

**ADA COUNTY FIXED PRICE CONSTRUCTION CONTRACT  
FOR PROJECTS LESS THAN \$200,000  
TERMS AND CONDITIONS  
(REVISED 6/24)**

These Terms and Conditions together with the Ada County Fixed Price Construction Contract For Projects Less Than \$200,000 Project Form (“Project Form”) are the Construction Contract. The Construction Contract shall be effective on the date the Project Form is executed by the last party.

**ARTICLE I.**

Reserved.

**ARTICLE II.**

**REPRESENTATIONS AND WARRANTIES OF THE CONTRACTOR**

In order to induce the Owner to execute the Construction Contract and recognizing that the Owner is relying thereon, the Contractor, by executing the Construction Contract, makes the following express representations to the Owner:

A. The Contractor is fully qualified to act as the Contractor for the Project and has, and shall maintain, any and all licenses, permits, or other authorizations necessary to act as the Contractor for, and to construct, the Project;

B. The Contractor has become familiar with the Project site and the local conditions under which the Project is to be constructed and operated;

C. The Contractor represents it has received, reviewed, compared, studied, and carefully examined all of the Contract Documents and has found them in all respects to be complete, accurate, adequate, consistent, coordinated, and sufficient for construction. Such review, comparison, study, and examination shall be a warranty that the Contract Documents are complete and the Project is buildable as described except as reported. Reported errors, inconsistencies, or omissions shall constitute a claim pursuant to Article XIII hereof, if appropriate;

D. The Contractor warrants that the Contract Time is a reasonable period for performing the work;

E. Pursuant to Idaho Code section 67-2346, if this Construction Contract is one hundred thousand dollars (\$100,000) or more and/or Contractor employs ten (10) or more persons, Contractor certifies that it is not currently engaged in, and will not for the duration of the Project engage in, a boycott of goods or services from Israel or territories under its control.

F. Pursuant to Idaho Code § 67-2359, Contractor certifies that it is not currently owned or operated by the government of China and will not, for the duration of this Contract, be owned or operated by the government of China.

G. Pursuant to Idaho Code § 67-2347A, if this Construction Contract is One Hundred Thousand Dollars (\$100,000) or more and if Contractor employs ten (10) or more persons full-time, Contractor certifies that it is not currently engaged in and will not, for the duration of this Contract engage in, a boycott of any individual or company because that individual or company: (1) engages in or supports the exploration, production, utilization, transportation, sale, or manufacture of fossil fuel-based energy, timber, minerals, hydroelectric power, nuclear energy, or agriculture; or (2) engages in or supports the manufacture, distribution, sale, or use of firearms.

### **ARTICLE III. INTENT AND INTERPRETATION**

A. The Contract Documents, as described herein, constitute the entire and exclusive agreements between the parties with reference to the Project, and said Contract Documents supersede any and all prior discussions, communications, representations, understandings, negotiations, or agreements;

B. Anything that may be required, implied, or inferred by the Contract Documents, shall be provided by the Contractor for the Contract Price;

C. Nothing contained in the Construction Contract shall create, nor be interpreted to create, privity or any other relationship whatsoever between the Owner and any person except the Contractor;

D. When a word, term, or phrase is used in the Contract Documents, it shall be interpreted or construed first, as defined herein; second, if not defined, according to its generally accepted meaning in the construction industry; and third, if there is no generally accepted meaning in the construction industry, according to its common and customary usage;

E. The words “include,” “includes,” or “including,” as used in the Contract Documents, shall be deemed to be followed by the phrase “without limitation;”

F. The specification herein of any act, failure, refusal, omission, event, occurrence, or condition as constituting a material breach of the Contract Documents shall not imply that any other, non-specified act, failure, refusal, omission, event, occurrence, or condition shall be deemed not to constitute a material breach of the Contract Documents;

G. The Contractor shall have a continuing duty to read, examine, review, compare, and contrast each of the Contract Documents, shop drawings, and other submittals and shall give written notice to the Owner and the Design Professional of any conflict, ambiguity, error, or omission which the Contractor may find with respect to these documents before proceeding with the affected work. Reported errors, inconsistencies, or omissions shall constitute a claim pursuant to Article XIII hereof, if appropriate.

The express or implied approval by the Owner or the Design Professional of any shop drawings or other submittals shall not relieve the Contractor of the continuing duties imposed

hereby, nor shall any such approval be evidence of the Contractor's compliance with the Contract Documents. The Owner has requested the Design Professional, if any, to only prepare documents for the Project, including the plans and specifications for the Project, which are accurate, adequate, consistent, coordinated, and sufficient for construction. **HOWEVER, THE OWNER MAKES NO REPRESENTATION OR WARRANTY OF ANY NATURE WHATSOEVER TO THE CONTRACTOR CONCERNING SUCH DOCUMENTS.** The Contractor again hereby acknowledges and represents that it has received, reviewed, and carefully examined such documents, has found them to be complete, accurate, adequate, consistent, coordinated, and sufficient for construction, and that the Contractor has not, does not, and will not rely upon any representations or warranties by the Owner concerning such documents, as no such representations or warranties have been or are hereby made;

H. In the event of any conflict, discrepancy, or inconsistency among any of the Contract Documents, the following shall control:

1. As between figures given on plans and scaled measurements, the figures shall govern;
2. As between large scale plans and small scale plans, the large scale plans shall govern;
3. As between plans and specifications, the requirements of the specifications shall govern;
4. As between the Instructions to Bidders and plans and specifications, the Instructions to Bidders shall govern;
5. As between the Construction Contract and other Contract Documents, the Construction Contract shall govern.

#### **ARTICLE IV. OWNERSHIP OF THE CONTRACT DOCUMENTS**

The Contract Documents, and each of them, as well as any other documents furnished by the Owner, shall remain the property of the Owner. The Contractor shall have the right to keep one (1) copy of the Contract Documents upon completion of the Project; provided, however, that in no event shall the Contractor use, or permit to be used, any portion or all of such Contract Documents on other projects without the Owner's prior written authorization.

#### **ARTICLE V. CONTRACTOR'S PERFORMANCE**

The Contractor shall perform all of the work required, implied, or reasonably inferable from the Contract Documents including, but not limited to, the following:

- A. Construction of the Project;

B. The furnishing of any required surety bonds and insurance;

C. The provision or furnishing, and prompt payment therefor, of labor, supervision, services, materials, supplies, equipment, fixtures, appliances, facilities, tools, transportation, storage, power, fuel, heat, light, cooling, or other utilities required for construction and all necessary building permits and other permits required for the construction of the Project;

D. The creation and submission to the Owner of detailed and comprehensive as-built drawings depicting all as-built construction, if required in the Project Form. Said as-built drawings shall be submitted to the Owner upon Final Completion of the Project, and receipt of same by the Owner shall be a condition precedent to final payment to the Contractor.

