

06-1536-CD  
Leonard Fiore Inc vs West Branch Area

2006-1536-CD  
Leonard S Fiore vs West Branch Area SD

LEONARD S. FIORE, INC.,  
Plaintiff:

vs.

WEST BRANCH AREA SCHOOL  
DISTRICT  
Defendant

: IN THE COURT OF COMMON PLEAS  
: CLEARFIELD COUNTY,  
: PENNSYLVANIA  
:  
: 2006 GN 06-1536-CD  
:  
: Civil Action - Law  
:  
: Complaint

### COMPLAINT

Counsel of Record for these  
Parties

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*10:50 AM* *085.00*  
SEP 22 2006 *cc Shff*

William A. Shaw  
Prothonotary/Clerk of Courts

LEONARD S. FIORE, INC.,  
Plaintiff:

VS.

WEST BRANCH AREA SCHOOL  
DISTRICT

Defendant

: IN THE COURT OF COMMON PLEAS  
: CLEARFIELD COUNTY,  
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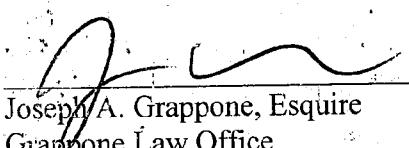
: Civil Action - Law

### NOTICE TO PLEAD

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this New Matter is served by entering a written appearance personally or by attorney and filing in writing with the Court your defense or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the New Matter or for any other claims or relief requested by the Plaintiffs. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH TO FIND OUT WHERE YOU CAN GET LEGAL HELP.**

MidPenn Legal Services  
211 1/2 E. Locust Street  
Clearfield, PA 16830  
1-800-3269177 or 765-9646

  
Joseph A. Grappone, Esquire  
Grappone Law Office  
Attorney for Defendants  
411 A Logan Blvd., Lakemont  
Altoona, PA 16602

LEONARD S. FIORE, INC.,  
Plaintiff:

: IN THE COURT OF COMMON PLEAS  
: CLEARFIELD COUNTY,  
: PENNSYLVANIA

vs.

WEST BRANCH AREA SCHOOL  
DISTRICT

Defendant

: 2006 GN \_\_\_\_\_

: Civil Action - Law

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:

**COMPLAINT**

AND NOW, comes the Plaintiff, LEONARD S. FIORE, INC., who by and through its attorney, Grappone Law Offices, files this Complaint and in support thereof avers as follows:

1. The Plaintiff is LEONARD S. FIORE, INC., a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business at 5506 Sixth Avenue, Rear, Altoona, Pennsylvania.
2. Defendant is the WEST BRANCH AREA SCHOOL DISTRICT, operating a public school with an address of 356 Allport Cutoff, R.R. #2, Box 194, Morrisdale, PA 16858-9312.
3. Defendant is the owner of a junior/senior high school building located at the same address.
4. On or about December 13, 2003, Defendant Owner contracted with Plaintiff (hereinafter the "Contract"), as the General Contractor, for a 60,000 square foot addition to the Junior/Senior High School, as well as additional renovation of the existing structure, hereinafter the "Project". A true and correct copy of the Contract, along with General and Supplementary Conditions, collectively attached hereto and marked as Exhibit "A" and made a part hereof.
5. Pursuant to the Contract, Plaintiff performed the construction work on the junior/senior high school building achieving substantial completion on or before May 10, 2005.
6. Article 5 of the Contract requires that Plaintiff submit applications for progress payments, which applications need to be certified for payment by the Construction Manager and Architect.
7. Upon the applications for progress payments being certified, Articles 5.1 and 5.3 require that the Owner shall make progress payments no later than the thirtieth day of

the month following submission for certification, as long as Plaintiff submitted the payment prior to the twenty-fifth of the preceding month.

