free and clear of Liens and other title defects, and all patent, licensing, copyright, or royalty obligations.
- B. Neither the final certificate of payment nor any provision in the Contract Documents, nor partial or entire occupancy of the premises by the Town, shall constitute an acceptance of work not done in accordance with the Contract Documents or relieve the Contractor of liability in respect to any express warranties or responsibility for faulty materials or workmanship. The Contractor shall remedy any defects in the Work and pay for any damage to other work resulting therefrom, which shall appear within a period of one (1) year from the date of final acceptance of the Work provided for in this Contract unless a longer period is specified. The Town will give notice of observed defects with reasonable promptness.

#### 15.03. Substantial Completion

- A. When the Contractor considers the entire Work ready for its intended use, the Contractor shall notify the Town and the Engineer in writing that the entire Work is substantially complete and request that the Engineer issue a certificate of Substantial Completion (Exhibit O). The Contractor shall at the same time submit to the Town and the Engineer an initial draft of Punch List items to be completed or corrected before final payment.

- B. Promptly after the Contractor's notification, the Town, the Contractor, and the Engineer shall make an inspection of the Work to determine the status of completion. If the Engineer does not consider the Work substantially complete, the Engineer will notify the Contractor in writing giving the reasons therefor.
- C. If the Engineer considers the Work substantially complete, the Engineer will deliver to the Town a preliminary certificate of Substantial Completion which will fix the date of Substantial Completion. The Engineer shall attach to the certificate a Punch List of items to be completed or corrected before final payment. The Town shall have seven (7) days after receipt of the preliminary certificate during which to make written objection to the Engineer as to any provisions of the certificate or attached Punch List. If, after considering the objections to the provisions of the preliminary certificate, the Engineer concludes that the Work is not substantially complete, the Engineer will, within fourteen (14) days after submission of the preliminary certificate to the Town, notify the Contractor in writing that the Work is not substantially complete, stating the reasons therefor. If the Town does not object to the provisions of the certificate, or if despite consideration of the Town's objections the Engineer concludes that the Work is substantially complete, then the Engineer shall, within said fourteen (14) days, execute and deliver to the Town and the Contractor a final certificate of Substantial Completion (with a revised Punch List of items to be completed or corrected) reflecting such changes from the preliminary certificate as the Engineer believes justified after consideration of any objections from the Town.
- D. At the time of receipt of the preliminary certificate of Substantial Completion, the Town and the Contractor shall confer regarding the Town's use or occupancy of the Work following Substantial Completion, review the builder's risk insurance policy with respect to the end of the builder's risk coverage, and confirm the transition to coverage of the Work under permanent property insurance held by the Town. Unless the Town and the Contractor agree otherwise in writing, the Town shall bear responsibility for security, operation, protection of the Work, property insurance, maintenance, heat, and utilities upon the Town's use or occupancy of the Work.
- E. After Substantial Completion, the Contractor shall promptly begin work on the Punch List of items to be completed or corrected prior to final payment. In appropriate cases, the Contractor may submit monthly Applications for Payment for completed Punch List items following the Progress Payment procedures set forth above.
- F. The Town shall have the right to exclude the Contractor from the Site after the date of Substantial Completion subject to allowing the Contractor reasonable access to remove its property and complete or correct items on the Punch List.

#### 15.04. Liquidated Damages

- A. The Contractor and the Town recognize that time is of the essence as stated in Paragraph 4.01 of the Contract and that the Town will suffer financial loss if the Work is not completed within the times specified in Paragraph 4.02 of the Agreement above, plus any extensions thereof allowed in accordance with Article 11 of the General Conditions. The Parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by the Town if the Work is not completed on time. Accordingly, instead of requiring any such proof, the Town and the Contractor agree that as liquidated damages for delay (but not as a penalty), the Contractor shall pay the Town the sum of \$1500.00 for each day that expires after the time specified in Paragraph 4.02 of the Agreement above for Substantial Completion until such time as the Work is substantially complete. After Substantial Completion, if the Contractor shall neglect, refuse, or fail to

complete the remaining Work within the Contract Time or any proper extension thereof granted by the Town, the Contractor shall pay the Town the sum of \$1500.00 for each day that expires after the time specified in Paragraph 4.02 of the Agreement above for final completion. The Town may set off liquidated damages from any payment made pursuant to this Contract.