#### **ARTICLE VI. TIME FOR CONTRACTOR'S PERFORMANCE**

A. The Contractor shall commence the performance of the Work upon issuance of the Notice to Proceed and shall diligently continue its performance to and until Final Completion of the Project. The Contractor shall accomplish Substantial Completion of the Project on or before the date stated on the Project Form;

B. The Contractor shall pay the Owner the sum of listed as Liquidated Damages for Late Completion on the Project Form per day for each and every calendar day of unexcused delay in achieving Substantial Completion beyond the time allowed herein for Substantial Completion. Any sums due and payable hereunder by the Contractor shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Owner, estimated at the time of executing the Construction Contract. When the Owner reasonably believes that Substantial Completion will be inexcusably delayed, the Owner shall be entitled, but not required, to withhold from any amounts otherwise due the Contractor an amount then believed by the Owner to be adequate to recover liquidated damages applicable to such delays. If and when the Contractor overcomes the delay in achieving Substantial Completion, or any part thereof, for which the Owner has withheld payment, the Owner shall promptly release to the Contractor those funds withheld, but no longer applicable, as liquidated damages;

C. The term "Substantial Completion," as used herein, shall mean that point at which, as certified in writing by the Design Professional, if any, the Owner has received a Certificate of Occupancy (if applicable), and the Project is at a level of completion in strict compliance with the Contract Documents such that the Owner or its designee can enjoy beneficial use or occupancy and can use or operate it in all respects for its intended purpose. Partial use or occupancy of the Project shall not result in the Project being deemed substantially complete, and such partial use or occupancy shall not be evidence of Substantial Completion;

D. Contractor shall achieve Final Completion of the Project on or before the dated stated on the Project Form;

E. The Contractor shall pay the Owner the sum of listed as Liquidated Damages for Late Completion on the Project Form per day for each and every calendar day of unexcused delay in achieving Final Completion beyond the date set forth herein for Final Completion of the Work. Any sums due and payable hereunder by the Contractor shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Owner, estimated at or before the time of executing the Construction Contract. When the Owner reasonably believes that Final Completion will be inexcusably delayed, the Owner shall be entitled, but not required, to withhold from any amounts otherwise due the Contractor an amount then believed by the Owner to be adequate to recover liquidated damages applicable to such delays. If and when the Contractor overcomes the delay in achieving Final Completion, or any part thereof, for which the Owner has withheld payment, the Owner shall promptly release to the Contractor those funds withheld, but no longer applicable, as liquidated damages;

F. All limitations of time set forth herein are material and are of the essence of the Contract Documents.

## **ARTICLE VII. FIXED PRICE AND CONTRACT PAYMENTS**

A. The Owner shall pay, and the Contractor shall accept, as full and complete payment for the Contractor's timely performance of its obligations hereunder the fixed price stated on the Project Form. The price set forth in this paragraph shall constitute the Contract Price, which shall not be modified except by Change Order as provided in the Contract Documents. All requests by the Contractor for an increase in the Contract Price must be submitted as a written claim under Article XIII;

B. Within ten (10) calendar days of the effective date hereof, the Contractor shall prepare and present to the Owner and the Design Professional the Contractor's Schedule of Values apportioning the Contract Price among the different elements of the Project for purposes of periodic and final payment. The Contractor's Schedule of Values shall be presented in whatever format, with such detail, and backed up with whatever supporting information the Design Professional or the Owner requests. The Contractor shall not imbalance its Schedule of Values nor artificially inflate any element thereof. The violation of this provision by the Contractor shall constitute a material breach of the Contract Documents. The Contractor's Schedule of Values will be utilized for the Contractor's Payment Requests but shall only be so utilized after it has been acknowledged in writing by the Design Professional and the Owner;

C. The Owner shall pay the Contract Price to the Contractor in accordance with the procedures set forth in this paragraph.

1. On or before the 1st day of each month after commencement of performance, but no more frequently than once monthly, the Contractor may submit a Payment Request. Said Payment Request shall be in such format and include whatever supporting information as may be required by the Design Professional, the Owner, or both. Therein, the Contractor may request payment for ninety-five percent (95%) of that part of the Contract

Price allocated on the Schedule of Values to Contract requirements to the date of the Payment Request properly provided, labor, materials, and equipment properly incorporated in the Project, and materials or equipment necessary for the Project and properly stored at the Project site (or elsewhere if off-site storage is approved in writing by the Owner), less the total amount of previous payments received from the Owner. Any payment on account of stored materials or equipment will be subject to the Contractor providing written proof that the Owner has title to such materials or equipment and that they are fully insured against loss or damage.

2. Each such Payment Request shall be signed by the Contractor and shall constitute the Contractor's representation that the quantity of work has reached the level for which payment is requested, that the work has been properly installed or performed in strict compliance with the Contract, and that the Contractor knows of no reason why payment should not be made as requested.
3. The Design Professional, if any, shall review the Payment Request and may also review the work at the Project site or elsewhere to determine whether the quantity and quality of the work is as represented in the Payment Request and is as required by the Contract Documents. The Design Professional, if any, shall approve in writing the amount which, in the opinion of the Design Professional, if any, is properly owing to the Contractor.
4. The Owner shall make payment to the Contractor within thirty (30) days following the Design Professional's written approval of each Payment Request, provided that as a condition precedent to payment, the Contractor has attested that it has paid all taxes, excises, and license fees due to the State of Idaho and its taxing units as required by Idaho Code, Title 63, Chapter 15; and provided further that the Contractor, in consideration of securing the business of erecting or constructing public works in this state, recognizing that the business in which he is engaged is of a transitory character, and that in the pursuit thereof, his property used therein may be without the state when taxes, excises, or license fees to which he is liable become payable, agrees:
  - a. To pay promptly when due all taxes (other than on real property), excises and license fees due to the state, its subdivisions, and municipal and quasi-municipal corporations therein, accrued or accruing during the term of this contract, whether or not the same shall be payable at the end of such term;
  - b. That if the said taxes, excises, and licenses fees are not payable at the end of said term, but liability for the payment thereof exists, even though the same constitute liens upon his property, to secure the

same to the satisfaction of the respective officers charged with the collection thereof; and

- c. That, in the event of his default in the payment or securing or of such taxes, excises, and license fees, to consent that the department, officer, board, or taxing unit entering into this contract may withhold for any payment due him hereunder the estimated amount of such accrued and accruing taxes, excises, and license fees for the benefit of all taxing units to which said contractor is liable.

The amount of each such payment shall be the amount approved for payment by the Owner and Design Professional, if any, less such amounts, if any, otherwise owing by the Contractor to the Owner or which the Owner shall have the right to withhold as authorized by the Contract Documents.

5. The Design Professional's, if any, approval of the Contractor's Payment Requests shall not preclude the Owner from the exercise of any of its rights as set forth in Section VII.F hereinbelow.
6. The submission by the Contractor of a Payment Request constitutes an affirmative representation and warranty that all work for which the Owner has previously paid is free and clear of any lien, claim, or other encumbrance of any person whatsoever. As a condition precedent to payment, the Contractor shall, if required by the Owner, also furnish to the Owner properly executed waivers of lien, in a form acceptable to the Owner, from all subcontractors, materialmen, suppliers or others having lien rights, wherein said subcontractors, materialmen, suppliers or others having lien rights shall acknowledge receipt of all sums due pursuant to all prior Payment Requests and waive and relinquish any liens, lien rights, or other claims relating to the Project site.
7. The Contractor warrants and represents that, upon payment of the Payment Request submitted, title to all work included in such payment shall be vested in the Owner.

D. When payment is received from the Owner, the Contractor shall immediately pay all subcontractors, materialmen, laborer and suppliers the amounts they are due for the work covered by such payment. In the event the Owner becomes informed that the Contractor has not paid a subcontractor, materialman, laborer, or supplier as provided herein, the Owner shall have the right, but not the duty, to issue future checks and payment to the Contractor of amounts otherwise due hereunder naming the Contractor and any such subcontractor, materialman, laborer, or supplier as joint payees. Such joint check procedure, if employed by the Owner, shall create no rights in favor of any person or entity beyond the right of the named payees to payment of the check and shall not be deemed to commit the Owner to repeat the procedure in the future;

E. Neither payment to the Contractor, utilization of the Project for any purpose by the Owner, nor any other act or omission by the Owner shall be interpreted or construed as an acceptance of any work of the Contractor not strictly in compliance with the Contract Documents;

F. The Owner shall have the right to refuse to make payment and, if necessary, may demand the return of a portion or all of the amount previously paid to the Contractor due to:

1. The quality of a portion, or all, of the Contractor's work not being in accordance with the requirements of this Contract;
2. The quantity of the Contractor's work not being as represented in the Contractor's Payment Request, or otherwise;
3. The Contractor's rate of progress being such that, in the Owner's opinion, Substantial or Final Completion, or both, may be inexcusably delayed;
4. The Contractor's failure to use Contract funds, previously paid the Contractor by the Owner, to pay Contractor's Project-related obligations including, but not limited to, subcontractors, laborers, and material and equipment suppliers;
5. Claims made, or likely to be made, against the Owner or its property;
6. Loss caused by the Contractor;
7. The Contractor's failure or refusal to perform any of its obligations to the Owner;
8. Failure of the Contractor to pay taxes as required by Idaho Code, Title 63, Chapter 15;
9. Contractor's failure to properly inventory and/or store materials on site.