8. Should the Defendant Owner's Construction Manager and/or Architect decide to withhold certification of an Application for Payment, the conditions of the Contract mandate that the reasons for withholding certification be provided to the Plaintiff. See Sections 9.4.2 and 9.5 et. seq. of the General Conditions of Construction Contract , part and parcel, of Exhibit "A."
9. The Defendant Owner's Construction Manager and/or Architect may also withhold a portion of the payment requested in the application in which case, the Plaintiff is entitled to a receive the partial payment and written explanation for the portion withheld. See Sections 9.4.2 and 9.5 et. seq. of the General Conditions of Construction Contract , part and parcel, of Exhibit "A."
10. Payments due and unpaid under the Contract shall bear interest from the date payment is due at the legal rate prevailing where the Project was located pursuant to Article 7.
11. Applications for Payment 20, 21, 22, and 23 have been properly submitted to the Owner, yet remain outstanding and unpaid by Defendant Owner.
12. Application 20 in the amount of \$93,941.65 was submitted on September 26, 2005. It was certified for payment by the Construction Manager on October 27, 2005, and then, the Architect on January 13, 2006. A true and correct copy of the Application and Certification for Payment attached hereto and marked as Exhibit "B" and made a part hereof.
13. Despite, the certification of Application 20, Defendant owner has failed to make payment in breach of the Contract.
14. Plaintiff believes and therefore avers that Application 21 in the amount of \$7,000.00 was submitted for approval and certification on October 24, 2005. On November 29, 2005, Application 21 was certified by the Construction Manager, as evidenced by Exhibit "C", attached hereto and incorporated herein.
15. Application 22 in the amount of \$2,608.00 was also submitted by Plaintiff for approval and certification on November 23, 2005. On February 16, 2006, Application 22 was certified by the Construction Manager, as evidenced by Exhibit "D", attached hereto and incorporated herein.
16. Likewise, Application 23 in the amount of \$7,000.00 was submitted by Plaintiff for approval and certification on February 22, 2006. On April 17, 2006, Application 23 was certified by the Construction Manager, as evidenced by Exhibit "E", attached hereto and incorporated herein.

17. Despite, submission by Plaintiff prior to the twenty-fifth day of a month for each of these applications, no payments has been tendered by the Owner to the Contractor by the thirtieth day of the following month.
18. Plaintiff has tried unsuccessfully on several occasions to determine the payment status of Application 20 in the amount of \$93, 941.65.
19. Likewise, Plaintiff has received no explanation on the withholding certification and/or payment status of; Application 21 in the amount of \$7,000.00, Application 22 in the amount of \$2,608.00 and Application 23 in the amount of 12, 000.00.
20. Defendant Owner has not responded to these inquiries and thus, refuses to pay the balance due under the Contract.
21. To date, Defendant Owner has made a mere \$10,000.00 payment toward the outstanding balances.
22. In addition to the failure to pay for invoices submitted, undisputed change requests totaling \$7,759.00 are also owed by Defendant Owner to Plaintiff.
23. Accordingly, Defendant Owner owes Plaintiff the sum of \$113,308.65, with interest, in accordance with the Contract between the parties.
24. Furthermore, pursuant to the Contractor and Subcontráctor Payment Act ( the "Act"), 73 P.S., Section 501 et seq., Plaintiff is entitled to interest at the rate of 1% per month, penalties at the rate of 1% per month and attorney's fees and costs and expenses as a result of the Defendant Owner's failure to pay Plaintiff in accordance with the Contract.

**COUNT ONE  
BREACH OF CONTRACT**

25. Plaintiff incorporates herein by reference hereto the foregoing averments in Paragraph 1 through 24 hereof, inclusive, as though fully set forth herein.
26. Plaintiff has fully and timely performed and its work has complied with all the Defendant's specifications as to Application 20.
27. Likewise, Plaintiff has performed the work set forth in Applications 21 through 23, as well as the change order work, yet, Defendant Owner and its representatives have failed to timely act upon those applications in contravention to the terms of the Contract.
28. Defendant Owner's failure and/or refusal to pay Plaintiff the balance due and owing for the work completed on the above referenced project is without basis in law and/or fact.

29. Defendant Owner breached the Contract between the parties, whereby Defendant Owner agreed to pay Plaintiff in full for the work which Defendant Owner requested Plaintiff to perform on the Project and to comply with the process of tendering payments.
30. Defendant Owner owes Plaintiff an outstanding contract balance in the amount of \$113,308.65, plus interest, fees, and costs.

WHEREFORE, the Plaintiff respectfully requests this Honorable Court enter judgment for Plaintiff and against Defendant in the amount of \$113,308.65, plus interest at six percent until judgment is satisfied.

**COUNT TWO  
UNJUST ENRICHMENT**

Plaintiff incorporates herein by reference hereto the foregoing averments in Paragraphs 1 through 30 hereof, inclusive, as though more fully set forth herein.