#### 15.05 Partial Use or Occupancy

- A. Prior to Substantial Completion of all the Work, the Town may use or occupy any substantially completed part of the Work which has specifically been identified in the Contract Documents, or which the Town, the Engineer, and the Contractor agree constitutes a separately functioning and usable part of the Work that can be used by the Town for its intended purpose without significant interference with the Contractor's performance of the remainder of the Work, subject to the following conditions:
1. At any time, the Town may request in writing that the Contractor permit the Town to use or occupy any such part of the Work that the Town believes to be substantially complete. If and when the Contractor agrees that such part of the Work is substantially complete, the Contractor, the Town, and the Engineer shall follow the procedures of Paragraph 15.03.A through 15.03.E for that part of the Work.
  2. At any time, the Contractor may notify the Town and the Engineer in writing that the Contractor considers any such part of the Work substantially complete and request the Engineer to issue a certificate of Substantial Completion for that part of the Work.
  3. Within a reasonable time after either such request, the Town, the Contractor, and the Engineer shall make an inspection of that part of the Work to determine its status of completion. If the Engineer does not consider that part of the Work to be substantially complete, the Engineer will notify the Town and the Contractor in writing giving the reasons therefor. If the Engineer considers that part of the Work to be substantially complete, the provisions of Paragraph 15.03 will apply with respect to certification of Substantial Completion of that part of the Work and the division of responsibility in respect thereof and access thereto.
  4. No use or occupancy or separate operation of part of the Work may occur prior to compliance with the requirements of Paragraph 6.04 regarding builder's risk or other property insurance.

#### 15.06. Final Inspection

- A. Upon written notice from the Contractor that the Work or an agreed portion thereof is complete, the Engineer will promptly make a final inspection with the Town and the Contractor and will notify the Contractor in writing of all particulars in which this inspection reveals that the Work, or agreed portion thereof, is incomplete or defective. The Contractor shall immediately take such measures as are necessary to complete such Work or remedy such deficiencies.

#### 15.07. Final Payment

##### A. Application for Payment

1. After the Contractor has, in the opinion of the Engineer, satisfactorily completed all corrections identified during the final inspection and has delivered, in accordance with the Contract Documents, all maintenance and operating instructions, schedules, guarantees, bonds, certificates or other evidence of insurance, certificates of inspection, annotated record documents (as provided in Paragraph 7.13), and other documents, the

Contractor may make the final Application for Payment on the attached form. (Exhibit N).