In the event that the Owner makes written demand upon the Contractor for amounts previously paid by the Owner as contemplated in this paragraph, the Contractor shall promptly comply with such demand;

G. If within thirty (30) days from the date payment to the Contractor is due, the Owner, without cause or basis hereunder, fails to pay the Contractor any amounts then due and payable to the Contractor, the Contractor shall have the right to cease work until receipt of proper payment after first providing ten (10) days written notice of its intent to cease work to the Owner. Any payment not made within thirty (30) days after the date due shall bear interest at the rate computed by the State Treasurer in compliance with Section 28-22-104, Idaho Code;

H. When Substantial Completion has been achieved, the Contractor shall notify the Owner and the Design Professional, if any, in writing and shall furnish to the Owner and Design



Professional a listing of those matters yet to be finished. The Owner and Design Professional will thereupon conduct an inspection to confirm that the work is in fact substantially complete. Upon its confirmation that the Contractor's work is substantially complete, the Design Professional, if any, will so notify the Owner and Contractor in writing and will therein set forth the date of Substantial Completion. If the Owner or Design Professional, through its inspection, fails to find that the Contractor's work is substantially complete, and is required to repeat all, or any portion, of its Substantial Completion inspection, the Contractor shall bear the cost of such repeat inspection(s) which cost may be deducted by the Owner from any payment then or thereafter due to the Contractor. Guarantees and equipment warranties required by this Contract shall commence on the date of Substantial Completion. Upon completion of equipment testing, Owner training, delivery and approval of O&M manuals, project punch list completion, and project acceptance by the Owner, the Owner shall pay the Contractor an amount sufficient to increase total payments to the Contractor to one hundred percent (100%) of the Contract Price less any amounts attributable to liquidated damages, together with the reasonable costs as determined by the Owner for completing all incomplete work, correcting and bringing into conformance all defective and nonconforming work, and handling any outstanding or threatened claims;

I. When the Project is finally complete and the Contractor is ready for a final inspection, it shall notify the Owner and the Design Professional thereof in writing. Thereupon, the Owner or Design Professional will perform a final inspection of the Project. If the Owner or Design Professional confirms that the Project is complete in full accordance with this Contract and that the Contractor has performed all of its obligations to the Owner hereunder, the Owner or Design Professional will furnish a final Approval for Payment to the Owner certifying to the Owner that the Project is complete and the Contractor is entitled to the remainder of the unpaid Contract Price, less any amount withheld pursuant to this Contract. If the Owner or Design Professional is unable to issue its final Approval for Payment and is required to repeat its final inspection of the Project, the Contractor shall bear the cost of such repeat inspection(s), which costs may be deducted by the Owner from the Contractor's final payment;

J. Reserved.

K. Prior to being entitled to receive final payment, and as a condition precedent thereto, the Contractor shall furnish the Owner, in the form and manner, if any, required by Owner with a copy to the Design Professional:

1. An affidavit that all of the Contractor's obligations to subcontractors, laborers, equipment or material suppliers, or other third parties in connection with the Project, have been paid or otherwise satisfied;
2. If required by the Owner, separate releases of lien or lien waivers from each subcontractor, lower-tier subcontractor, laborer, supplier, or other person or entity who has or might have a claim against the Owner or the Owner's property;
3. If applicable, consent(s) of Surety to final payment;

4. All product warranties, operating manuals, instruction manuals, and other record documents, drawings, and things customarily required of the Contractor, or expressly required herein, as a part of or prior to Project closeout;

L. The Owner shall, subject to its rights set forth in Sections VII.F and VII.K above, make final payment of all sums due the Contractor within ten (10) days of the Owner or Design Professional's execution of a final Approval for Payment.

#### **ARTICLE VIII. INFORMATION AND MATERIAL SUPPLIED BY THE OWNER**

A. The Owner shall furnish to the Contractor, prior to the execution of the Construction Contract, any and all written and tangible material in its possession concerning conditions below ground at the site of the Project. Such written and tangible material is furnished to the Contractor only in order to make complete disclosure of such material as being in the possession of the Owner and for no other purpose. By furnishing such material, the Owner does not represent, warrant, or guarantee its accuracy either in whole, in part, implicitly or explicitly, or at all, and shall have no liability therefor. The Owner shall also furnish, if appropriate, the legal description of the Project site and any required survey;

B. The Owner shall obtain all required authorizations, approvals, easements, and the like, excluding the building permit and other permits or fees required of the Contractor by the Contract Documents, or permits and fees customarily the responsibility of the Contractor;

#### **ARTICLE IX. CEASE AND DESIST ORDER**

In the event the Contractor fails or refuses to perform the Work as required herein, the Owner may instruct the Contractor to cease and desist from performing further work in whole or in part. Upon receipt of such instruction, the Contractor shall immediately cease and desist as instructed by the Owner and shall not proceed further until the cause for the Owner's instructions has been corrected, no longer exists, or the Owner instructs that the Work may resume. In the event the Owner issues such instructions to cease and desist, and in the further event that the Contractor fails and refuses within seven (7) days of receipt of same to provide adequate assurance to the Owner that the cause of such instructions will be eliminated or corrected, then the Owner shall have the right, but not the obligation, to carry out the Work with its own forces or with the forces of another contractor, and the Contractor shall be fully responsible and liable for the costs of performing such work by the Owner. The rights set forth herein are in addition to, and without prejudice to, any other rights or remedies the Owner may have against the Contractor.

**ARTICLE X.  
DUTIES, OBLIGATIONS, AND RESPONSIBILITIES OF THE CONTRACTOR**

In addition to any and all other duties, obligations, and responsibilities of the Contractor set forth in the Contract Documents, the Contractor shall have and perform the following duties, obligations, and responsibilities to the Owner:

- A. Contract Documents and site conditions:
  - 1. The Contractor's continuing duties include, but are not limited to, those set forth in Section III.G and are by reference hereby incorporated in this Section X.A. The Contractor shall not perform work without adequate plans and specifications or, as appropriate, approved shop drawings or other submittals. If the Contractor performs work knowing or believing it involves an error, inconsistency, or omission in the Contract Documents without first providing written notice to the Design Professional and Owner, the Contractor shall be responsible for such work and pay the cost of correcting same;
  - 2. The Contractor shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to the Contractor with the Contract Documents before commencing the work. Errors, inconsistencies, or omissions discovered shall be reported to the Owner and the Owner's Representative immediately. Such examination, review, and comparison shall be a warranty that the Contract Documents are complete and the Project is buildable as described except as reported. Reported errors, inconsistencies, or omissions shall constitute a claim pursuant to Article XIII hereof where appropriate.
- B. All work shall strictly conform to the requirements of the Contract Documents;
- C. The work shall be strictly supervised, the Contractor bearing full responsibility for any and all acts or omissions of those engaged in the work on behalf of the Contractor;
- D. The Contractor hereby warrants that all labor furnished shall be competent to perform the tasks undertaken, that the product of such labor shall yield only first-class results, that all materials and equipment provided shall be new and of high quality, that the finished work will be complete, of high quality, without defects, and that all work strictly complies with the requirements of the Contract Documents. Any work not strictly complying with the requirements of this Section shall constitute a breach of the Contractor's warranty;
- E. The Contractor shall secure the building permit and other permits and governmental approvals and inspections necessary for proper execution and completion of the work. The Owner shall either pay direct or reimburse the Contractor for the actual fees with no markup for overhead

or profit. The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work;