31. Plaintiff provided materials and services in the performance of construction work on the Project, including adding on to and remodeling the existing Project structure, for the benefit of Defendant Owner.
32. Defendant Owner induced Plaintiff to provide such materials and perform such services by expressly promising to compensate Plaintiff.
33. Nevertheless, and despite Plaintiff's timely and competent performance, Defendant Owner has failed and refused to pay in the full the balances due.
34. For all of the reasons above, Defendant has been unjustly enriched in the amount of \$113,308.65.

WHEREFORE, the Plaintiff prays judgment in its favor and against the Defendant Owner in the sum of \$113,308.65, together with costs, interest, penalties, and attorney's fees from the date said sums were due.

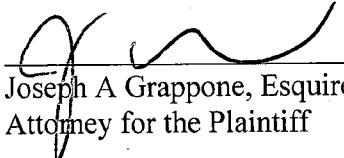
**COUNT THREE  
CONTRACTOR AND SUBCONTRACTOR PAYMENT ACT  
(THE "ACT") 73 P.S. Section 501 ET. SEQ.**

The Plaintiff incorporates by reference the foregoing averments in Paragraphs 1 through 34 hereof, inclusive, as though fully set forth herein.

35. The Act provides that performance by Contractor in accordance with the provisions of the Contract entitles the Contractor to payment from the party with whom it has contracted. 73 Pa.C.S. Section 504.
36. Under the Act, the Owner must pay the contractor according to the provisions of the Act for any item which appears on the invoice and has been satisfactorily completed. 73 Pa.C. S. Section 506.
37. According to the Act, the Owner is obligated to pay interest at the rate of 1% per month on the outstanding balance beginning seven days after the payment was due and the Owner is liable for reasonable attorney's fees upon Plaintiff's success in litigation. 73 Pa.C.S. Section 505 (d) and Section 512, respectively.
38. If the Owner withholds payment alleging a deficiency, the Owner must notify the Contractor of the alleged deficiency within seven days of the date that the invoice is received. 73 Pa. C. S. Section 506 (b).
39. In the instant matter, despite the approval and certification of Plaintiff' Application 20 by the Defendant Owner's Construction Manager and Architect, Defendant Owner has failed to render payment in the amount of \$93, 941.65.
40. Additionally, the Defendant Owner has failed to comply with the notice requirements of the Act, as set forth in Section 506 (b), relative to Application 20 and any good faith claim for withholding payment.
41. Under the Act, the Defendant Owner is liable to the Plaintiff for 1% penalty per month on the outstanding balance due for the wrongfully withholding payment for the work by the Plaintiff which the Defendant Owner has accepted by virtue of the certification process.
42. Furthermore, the Defendant Owner is liable for the Plaintiff's reasonable attorney's fees if Plaintiff is successful in this litigation. 73 Pa. C.S. Section 512.
43. With regard to the work represented by Application 20, the Plaintiff performed fully, timely, and as per all specifications and Plaintiff believes and therefore avers that all work was accepted by Defendant Owner. Thus, all conditions precedent to Plaintiff's entitlement to payment under Contract and under the Act has been fulfilled.
44. The Defendant Owner's failure and refusal to pay the Plaintiff the balance due on Application 20 in the amount of \$93,941.65 entitles the Plaintiff to seek interest, penalties, attorney's fees and costs as permitted under the Act.

WHEREFORE, the Plaintiff demands judgment in its favor and against the Defendant Owner, in the sum of \$93,941.65, together with interest, penalties, and attorney's fees and costs from the date said sums were due and owing under the Contract.

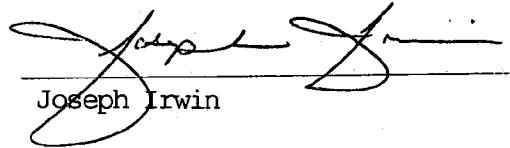
Respectfully submitted,



Joseph A Grappone, Esquire  
Attorney for the Plaintiff

## VERIFICATION

I, Joseph Irwin, Vice President of Leonard S. Fiore, Inc., verify the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904, relating to unsworn falsification to authorities.



Joseph Irwin

Dated: September 21, 2006

**EXHIBIT "A"**



# AIA® Document A101/CMa™ – 1992

## Standard Form of Agreement Between Owner and Contractor where the basis of payment is a STIPULATED SUM

### AGREEMENT

made as of the Thirtieth day of December in the year of Two Thousand Three  
(In words, indicate day, month and year)

### BETWEEN the Owner:

(Name and address)

West Branch Area School District  
356 Allport Cutoff  
R.R. #2, Box 194  
Morrisdale, PA 16858-9312

and the Contractor:  
(Name and address)

Leonard S. Fiore, Inc.  
5506 Sixth Avenue, Rear  
Altoona, PA 16602

This document has important legal consequences.