2. The final Application for Payment must be accompanied (except as previously delivered) by:
    - a. all documentation called for in the Contract Documents;
    - b. consent of the surety to final payment;
    - c. satisfactory evidence that all title issues have been resolved such that title to all Work, materials, and equipment has passed to the Town free and clear of any title defects, or will so pass upon final payment;
    - d. a list of all duly pending Change Proposals and Claims; and
    - e. complete and legally effective releases or waivers (satisfactory to the Town) filed in connection with the Work.
  3. In lieu of the releases or waivers and so long as approved by the Town, the Contractor may furnish receipts or releases in full and an affidavit of the Contractor that: (a) the releases and receipts include all labor, services, material, and equipment; and (b) all payrolls, material and equipment bills, and other indebtedness connected with the Work for which the Town might in any way be responsible have been paid or otherwise satisfied. If any Subcontractor or Supplier fails to furnish such a release or receipt in full, the Contractor may furnish a bond or other collateral satisfactory to the Town, or the Town at its option may issue joint checks payable to the Contractor and specified Subcontractors and Suppliers.
- B. *Engineer's Review of Final Application and Recommendation of Payment:* If, on the basis of the Engineer's observation of the Work during construction and final inspection, and the Engineer's review of the final Application for Payment and accompanying documentation as required by the Contract Documents, the Engineer is satisfied that the Work has been completed and that the Contractor's other obligations under the Contract have been fulfilled, the Engineer will, within ten (10) days after receipt of the final Application for Payment, indicate in writing the Engineer's recommendation of final payment and present the final Application for Payment to the Town for payment. Such recommendation will account for any set-offs against payment that are necessary in the Engineer's opinion to protect the Town from loss for the reasons stated above with respect to Progress Payments. Otherwise, the Engineer will return the Application for Payment to the Contractor, indicating in writing the reasons for refusing to recommend final payment, in which case the Contractor shall make the necessary corrections and resubmit the Application for Payment.
- C. *Notice of Acceptability:* In support of its recommendation of payment of the final Application for Payment, the Engineer shall also give written notice to the Town and the Contractor that the Work is acceptable, subject to stated limitations in the notice and to the provisions of Paragraph 15.06.
- D. *Completion of Work:* The Work is complete (subject to surviving obligations) when it is ready for final payment as established by the Engineer's written recommendation of final payment and issuance of notice of the acceptability of the Work.
- E. *Final Payment Becomes Due:* Upon receipt from the Engineer of the final Application for Payment and accompanying documentation, the Town shall set off against the amount recommended by the Engineer for final payment any further sum to which the Town is entitled, including but not limited to set-offs for liquidated damages and set-offs allowed

under the provisions of this Contract with respect to Progress Payments. The Town shall pay the resulting balance due to the Contractor within thirty (30) days of the Town's receipt of the final Application for Payment from the Engineer.

15.08. Waiver of Claims (Omitted)

15.09. Correction Period

- A. If within one year after the date of Substantial Completion or the terms of any applicable special guarantee required by the Contract Documents), the Town gives the Contractor written notice that any Work has been found to be defective, or that the Contractor's repair of any damages to the Site or adjacent areas has been found to be defective, then after receipt of such notice of defect the Contractor shall promptly, without cost to the Town and in accordance with the Town's written instructions:
  - 1. correct the defective repairs to the Site or such adjacent areas;
  - 2. correct such defective Work;
  - 3. remove the defective Work from the Project and replace it with Work that is not defective, if the defective Work has been rejected by the Town, and
  - 4. satisfactorily correct or repair or remove and replace any damage to other Work, to the work of others, or to other land or areas resulting from the corrective measures.
- B. The Town shall give any such notice of defect within sixty (60) days of the discovery that such Work or repairs is defective. If such notice is given within such sixty (60) days but after the end of the correction period, the notice will be deemed a notice of defective Work under Paragraph 7.18.C.
- C. If, after receipt of a notice of defect, the Contractor does not promptly comply with the terms of the Town's written instructions, or where an emergency exists where delay would cause serious risk of loss or damage, the Town may have the defective Work corrected or repaired or may have the rejected Work removed and replaced. The Contractor shall pay all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such correction or repair or such removal and replacement (including but not limited to all costs of repair or replacement of work of others). The Contractor's failure to pay such costs, losses, and damages within ten (10) days of invoice from the Town shall be deemed the start of an event giving rise to a Claim under Paragraph 12.01.E, such that any related Claim must be brought within thirty (30) days of the failure to pay.
- D. In special circumstances where a particular item of equipment is placed in continuous service before Substantial Completion of all the Work, the correction period for that item may start to run from an earlier date if so provided in the Specifications.
- E. Where defective Work (and damage to other Work resulting therefrom) has been corrected or removed and replaced under this paragraph, the correction period hereunder with respect to such Work will be extended for an additional period of one year after such correction or removal and replacement has been satisfactorily completed.
- F. The Contractor's obligations under this paragraph are in addition to all other obligations and warranties. The provisions of this paragraph are not to be construed as a substitute for, or a waiver of, the provisions of any applicable statute of limitation or repose.