F. The Contractor shall employ and maintain at the Project site only competent supervisory personnel. Key supervisory personnel assigned by the Contractor to this Project are as listed in the Project Form. So long as those individuals remain actively employed or retained by the Contractor, they shall perform the functions indicated next to their names unless the Owner agrees to the contrary in writing. In the event one or more individuals not listed above subsequently assumes one or more of those functions listed above, the Contractor shall be bound by the provisions of this Section X.F as though such individuals had been listed above;

G. The Contractor, within fifteen (15) days of commencing the work, shall provide to the Owner and the Design Professional, and comply with, the Contractor's schedule for completing the work within the time provided by the Contract Documents. Such schedule shall be in a form acceptable to the Owner. The Contractor's schedule shall be updated to reflect conditions encountered from time to time as required by the Owner and shall apply to the total Project. A Contractor's revisions to the schedule shall not constitute a waiver of the requirement to complete the Project in the time allowed by the Contract Documents, unless additional time for performance has been allowed pursuant to Article XIII hereof. Each such revision shall be furnished to the Owner and the Design Professional. Strict compliance with the requirements of this Section X.G shall be a condition precedent to the payment to the Contractor, and failure by the Contractor to strictly comply with said requirements shall constitute a material breach of the Construction Contract;

H. The Contractor shall keep an updated copy of the Contract Documents at the site. Additionally, the Contractor shall keep a copy of approved shop drawings and other submittals. All of these items shall be available to the Owner and the Design Professional at all regular business hours. Upon Final Completion of the work, all of these items shall be finally updated and provided to the Owner and shall become the property of the Owner;

I. Shop drawings and other submittals from the Contractor do not constitute a part of the Contract Documents. The Contractor shall not do any work requiring shop drawings or other submittals unless such shall have been approved in writing by the Owner or Design Professional. All work requiring approved shop drawings or other submittals shall be done in strict compliance with such approved documents. However, approval by the Design Professional or the Owner shall not be evidence that work installed pursuant thereto conforms with the requirements of the Contract Documents. The Owner and the Design Professional shall have no duty to review partial submittals or incomplete submittals. The Contractor shall maintain a submittal log which shall include, at a minimum, the date of each submittal, the date of any resubmittal, the date of any approval or rejection, and the reason for any approval or rejection. The Contractor shall have the duty to carefully review, inspect, and examine any and all submittals before submission of same to the Owner or the Design Professional;

J. The Contractor shall maintain the Project site in a reasonably clean condition during performance of the work. Upon Final Completion, the Contractor shall thoroughly clean the Project site of all debris, trash, and excess materials or equipment;

K. At all times relevant to the Construction Contract, the Contractor shall permit the Owner and the Design Professional to enter upon the Project site and to review or inspect the work without formality or other procedure;

L. Contractor's Safety Obligations:

1. Contractor shall be solely responsible for assuring that all of the work, whether performed by Contractor or by any subcontractor, on the construction sites are performed with due regard to the safety of persons and property;
2. All work shall be performed in strict accordance with all applicable municipal, state, and other governmental codes governing the particular trade. In addition, all work shall be performed in accordance with applicable safe practices outlined in current editions of the National Electrical Code.
3. Contractor shall be responsible for compliance by all subcontractors with all safety procedures required by this Contract;
4. Contractor shall, before commencement of the work at the construction site, meet with the Design Professional, if any, and submit a safety program to the Design Professional that outlines how it will meet its safety obligations, and that addresses the following: the construction site layout (including access and haul roads, areas designated for material storage and development of equipment, placement of temporary structures, vehicle parking spaces, locations of underground and overhead utility lines, and any other unusual hazards); housekeeping (including cleanup and disposal of debris, storage of materials, and the elimination of potential cause of tripping and falling); fire safety (including safe procedures for handling, storage, and disposal of flammable or explosive substances and welding and cutting operations); personal protective equipment (including the determination of areas and operations where such equipment will be required); barricades (including locations and types of the same); compressed gas cylinders to be used (including procedures for safe storage, handling, and use); radiation and unusual hazards (including procedures for the avoidance of exposure to the same); rigging equipment to be used (including the types to be used and the methods to be established by the Contractor for the safe operation of the same); excavation, if applicable, (including Contractor's procedures for barricading and shoring adjacent to existing structures); electrical safety (including the procedures for locking out and grounding the equipment); special equipment (including procedures necessary for the safe operation of the same); inspection programs (including all operations which may require special consideration by the Contractor); protection of Owner's

personnel (including procedures required for any operations to be conducted by Contractor or any subcontractors in areas adjacent to those occupied by Owner's employees); first-aid facilities (including familiarization of Contractor with facilities available to its employees); sanitation (including information as to the location of facilities available at the job site); and the protection of property adjoining that of the Owner;

5. Contractor shall periodically conduct safety inspections of the Project construction site;
6. Contractor shall maintain accurate records of all accidents resulting in death, traumatic injury, occupational disease, or damage to any property, whether or not that of the Owner, and shall promptly report any of the same to the Owner;
7. Without limiting the generality of the foregoing, Contractor specifically warrants that all equipment and material delivered by the Contractor, its subcontractors, or the servants, agents, or employees of any of them to the site and/or all work performed by Contractor, its subcontractors, or the servants, agents, or employees of any of them on the Owner's premises shall comply with all requirements of the Occupational Safety and Health Act of 1970, as the same may be amended from time to time, and including all regulations adopted pursuant to that Act;
8. The presence of Design Professional's and Owner's personnel at a construction site (whether as on-site representatives or otherwise), and the performance of Design Professional's or Owner's duties, do not make any of them or their representatives or personnel in any way responsible for those duties that belong to the Contractor(s) or other entities, and do not relieve the Contractor or any other entities of their obligations, duties, and responsibilities, including, but not limited to, any health or safety precautions required by such construction work. Design Professional's and Owner's personnel have no authority to exercise any control over any Contractor or other entities or their employees in connection with their work or any health or safety precautions and have no duty for inspecting, noting, observing, correcting, or reporting on health or safety deficiencies of the Contractor or other entities or any other persons at the site except their own personnel. The presence of Design Professional's or Owner's personnel at a construction site is for the purpose of providing to Owner a greater degree of confidence that the completed Work will conform to the Contract Documents and that the integrity of the design concept as reflected in the Contract Documents has been implemented and preserved by the Contractor. For this Section X.L only, "construction site(s)" include places of manufacture for materials incorporated into the Work, and "Contractor" includes manufacturers of materials incorporated into the Work;

9. Contractor will adequately protect work performed from damage, will protect Owner's property from injury or loss, and will take all necessary precautions during the progress of the work to protect all persons and property of other from injury or damage. Contractor will assume full responsibility for all its tools and equipment and all materials to be used in connection with the completion of the Project;
10. In performing the work, Contractor and each of its subcontractors shall exercise the highest degree of care to prevent accidents and injuries to persons (including employees) and damage or loss of property in, on, or about the Project site and shall promptly comply with any reasonable direction of the Design Professional, if any, for the prevention and elimination of safety hazards;
11. Contractor shall use proper barricading, ropes, warning signs, and other such devices wherever excavating, performing overhead work, hoisting, opening pits or trenches, or the like is in progress. Roads and highways closed to traffic shall be protected by effective barricades on which shall be placed appropriate warning and detour signs. All barricades and obstructions shall be illuminated at night and when dark, and all lights shall be kept on from sunset to sunrise. Contractor will also keep all aisles and roadways clear, and at no time obstruct passageways to existing emergency equipment such as showers, eye-wash fountains, fire blankets, hoses, alarm boxes, extinguishers, shut-off valves, and switches, etc.;
12. Contractor is expected to supply fire extinguishers, blankets, and other fire-fighting equipment in or near the Project area;
13. Contractor shall be responsible for any damage or injury to any person or property resulting from Contractor's and/or its subcontractors' failure to maintain adequate safeguards against the occurrence of accidents, injuries, or damages at the site of the Project;
14. Contractor shall take all precautions necessary and shall be responsible for the safety of the work and shall maintain all lights, guards, signs, temporary passages, or other protection necessary for that purpose. All work shall be done at the Contractor's risk, including work performed by subcontractors. If any loss or damage shall result from fire or from other cause, Contractor shall promptly repair and replace such loss or damage to the satisfaction of the Owner, free from all expense to Owner.
15. Contractor shall be solely responsible at all times for the safety of the general public and for the protection of persons who may, for any reason, enter within the limits of its Project and construction sites.