Consultation with an attorney is encouraged with respect to its completion or modification.

The 1992 Edition of AIA Document A201/CMa, General Conditions of the Contract for Construction, Construction Manager-Adviser Edition, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

For the following Project:  
(Include detailed description of Project, location, address and scope.)

West Branch Area School District  
356 Allport Cutoff  
Morrisdale, PA 16858  
Additions and Alterations to the Junior/Senior High School

The Construction Manager is:  
(Name and address)

The Quandel Group, Inc.  
4755 Linglestown Road, Suite 201  
Harrisburg, PA 17112

The Architect is:  
(Name and address)

Roth Marz Partnership, PC  
3505 Chapin Street  
Erie, PA 16508

The Owner and Contractor agree as set forth below.

## ARTICLE 1 THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 9.

## ARTICLE 2 THE WORK OF THIS CONTRACT

The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

### Contract No. 1 – General Trades

## ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 3.1 The date of commencement is the date from which the Contract Time of Section 3.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

*(Insert the date of commencement, if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)*

### The commencement date will be fixed in a notice to proceed.

Unless the date of commencement is established by a notice to proceed issued by the Owner, the Contractor shall notify the Owner, through the Construction Manager, in writing not less than five days before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 3.2 The Contractor shall achieve Substantial Completion of the entire Work not later than four hundred fifty (450) days after the Date of Commencement.

*(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)*

### Portion of Work

### Substantial Completion date

, subject to adjustments of this Contract Time as provided in the Contract Documents.

*(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)*

The Contractor and the Contractor's Surety shall be liable for and shall pay the Owner liquidated damages in accordance with provisions of the General Conditions and as modified by the Supplementary Conditions.

## ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of Three Million Seven Hundred Nine Thousand Eight Hundred Twenty-two Dollars And Zero Cents (\$ 3,709,822.00), subject to additions and deductions as provided in the Contract Documents.

§ 4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:

*(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)*

### Alternate Numbers 1, 6a, 9, 10, 12, 13

§ 4.3 Unit prices, if any, are as follows:

Description	Units	Price (\$ 0.00)
-------------	-------	-----------------

#### ARTICLE 5 PROGRESS PAYMENTS

§ 5.1 Based upon Applications for Payment submitted by the Contractor to the Construction Manager, and upon Project Applications and Certificates for Payment issued by the Construction Manager and Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

§ 5.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

§ 5.3 Provided an Application for Payment is submitted to the Construction Manager not later than the twenty-fifth day of a month, the Owner shall make payment to the Contractor not later than the thirtieth day of the following month. If an Application for Payment is received by the Construction Manager after the application date fixed above, payment shall be made by the Owner not later than the next billing cycle — ( ) days after the Construction Manager receives the Application for Payment.

§ 5.4 Each Application for Payment shall be based upon the Schedule of Values submitted by the Contractor in accordance with the Contract Documents. The Schedule of Values shall allocate the entire Contract Sum among the various portions of the Work and be prepared in such form and supported by such data to substantiate its accuracy as the Construction Manager or Architect may require. This schedule, unless objected to by the Construction Manager or Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 5.5 Applications for Payment shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

§ 5.6 Subject to the provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

§ 5.6.1 Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the total Contract Sum allocated to that portion of the Work in the Schedule of Values, less retainage of ten percent ( 10.00% ). Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.7 of the General Conditions;

§ 5.6.2 Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction (or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing), less retainage of ten percent ( 10.00% );

§ 5.6.3 Subtract the aggregate of previous payments made by the Owner; and

§ 5.6.4 Subtract amounts, if any, for which the Construction Manager or Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of the General Conditions.

§ 5.7 The progress payment amount determined in accordance with Section 5.6 shall be further modified under the following circumstances:

§ 5.7.1 Add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to ( ) of the Contract Sum, less such amounts as the Construction Manager recommends and the Architect determines for incomplete Work and unsettled claims; and

**§ 5.7.2** Add, if final completion of the Work is thereafter materially delayed through no fault of the Contractor, any additional amounts payable in accordance with Section 9.10.3 of the General Conditions.