## ARTICLE 16 – SUSPENSION OF WORK AND TERMINATION

### 16.01. Town May Suspend Work

- A. At any time and without cause, the Town may suspend the Work or any portion thereof for a period of not more than ninety (90) consecutive days by written notice to the Contractor and the Engineer. Such notice will fix the date on which Work will be resumed. The Contractor shall resume the Work on the date so fixed. The Contractor shall be entitled to an adjustment in the Contract Price or an extension of the Contract Times directly attributable to any such suspension. Any Change Proposal seeking such adjustments must be submitted no later than thirty (30) days after the date fixed for resumption of Work.

### 16.02. Town May Terminate for Cause

- A. The occurrence of any one or more of the following events will constitute a default by the Contractor and justify termination for cause:
  - 1. the Contractor's persistent failure to perform the Work in accordance with the Contract Documents (including, but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment, or failure to adhere to the Progress Schedule);
  - 2. failure of the Contractor to perform or otherwise to comply with a material term of the Contract Documents;
  - 3. the Contractor's disregard of Laws or Regulations; or
  - 4. the Contractor's repeated disregard of the authority of the Town or the Engineer.
- B. If one or more of the events identified in Paragraph 16.02.A occurs, then after giving the Contractor (and any surety) ten (10) days' written notice of default and termination of the Contract, the Town may proceed to:
  - 1. declare the Contractor to be in default, and give the Contractor (and any surety) written notice that the Contract is terminated; and
  - 2. enforce the rights available to the Town under any applicable Performance Bond. for breach of contract, for injunctive relief, and as otherwise provided Law.
- C. If the Town has terminated the Contract for cause, the Town may exclude the Contractor from the Site, take possession of the Work, incorporate in the Work all materials and equipment stored at the Site or for which the Town has paid the Contractor but which are stored elsewhere, and complete the Work as the Town may deem expedient.
- D. The Town may not proceed with termination of the Contract under Paragraph 16.02.B if the Contractor, within seven (7) days of receipt of notice of default and termination, resumes performance of its obligations.
- E. If the Town proceeds as provided in Paragraph 16.02.B, the Contractor shall not be entitled to receive any further payment until the Work is completed.
- F. Where the Contractor's services have been so terminated by the Town, the termination will not affect any rights or remedies of the Town against the Contractor then existing or which may thereafter accrue, or any rights or remedies of the Town against the Contractor or any surety under any Payment Bond or Performance Bond. Any retention or payment of money due the Contractor by the Town will not release the Contractor from liability.

#### 16.03. Town May Terminate for Convenience

- A. Upon seven (7) days' written notice to the Contractor and the Engineer, the Town may, for its own convenience and without cause and without prejudice to any other right or remedy of the Town, terminate the Contract. In such case, the Contractor shall be paid for (without duplication of any items):
  - 1. completed and acceptable Work executed in accordance with the Contract Documents prior to the effective date of termination, including fair and reasonable sums for overhead and profit on such Work;
  - 2. expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials, or equipment as required by the Contract Documents in connection with uncompleted Work, plus fair and reasonable sums for overhead and profit on such expenses; and
  - 3. other reasonable expenses directly attributable to termination, including costs incurred to prepare a termination for convenience cost proposal.
- B. The Contractor shall not be paid for any loss of anticipated profits or revenue, post-termination overhead costs, or other economic loss arising out of or resulting from such termination.

#### 16.04. Contractor May Stop Work or Terminate

- A. If, through no act or fault of the Contractor, (1) the Work is suspended for more than ninety (90) consecutive days by the Town or under an order of Court or other public authority, or (2) the Engineer fails to act on any Application for Payment within thirty (30) days after it is submitted, or (3) the Town fails for thirty (30) days to pay the Contractor any sum finally determined to be due, then the Contractor may, upon seven (7) days' written notice to the Town and the Engineer, and provided the Town or the Engineer do not remedy such suspension or failure within that time, terminate the Contract and recover from the Town payment on the same terms as provided in Paragraph 16.03.
- B. In lieu of terminating the Contract and without prejudice to any other right or remedy, if the Engineer has failed to act on an Application for Payment within thirty (30) days after it is submitted, or the Town has failed for thirty (30) days to pay the Contractor any sum finally determined to be due, the Contractor may, seven (7) days after written notice to the Town and the Engineer, stop the Work until payment is made of all such amounts due the Contractor, including interest thereon. The provisions of this paragraph are not intended to preclude the Contractor from submitting a Change Proposal for an adjustment in Contract Price or Contract Times or otherwise for expenses or damage directly attributable to the Contractor's stopping the Work as permitted by this paragraph.