16. The specific safety requirements listed herein are minimum standards. By listing these requirements, Owner does warrant that meeting these minimum standards will fulfill Contractor's responsibility to assure that all work is performed with due regard for safety. These specific requirements do not limit Contractor's obligation to perform the work in a manner that safeguards persons and property. Likewise, these specific requirements do not limit Contractor's responsibility for assuring that all subcontractors perform their work with due regard for safety of persons and property.

M. Contractor shall comply with the quality control program for the Project, if any, designed by the Design Professional, if any, and such a part of the Construction Contract;

N. Contractor shall submit a safety program to the Design Professional and Owner and shall thereafter faithfully adhere to its terms.

O. Pursuant to Idaho Code § 44-1002, Contractor shall employ ninety-five percent (95%) bona fide Idaho residents as employees on the Work; provided, however, if fifty (50) or less persons are employed Contractor may employ ten percent (10%) nonresidents; provided, further, in all cases Contractor must give preference to the employment of bona fide Idaho residents in the performance of the Work.

## **ARTICLE XI. INDEMNITY**

To the fullest extent permitted by law the Contractor shall secure, defend, protect, hold harmless, and indemnify the Owner and the Owner's Related Parties from and against any and all liability, loss, claims, demands, suits, costs, fees and expenses (including actual fees and expenses of attorneys, expert witnesses, and other consultants), by whomsoever brought or alleged, and regardless of the legal theories upon which premised, including, but not limited to, those actually or allegedly arising out of bodily injury to, or sickness or death of, any person, or property damage or destruction (including loss of use), which may be imposed upon, incurred by or asserted against the Owner or the Owner's Related Parties allegedly or actually arising out of or resulting from the Contractor's services, including without limitation any breach of contract or negligent act or omission (i) of the Contractor; or (ii) of the Contractor's subcontractors or suppliers, or (iii) of the agents, employees or servants of the Contractor or its subcontractors or suppliers.

In the event the Owner is alleged to be liable on account of alleged acts or omissions, or both, of the Contractor or anyone for whose acts the Contractor may be liable, the Contractor shall defend such allegations through counsel chosen by the Owner and the Contractor shall bear all cost, fees, and expenses of such defense, including, but not limited to, all attorney fees and expenses, court costs, and expert witness fees and expenses.

In claims against any person or entity indemnified under this Article by an employee of the Contractor, a subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under this Article shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for the Contractor



or a subcontractor under workers' or workmen's compensation acts, disability benefit acts, or other employee benefit acts.

## **ARTICLE XII. THE PROJECT DESIGN PROFESSIONAL**

The Design Professional for this Project, if any, is noted in the Project Form (the "Design Professional"). In the event the Owner should find it necessary or convenient to replace the Design Professional, the Owner shall retain a replacement Design Professional and the role of the replacement design professional shall be the same as the role of the Design Professional. Unless otherwise directed by the Owner in writing, the Design Professional will perform those duties and discharge those responsibilities allocated to the Design Professional in the Contract Documents. The duties, obligations, and responsibilities of the Design Professional shall include, but are not limited to, the following:

A. Unless otherwise directed by the Owner in writing, the Design Professional shall act as the Owner's agent from the effective date of the Construction Contract until final payment has been made, to the extent expressly set forth in the Contract Documents;

B. Unless otherwise directed by the Owner in writing, the Owner and the Contractor shall communicate with each other through the Design Professional;

C. When requested by the Contractor in writing, the Design Professional shall render interpretations necessary for the proper execution or progress of the work;

D. The Design Professional shall draft proposed Change Orders;

E. The Design Professional shall approve or respond otherwise as necessary concerning shop drawings or other submittals received from the Contractor;

F. The Design Professional shall be authorized to refuse to accept work which is defective or otherwise fails to comply with the requirements of the Contract Documents. If the Design Professional deems it appropriate, the Design Professional shall be authorized to call for extra inspection or testing of the work for compliance with requirements of the Contract Documents;

G. The Design Professional shall review the Contractor's Payment Requests and shall approve in writing those amounts which, in the opinion of the Design Professional, are properly owing to the Contractor as provided in the Construction Contract;

H. The Design Professional shall, upon written request from the Contractor, perform those inspections required in Article VII hereinabove;

I. The Design Professional shall be authorized to require the Contractor to make changes which do not involve a change in the Contract Price or in the time for the Contractor's performance of the Construction Contract consistent with the intent of the Contract Documents;

J. THE DUTIES, OBLIGATIONS, AND RESPONSIBILITIES OF THE CONTRACTOR UNDER THE CONTRACT DOCUMENTS SHALL IN NO MANNER WHATSOEVER BE CHANGED, ALTERED, DISCHARGED, RELEASED, OR SATISFIED BY ANY DUTY, OBLIGATION, OR RESPONSIBILITY OF THE DESIGN PROFESSIONAL. THE CONTRACTOR IS NOT A THIRD-PARTY BENEFICIARY OF ANY CONTRACT BY AND BETWEEN THE OWNER AND THE DESIGN PROFESSIONAL. IT IS EXPRESSLY ACKNOWLEDGED AND AGREED THAT THE DUTIES OF THE CONTRACTOR TO THE OWNER ARE INDEPENDENT OF, AND ARE NOT DIMINISHED BY, ANY DUTIES OF THE DESIGN PROFESSIONAL TO THE OWNER.

### **ARTICLE XIII. CLAIMS BY THE CONTRACTOR**

Claims by the Contractor against the Owner are subject to the following terms and conditions:

A. All Contractor claims against the Owner, except previously concealed and unknown site conditions which are materially at variance from those typically and ordinarily encountered in the general geographic location of the Project, shall be initiated by a written claim submitted to the Owner and the Design Professional. Such claim shall be received by the Owner and the Design Professional no later than seven (7) calendar days after the event or the first appearance of the circumstances causing the claim, whichever occurred sooner, and same shall set forth in detail all facts, circumstances, and supporting documentation;

B. In the event the Contractor discovers previously concealed and unknown site conditions which are materially at variance from those typically and ordinarily encountered in the general geographical location of the Project, the Contractor shall:

1. provide the Owner and Design Professional written notice of such condition, by facsimile transmission or hand delivery, within 24 hours after the first appearance to the Contractor of such condition;
2. give the Owner and Design Professional an opportunity to observe such condition prior to disturbing it;
3. file a written claim with all available facts, circumstances, and supporting documentation with the Owner and Design Professional within seven (7) calendar days after the first appearance to the Contractor of such condition, unless such period is otherwise extended by the Owner in writing; and
4. provide all additional facts, circumstances, and supporting documentation for such claim to the Owner and Design Professional as soon as it is available with the exercise of due diligence;

C. In the event the Contractor seeks to make a claim against the Owner, as a condition precedent to any liability of the Owner therefor, the Contractor shall strictly comply with the requirements of this Article, and such claim shall be made by the Contractor before proceeding to execute any additional or changed work. Failure of the condition precedent to occur shall constitute a waiver by the Contractor of any such claim;

D. The Contractor and the Owner shall continue their performance hereunder regardless of the existence of any claims submitted by the Contractor;

E. In connection with any claim by the Contractor against the Owner for compensation in excess of the Contract Price, any liability of the Owner for the Contractor's cost shall be strictly limited to direct cost incurred by the Contractor as described in Article XV, Section B.2 and shall in no event other than as described in Article XV, Section B.2 include indirect cost or consequential damages of the Contractor. The Owner shall not be liable to the Contractor for claims of third-parties including subcontractors, unless and until liability of the Contractor has been established therefor in a court of competent jurisdiction;

F. In the event the Contractor should be delayed in performing any task which at the time of the delay is then critical or which during the delay becomes critical to the extent attributable to any act or omission by the Owner or someone acting in the Owner's behalf, or by Owner-authorized Change Orders, unusually bad weather not reasonably anticipatable, fire or other Acts of God, the date for achieving Substantial Completion, or, as applicable, Final Completion, shall be appropriately adjusted by the Owner upon the written claim of the Contractor to the Owner and the Design Professional as the Contractor's sole remedy. A task is critical within the meaning of this Section XIII.F if, and only if, said task is on the critical path of the Project schedule so that a delay in performing such task will delay the ultimate completion of the Project.

An extension to the Contract Time will be the Contractor's sole remedy whether or not such delays are foreseeable, unless a delay is caused by acts of the Owner constituting active interference with Contractor's performance of the work, and only to the extent such acts continue after the Contractor furnishes the Owner with written notice of such interference. In no event shall the Contractor be entitled to compensation or recovery of any indirect damages in connection with any delay, including, without limitation, consequential damages, lost opportunity costs, impact damages, or other similar remuneration. The Owner's exercise of any of its rights or remedies under the Contract Documents including, without limitation, ordering changes in the work, direct suspension, rescheduling, or correction of the work and, regardless of the extent or frequency of the Owner's exercise of such remedies, shall not be construed as active interference with the Contractor's performance of the work.

G. If the Contractor submits a schedule or progress report indicating, or otherwise expressing an intention to achieve completion of the work prior to any completion date required by the Contract Documents or expiration of the Contract Time, no liability of the Owner to the Contractor for any failure of the Contractor to so complete the work shall be created or implied.

**ARTICLE XIV.  
SUBCONTRACTORS**

Upon execution of the Construction Contract, the Contractor shall identify to the Owner and the Design Professional, in writing, those parties intended as subcontractors on the Project. Submission of Exhibit A of the Contractor's Bid shall satisfy this requirement. The Owner shall, in writing, state any objections the Owner may have to one or more of such subcontractors. The Contractor shall not enter into a subcontract with an intended subcontractor with reference to whom the Owner objects. All subcontracts shall afford the Contractor rights against the subcontractor which correspond to those rights afforded to the Owner against the Contractor herein, including those rights of Construction Contract termination as set forth hereinbelow.

**ARTICLE XV.  
CHANGE ORDERS**

One or more changes to the work within the general scope of the Construction Contract may be ordered by Change Order. With respect to all change order requests involving credit to the Owner or additional compensation to the Contractor, the Contractor shall (a) obtain from subcontractors and suppliers the best possible price quotations; (b) review such quotations to ascertain whether they are reasonable; (c) prepare an itemized accounting together with appropriate supporting data, including reasonable expenditures by, and savings to, those performing the scope of the Work involved in the proposed change; and (d) provide a reasonable price quotation to the Owner. The Contractor shall proceed with any such changes and same shall be accomplished in strict accordance with the Contract Documents and the following terms and conditions:

A. Change Order shall mean a written order to the Contractor executed by the Owner and the Design Professional after execution of the Construction Contract, directing a change in the work and may include a change in the Contract Price or the time for the Contractor's performance, or any combination thereof;

B. Any change in the Contract Price resulting from a Change Order shall be determined as follows:

1. By mutual agreement between the Owner and the Contractor as evidenced by the change in the Contract Price being set forth in the Change Order executed by both parties; or
2. If no mutual agreement occurs between the Owner and Contractor, the change in the Contract Price, if any, shall be derived by determining the reasonable costs incurred or savings achieved, resulting from revisions in the work as computed by one of the following methods chosen at the discretion of the Owner:
  - a. A lump sum utilizing the most recent Means Cost Guide, as adjusted for Boise, Idaho, properly itemized and supported by sufficient substantiating data to permit evaluation;

- b. Labor and materials costs stated in the Escrowed Bid Documents attached as Exhibit A hereto, if Escrowed Bid Documents are required in the Project Form. Provided, however, the Contractor may add five percent (5%) (as a total for the Contractor, subcontractors, suppliers, consultants and agents) for all overhead and other indirect costs, and five percent (5%) (as a total for the Contractor, subcontractors, suppliers, consultants and agents) as profit, to be allocated by the Contractor among the Contractor, its subcontractors, suppliers, consultants and agents, as the Contractor may determine.
- c. Labor at the actual wage paid the employee, if any, plus the actual cost of materials, if any. Provided, however, the Contractor may add five percent (5%) (as a total for the Contractor, subcontractors, suppliers, consultants and agents) for all overhead and other indirect costs, and five percent (5%) (as a total for the Contractor, subcontractors, suppliers, consultants and agents) as profit, to be allocated by the Contractor among the Contractor, its subcontractors, suppliers, consultants and agents, as the Contractor may determine.

Any such costs or savings shall be documented in the format and with such content and detail as the Owner or the Design Professional requires. In no event shall the Change Order include consequential damages.

C. The execution of a Change Order by the Contractor shall constitute conclusive evidence of the Contractor's agreement to the ordered changes in the work, the Construction Contract as thus amended, the Contract Price, and the time for performance by the Contractor. The Contractor, by executing the Change Order, waives and forever releases any claim against the Owner for additional time or compensation for matters relating to or arising out of or resulting from the work included within or affected by the executed Change Order;

D. The Contractor shall notify and obtain the consent and approval of the Contractor's Surety with reference to all Change Orders. The Contractor's execution of the Change Order shall constitute the Contractor's warranty to the Owner that the Surety has been notified of, and consents to, such Change Order and the Surety shall be conclusively deemed to have been notified of such Change Order and to have expressly consented thereto.

## **ARTICLE XVI.**

### **DISCOVERING AND CORRECTING DEFECTIVE OR INCOMPLETE WORK**

A. In the event that the Contractor covers, conceals, or obscures its work performed in violation of the Contract Documents or in violation of a directive from the Owner or the Design Professional, such work shall be uncovered and displayed for the Owner's or Design Professional's inspection upon request and shall be reworked at no cost in time or money to the Owner;

B. If any of the work is covered, concealed, or obscured in a manner not covered by Section XVI.A above, it shall if directed by the Owner or the Design Professional be uncovered and displayed for the Owner's or Design Professional's inspection. If the uncovered work conforms strictly with the Contract Documents, the costs incurred by the Contractor to uncover and subsequently replace such work shall be borne by the Owner. Otherwise, such costs shall be borne by the Contractor;

C. The Contractor shall, at no cost in time or money to the Owner, correct work rejected by the Owner or by the Design Professional as defective or failing to conform to the Contract Documents. Additionally, the Contractor shall reimburse the Owner for all testing, inspections and other expenses incurred as a result thereof;