### ARTICLE 17 – FINAL RESOLUTION OF DISPUTES

#### 17.01. Methods and Procedures

- A. *Disputes Subject to Final Resolution:* The following disputed matters are subject to final resolution under the provisions of this Article:
  - 1. A timely appeal of an approval in part and denial in part of a Claim, or of a denial in full, pursuant to Article 12; and
  - 2. Disputes between the Town and the Contractor concerning the Work, or obligations under the Contract Documents, that arise after final payment has been made.

- B. *Final Resolution of Disputes*: If the dispute is not resolved by mediation, the dispute shall be resolved through litigation in the Eighth Judicial District Court. The parties agree that the exclusive forum for such litigation shall be the State of New Mexico District Court for the Eighth Judicial District sitting at Taos, New Mexico. The Contractor irrevocably consents to the jurisdiction of said Court and agrees to accept service of a summons and complaint by mail or commercial courier service in accordance with Rule 1-004(E) (3) NMRA 2020.

## ARTICLE 18 – MISCELLANEOUS

### 18.01. Giving Notice

- A. Whenever any provision of the Contract requires the giving of written notice to the Town, the Engineer, or the Contractor, it will be deemed to have been validly given only if delivered:

1. in person, by a commercial courier service or otherwise, to the recipient's place of business. For the Town the address is;

Town of Taos  
Taos Regional Airport Manager  
Colton Rapstine  
Copy to Town Manager and Town Attorney

Town Manager  
400 Camino de la Placita  
Taos, NM 87571

Engineer: Alex Nunez Thompson  
Daniel B. Stephens & Associates, Inc.  
6501 Americas Parkway, NE, Ste. 200  
Albuquerque, NM 87110

For the Contractor, the address is:

2. by registered or certified mail, postage prepaid, to the recipient's place of business; or
3. by e-mail to the recipient, with the words "Formal Notice" or similar in the e-mail's subject line delivered to: [mflores@taosnm.gov](mailto:mflores@taosnm.gov), [rapstine@taosnm.gov](mailto:rapstine@taosnm.gov), [jnixon@robleshrael.com](mailto:jnixon@robleshrael.com), and [anunezthompson@geo-logic.com](mailto:anunezthompson@geo-logic.com)

- B. Nothing herein contained shall preclude the giving of any such written notice by personal service. The address to which notices shall be mailed to either Party may be changed by written notice given by such Party to the other as hereinabove provided.

### 18.02. Computation of Time

- A. When any period of time is referred to in the Contract by days, it will be computed to exclude the first and include the last day of such period. If the last day of any such period falls on a Saturday or Sunday or on a day made a legal holiday by the law of the applicable jurisdiction, such day will be omitted from the computation.

18.03. Cumulative Remedies

- A. The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto are in addition to, and are not to be construed in any way as a limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available by Laws or Regulations, by warranty, or by other provisions of the Contract. The provisions of this paragraph will be as effective as if repeated specifically in the Contract Documents in connection with each particular duty, obligation, right, and remedy to which they apply.

18.04. Limitation of Liability

- A. With respect to any and all Change Proposals, Claims, disputes subject to final resolution, and other matters at issue, neither the Town, nor its Elected Officials nor Engineer, nor any of their officers, directors, members, partners, employees, insurers, agents, consultants, or subcontractors, shall be liable to the Contractor for any claims, costs, losses, or damages sustained by the Contractor on or in connection with this Contract.

18.05. No Waiver.

- A. No provision of this Contract shall be deemed to have been waived by either Party unless such waiver be in writing signed by the Party making the waiver and addressed to the other Party; nor shall any custom or practice which may evolve between the Parties in the administration of the terms hereof be construed to waive or lessen the right of either Party to insist upon performance by the other Party in strict accordance with the terms hereof. Further, the waiver by any Party of a breach by the other Party of any term, covenant, or condition hereof shall not operate as a waiver of any subsequent breach of the same or any other term, covenant, or condition thereof.