D. In addition to its warranty obligations set forth elsewhere herein, the Contractor shall be specifically obligated to correct any and all defective or nonconforming work for a period of twelve (12) months following Final Completion upon written direction from the Owner. The Contractor shall schedule, coordinate and participate walk-through inspection of the Work three (3) months prior to the expiration of the one-year correction period, and shall notify the Owner and any necessary subcontractors and suppliers of the date of, and request their participation in, the walk-through inspection. The purpose of the walk-through inspection will be to determine if there are defects or failures, which require correction. The warranties and guarantees set forth in this Article shall be in addition to all other warranties, express, implied or statutory, and shall survive the Owner's payment, acceptance, inspection of or failure to inspect the Work and review of the Construction Documents;

E. The Owner may, but shall in no event be required to, choose to accept defective or nonconforming work. In such event, the Contract Price shall be reduced by the greater of (1) the reasonable costs of removing and correcting the defective or nonconforming work or (2) the difference between the fair market value of the Project as constructed and the fair market value of the Project had it not been constructed in such a manner as to include defective or nonconforming work. If the remaining portion of the unpaid Contract Price, if any, is insufficient to compensate the Owner for the acceptance of defective or nonconforming work, the Contractor shall, upon written demand from the Owner, pay the Owner such remaining compensation for accepting defective or nonconforming work.

## **ARTICLE XVII. TERMINATION BY THE CONTRACTOR**

If the Owner repeatedly fails to perform its material obligations to the Contractor for a period of thirty (30) days after receiving written notice from the Contractor of its intent to terminate hereunder and specific details of the reasons therefor, the Contractor may terminate performance under the Construction Contract by written notice to the Owner and the Design Professional. In such event, the Contractor shall be entitled to recover from the Owner as though the Owner had terminated the Contractor's performance under the Construction Contract for convenience pursuant to Section XIX.A hereunder.

**ARTICLE XVIII.  
OWNER’S RIGHT TO SUSPEND CONTRACTOR’S PERFORMANCE**

A. The Owner shall have the right at any time to direct the Contractor to suspend its performance, or any designated part thereof, for any reason whatsoever, or without reason, for a cumulative period of up to thirty (30) calendar days. If any such suspension is directed by the Owner, the Contractor shall immediately comply with same;

B. In the event the Owner directs a suspension of performance under this Article XVIII, through no fault of the Contractor, the Owner shall pay the Contractor as full compensation for such suspension of the Contractor’s reasonable costs, actually incurred and paid, of:

1. demobilization and remobilization, including such costs paid to subcontractors;
2. preserving and protecting work in place;
3. storage of materials or equipment purchased for the Project, including insurance thereon;
4. performing in a later, or during a longer, time frame than that contemplated by the Contract Documents.

**ARTICLE XIX.  
TERMINATION BY THE OWNER**

The Owner may terminate this Contract in accordance with the following terms and conditions:

A. The Owner may, for any reason whatsoever, terminate performance under the Construction Contract by the Contractor for convenience. The Owner shall give written notice of such termination to the Contractor specifying when termination becomes effective. The Contractor shall incur no further obligations in connection with the work and the Contractor shall stop work when such termination becomes effective. The Contractor shall also terminate outstanding orders and subcontracts. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders. The Owner may direct the Contractor to assign the Contractor’s right, title, and interest under termination orders or subcontracts to the Owner or its designee. The Contractor shall transfer title and deliver to the Owner such completed or partially completed work and materials, equipment, parts, fixtures, information, and contract rights as the Contractor has. When terminated for convenience, the Contractor shall be compensated as follows:

1. The Contractor shall submit a termination claim to the Owner and the Design Professional specifying the amounts due because of the termination for convenience together with costs, pricing, or other data required by the Owner or the Design Professional. If the Contractor fails to file a termination claim

within one (1) year from the effective date of termination, the Owner shall pay the Contractor, an amount derived in accordance with Section (3) below;

2. The Owner and the Contractor may agree to the compensation, if any due to the Contractor hereunder;
3. Absent agreement to the amount due to the Contractor, the Owner shall pay the Contractor the following amounts:
  - a. Actual costs for labor, materials, equipment, and other services accepted under the Construction Contract plus a maximum of five percent (5%) for all overhead and other indirect costs, and five percent (5%) as profit (such profit shall not include anticipated profit or consequential damages); provided, however, that if it appears that the Contractor would have not profited or would have sustained a loss if the entire Construction Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss, if any; and
  - b. Reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Section XIX.A of this Article. These costs shall not include amounts paid in accordance with other provisions hereof.

The total sum to be paid the Contractor under this Section XIX.A shall not exceed the total Contract Price, as properly adjusted, reduced by the amount of payments otherwise made and shall in no event include duplication of payment.

B. If the Contractor does not perform the work, or any part thereof, in a timely manner, supply adequate labor, supervisory personnel, or proper equipment or materials, or if it fails to timely discharge its obligations for labor, equipment, and materials, or proceeds to disobey applicable law, or otherwise commits a violation of a material provision of the Contract Documents, then the Owner, in addition to any other rights it may have against the Contractor or other, may terminate the performance of the Contractor and assume possession of the Project site and of all materials and equipment at the site and may complete the work. In such case, the Contractor shall not be paid further until the work is complete. After Final Completion has been achieved, if any portion of the Contract Price, as it may be modified hereunder, remains after the cost to the Owner of completing the work, including all costs and expenses of every nature incurred, has been deducted by the Owner, such remainder shall belong to the Contractor. Otherwise, the Contractor shall pay and make whole the Owner for such cost. This obligation for payment shall survive the termination of the Construction Contract. In the event the employment of the Contractor is terminated by the Owner for cause pursuant to this Section XIX.B and it is subsequently determined by a Court of competent jurisdiction that such termination was without cause, such termination shall



thereupon be deemed a Termination for Convenience under Section XIX.A and the provisions of Section XIX.A shall apply.

#### **ARTICLE XX.**

Reserved.

#### **ARTICLE XXI. SURETY BONDS**

The Contractor shall furnish separate performance and payment bonds to the Owner. Each bond shall set forth a penal sum in an amount not less than the Contract Price. Each bond furnished by the Contractor shall incorporate by reference the terms of this Contract as fully as though they were set forth verbatim in such bonds. In the event the Contract Price is adjusted by Change Order executed by the Contractor, the penal sum of both the performance bond and the payment bond shall be deemed increased by like amount. The performance and payment bonds furnished by the Contractor shall be in form suitable to the Owner and shall be executed by a Surety, or Sureties, reasonably acceptable to the Owner.

#### **ARTICLE XXII. PROJECT RECORDS**

All documents relating in any manner whatsoever to the Project, or any designated portion thereof, which are in the possession of the Contractor or any subcontractor of the Contractor, shall be made available to the Owner or the Design Professional for inspection and copying upon written request by the Owner. Furthermore, said documents shall be made available, upon request by the Owner, to any state, federal, or other regulatory authority and any such authority may review, inspect, and copy such records. Said records include, but are not limited to, all drawings, plans, specifications, submittals, correspondence, minutes, memoranda, tape recordings, videos, or other writings or things which document the Project, its design, and its construction. Said records expressly include those documents reflecting the cost of construction to the Contractor. The Contractor shall maintain and protect these documents for no less than five (5) years after Final Completion of the Project or for any longer period of time as may be required by law or good construction practice.

#### **ARTICLE XXIII. APPLICABLE LAW**

The Construction Contract and its performance shall be construed in accordance with and governed by the laws of the State of Idaho, with venue for any action brought pursuant to this Agreement to be in the Fourth Judicial District, Ada County, State of Idaho.

**ARTICLE XXIV.  
SUCCESSORS AND ASSIGNS**

Each party binds itself, its successors, assigns, executors, administrators, or other representatives to the other party hereto and to successors, assigns, executors, administrators, or other representatives of such other party in connection with all terms and conditions of the Construction Contract. The Contractor shall not assign the Construction Contract without prior written consent of the Owner.

**ARTICLE XXV.  
SEVERABILITY**

In the event any provision or section of this Agreement conflicts with applicable law, or is otherwise held to be unenforceable, the remaining provisions shall nevertheless be enforceable and shall be carried into effect.

**ARTICLE XXVI.  
AMENDMENTS**

This Agreement may be modified or amended only by a writing duly executed by both parties.

**ARTICLE XXVII.  
AUTHORITY**

Each individual executing this Construction Contract on behalf of an entity represents and warrants that he or she is duly authorized to execute and deliver this Construction Contract on behalf of said entity in accordance with duly adopted organizational documents or contracts and, if appropriate, a resolution of the entity, and that this Construction Contract is binding upon said entity in accordance with its terms.

## **EXHIBIT A**

### **ESCROWED BID DOCUMENTS**

#### **1. Scope**

The Contractor shall submit, within the specified time after receipt of bids, one copy of all documentary information generated in preparation of bid prices for this project (the “Escrowed Bid Documents”). The Escrowed Bid Documents will be held in escrow for the duration of the Project.

The Contractor acknowledges, as a condition of award of the Construction Contract, that the Escrowed Bid Documents constitute all of the information used in preparation of the bid, and that no other bid preparation information shall be considered in resolving disputes.

Nothing in the Escrowed Bid Documents shall change or modify the terms or conditions of the Contract Documents.

#### **2. Ownership**

The Escrowed Bid Documents are, and shall always remain, the property of the Contractor, subject only to joint review by the Owner and the Contractor, as provided herein.

The Owner stipulates and expressly acknowledges that the Escrowed Bid Documents, as defined herein, constitute trade secrets. This acknowledgment is based on the Owner’s express understanding that the information contained in the Escrowed Bid Documents is not known outside the Contractor’s business, is known only to a limited extent and only by a limited number of employees of the Contractor, is safeguarded while in Contractor’s possession, is extremely valuable to Contractor and could be extremely valuable to Contractor’s competitors by virtue of it reflecting Contractor’s contemplated techniques of construction. Owner acknowledges that the Contractor expended substantial sums of money in developing the information included in the Escrowed Bid Documents and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. Owner further acknowledges that the Escrowed Bid Documents and the information contained therein are made available to Owner only because such action is an express prerequisite to award of the Construction Contract. Owner acknowledges that the Escrowed Bid Documents include a compilation of information used in the Contractor’s business, intended to give the Contractor an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation. Owner agrees to safeguard the Escrowed Bid Documents, and all information contained therein, against disclosure to the fullest extent permitted by law, except in case of litigation related to the Project.

#### **3. Purpose**

Escrowed Bid Documents will be used to assist in the negotiation of price adjustments and change orders and in the settlement of disputes, claims and other controversies. They will not be

used for pre-award evaluation of the Contractor's anticipated methods of construction or to assess the Contractor's qualifications for performing the work.

#### **4. Format and Content**

The successful Contractor may submit Escrowed Bid Documents in its usual cost estimating format. It is not the intention of this provision to cause the Contractor extra work during the preparation of the proposal, but to ensure that the Escrowed Bid Documents will be adequate to enable complete understanding and proper interpretation for their intended use. The Escrowed Bid Documents shall be in English.

It is, however, required that the Escrowed Bid Documents clearly itemize the estimated costs of performing the work of each bid item contained in the bid schedule. Bid items should be separated into sub-items as required to present a complete and detailed cost estimate and allow a detailed cost review. The Escrowed Bid Documents shall include all quantity takeoffs, crew, equipment, calculations of rates of production and progress, copies of quotations from subcontractors and suppliers, and memoranda, narratives, consultant's reports, add/deduct sheets, and all other information used by the Contractor to arrive at the prices contained in the bid proposal. Estimated costs should be broken down into the Contractor's usual estimate categories such as direct labor, repair labor, equipment operation, equipment ownership, expendable materials, permanent materials, and subcontract costs as appropriate. Plant and equipment and indirect costs should be detailed in the Contractor's usual format. The Contractor's allocation of plant and equipment, indirect costs, contingencies, markup and other items to each bid item shall be included. All costs shall be identified. For bid items amounting to less than \$10,000, estimated unit costs are acceptable without a detailed cost estimate, providing that labor, equipment, materials, and subcontracts, as applicable, are included and provided that indirect costs, contingencies, and markup, as applicable, are allocated.

Bid documents provided by the Owner should not be included in the Escrowed Bid Documents unless needed to comply with the requirements of this contract provision.

#### **5. Submittal**

One copy of the Escrowed Bid Documents shall be submitted by the successful Contractor in a sealed container within seventy-two (72) hours after the time of the notice of award. The container shall be clearly marked on the outside with the Contractor's name, date of submittal, project names and the words "Escrowed Bid Documents."

The Escrowed Bid Documents shall be accompanied with the bid Documentation Certification, signed by an individual authorized by the Contractor to execute the bidding proposal, stating that the material in the escrow documentation constitutes all the documentary information used in preparation of the bid and that he or she has personally examined the contents of the Escrowed Bid Documents container and has found that the documents in the container are complete.

Prior to execution of the Construction Contract, Escrowed Bid Documents of the Contractor will be examined, organized and inventoried by representatives of the Owner, together with members of the Contractor's staff who are knowledgeable in how the bid was prepared.

This examination is to insure that the Escrowed Bid Documents are authentic, legible and complete. It will not include review of, and will not constitute approval of, proposed construction methods, estimating assumptions, or interpretations of Contract Documents. Examination will not alter any condition(s) or term(s) of the Contract Documents.

If all the documentation required in Section 4, "Format and Content" has not been included in the original submittal, additional documentation shall be submitted, at the Owner's discretion, prior to execution of the Construction Contract. The detailed breakdown of estimated costs shall be reconciled and revised, if appropriate, by agreement between the Contractor and the Owner before executing the Construction Contract.

Timely submission of complete Escrowed Bid Documents is an essential element of the Contractor's responsibility and a prerequisite to Construction Contract execution. Failure to provide the necessary Escrowed Bid Documents will be sufficient cause for the Owner to reject the bid.

If the Contractor's proposal is based on subcontracting any part of the work, each subcontractor, whose total subcontracting prices exceeds five percent of the total contract price proposed by the Contractor, shall provide separate Escrowed Bid Documents to be included with those of the Contractor. These documents will be opened and examined in the same manner and at the same time as the examination described above for the apparent successful Contractor.

If the Contractor wishes to subcontract any portion of the work after the award, the Owner retains the right to require the Contractor to submit Escrowed Bid Documents and other applicable quotation documents from the subcontractor before the subcontract is approved.

## **6. Storage**

The Escrowed Bid Documents will be placed in escrow, for the duration of the Project, in a mutually agreeable institution. The cost of storage will be paid by the Owner.

## **7. Examination**

The Escrowed Bid Documents shall be examined by both the Owner and the Contractor, at any time deemed necessary by either the Owner or the Contractor, to assist in the negotiation of price adjustments and change orders, or the settlement of disputes.

Examination of the Escrowed Bid Documents is subject to the following conditions:

- a. As trade secrets, the Escrowed Bid Documents are proprietary and confidential as described in Section 2.

- b. The Owner and the Contractor shall each designate, in writing to the other party and a minimum of ten days after execution of this contract, representatives who are authorized to examine the Escrowed Bid Documents. No other person shall have access to the Escrowed Bid Documents.
- c. Access to the Escrowed Bid Documents will take place only in the presence of duly designated representatives of both the Owner and the Contractor.

## **8. Final Disposition**

The Escrowed Bid Documents will be returned to the Contractor at such time as the Project has been completed and final settlement has been achieved.