18.06. Survival of Obligations

- A. All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with the Contract, as well as all continuing obligations or provisions in the Contract including but not limited to reuse of documents, choice of law and tax liability will survive final payment, completion, and acceptance of the Work or termination or completion of the Agreement.

18.07. Assignment of Contract

- A. Unless expressly agreed to elsewhere in the Contract, no assignment by a party to this Contract of any rights under or interests in the Contract will be binding on the other Party without the written consent of the Party sought to be bound; and, specifically but without limitation, money that may become due and money that is due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract. Any attempted assignment or transfer without the Town 's advance written approval shall be null and void and without any legal effect.

18.08. Headings

- A. Article and paragraph headings are inserted for convenience only and do not constitute parts of these General Conditions.

18.09. Independent Contractor

- A. The Contractor and the Contractor's agents and employees are independent contractors performing construction services for the Town and are not employees of the Town. The Contractor and the Contractor's agents and employees shall not accrue leave, retirement, insurance, bonding, use of the Town's vehicles, or any other benefits afforded to employees of the Town as a result of this Contract.

18.10. Appropriations and Authorizations, Bateman Act

- A. *Appropriations and Authorizations.* Consistent with the Bateman Act, this Contract is contingent upon sufficient appropriations and authorizations being made for performance of this Contract by the Governing Body of the Town of Taos and/or, if state or federal funds are involved, the New Mexico State Legislature of the United States. If sufficient appropriations and authorizations are not made in this or future fiscal years, this Contract shall terminate upon written notice by the Town to the Contractor. Such termination shall be without penalty to the Town, and the Town shall have no duty to reimburse the Contractor for expenditures made in the performance of this Contract. The Town is expressly not committed to expenditure of any funds until such time as they are programmed, budgeted, encumbered and approved for expenditure by the Town. The Town's decision as to whether sufficient appropriations and authorizations have been made for the fulfillment of this Agreement shall be final and not subject to challenge by the Contractor in any way or forum, including a lawsuit.

18.11 Interest of Member

- A. No member of the Governing Body of the Town of Taos shall be admitted to any share or part of this Contract or to any benefit that may arise therefrom.

18.12. Other Prohibited Interests

- A. No official of the Town who is authorized in such capacity and on behalf of the Town to negotiate, make, accept or approve, or to take part in negotiating, making accepting or approving any architectural, engineering, inspection, construction or material supply contract or any subcontract in connection with the construction of the Project, shall become directly or indirectly interested personally in this Contract or in any part hereof. No officer, employee, architect, attorney, engineer or inspector of or for the Town who is authorized in such capacity and on behalf of the Town to exercise any legislative, executive, supervisory or other similar functions in connection with the construction of the Project, shall become directly or indirectly interested personally in this Contract or in any part thereof, any material supply contract, subcontract, insurance contract, or any other contract pertaining to the Project.

18.13. Conflict of Interest of Officers or Employees of the Local Jurisdiction, Members of the Local Governing Body, or Other Public Officials

- A. The Contractor warrants that the Contractor presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under this Contract.

**SIGNATURE PAGE**

**IN WITNESS WHEREOF**, the parties have duly executed this Agreement as of the date first written above

CONTRACTOR

\_\_\_\_\_  
Signature

By: \_\_\_\_\_  
Print Name and Title

\_\_\_\_\_  
Attest (Secretary)

\_\_\_\_\_  
Date

THE TOWN OF TAOS

By: \_\_\_\_\_  
Pascualito Maestes, Mayor

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

\_\_\_\_\_  
Attest: City Clerk

\_\_\_\_\_  
XXXXXX, Finance Director

Approved as to form:

\_\_\_\_\_  
Attorney for the Town of Taos

Budget Line Item:

Administrative approval:

\_\_\_\_\_  
Lupe Martinez, Town Manager