**§ 5.8 Reduction or limitation of retainage, if any, shall be as follows:**

*(If it is intended, prior to Substantial Completion of the entire Work, to reduce or limit the retainage resulting from the percentages inserted in Sections 5.6.1 and 5.6.2 above, and this is not explained elsewhere in the Contract Documents, insert here provisions for such reduction or limitation.)*

Owner's right to hold retainage is per the requirements of the General Conditions and Supplementary General Conditions.

## **ARTICLE 6 FINAL PAYMENT**

Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when (1) the Contract has been fully performed by the Contractor except for the Contractor's responsibility to correct nonconforming Work as provided in Section 12.2.2 of the General Conditions and to satisfy other requirements, if any, which necessarily survive final payment; and (2) a final Project Certificate for Payment has been issued by the Construction Manager and Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the final Project Certificate for Payment, or as follows:

## **ARTICLE 7 MISCELLANEOUS PROVISIONS**

**§ 7.1** Where reference is made in this Agreement to a provision of the General Conditions or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

**§ 7.2** Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon, if any.)*

(      ) per annum

*(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)*

**§ 7.3** Temporary facilities and services:

*(Here insert temporary facilities and services which are different from or in addition to those included elsewhere in the Contract Documents.)*

**§ 7.4** Other Provisions:

*(Here list any special provisions affecting the Contract.)*

## **ARTICLE 8 TERMINATION OR SUSPENSION**

**§ 8.1** The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of the General Conditions.

**§ 8.2** The Work may be suspended by the Owner as provided in Article 14 of the General Conditions.

## ARTICLE 9 ENUMERATION OF CONTRACT DOCUMENTS

§ 9.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

§ 9.1.1 The Agreement is this executed Standard Form of Agreement Between Owner and Contractor, AIA Document A101/CMA, 1992 Construction Manager-Adviser Edition.

§ 9.1.2 The General Conditions are the General Conditions of the Contract for Construction, AIA Document A201/CMA, 1992 Construction Manager-Adviser Edition.

§ 9.1.3 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated October 22, 2003, and are as follows:

Document	Title	Pages
<u>The Supplementary and other conditions of the Contract are enumerated in the project manual and include modifications contained in the Addenda listed under Subparagraph 9.1.6 of this Agreement</u>		

§ 9.1.4 The Specifications are those contained in the Project Manual dated as in Section 9.1.3, and are as follows:  
(Either list the Specifications here or refer to an exhibit attached to this Agreement.)

Section	Title	Pages
<u>The Specifications are enumerated in the Table of Contents of the Project Manual and include modifications contained in the Addenda List under Subparagraph 9.1.6 of this Agreement</u>		

§ 9.1.5 The Drawings are as follows, and are dated October 22, 2003 unless a different date is shown below:  
(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

Number	Title	Date
<u>The Drawings are enumerated in the Table of Contents of the Project Manual and include modifications contained in the Addenda listed under Subparagraph 9.1.6 of this Agreement.</u>		

§ 9.1.6 The Addenda, if any, are as follows:

Number	Date	Pages
<u>Addendum No. 1</u>	<u>11/10/2003</u>	<u>35</u>

<u>Addendum No. 2</u>	<u>11/12/2003</u>	<u>19</u>
<u>Addendum No. 3</u>	<u>11/19/2003</u>	<u>89</u>
<u>Addendum No. 4</u>	<u>11/26/2003</u>	<u>6</u>
<u>Addendum No. 5</u>	<u>12/5/2003</u>	<u>8</u>
<u>Addendum No. 6</u>	<u>12/11/2003</u>	<u>34</u>

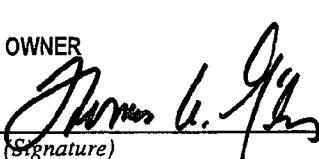
Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 9.

**§ 9.1.7 Other documents, if any, forming part of the Contract Documents are as follows:**

*(List here any additional documents which are intended to form part of the Contract Documents. The General Conditions provide that bidding requirements such as advertisement or invitation to bid, Instructions to Bidders, sample forms and the Contractor's bid are not part of the Contract Documents unless enumerated in this Agreement. They should be listed here only if intended to be part of the Contract Documents.)*

This Agreement is entered into as of the day and year first written above and is executed in at least four original copies of which one is to be delivered to the Contractor, one each to the Construction Manager and Architect for use in the administration of the Contract, and the remainder to the Owner.

OWNER



(Signature)

Mr. Thomas A. Giles, Superintendent

(Printed name and title)

CONTRACTOR



(Signature)

Richard F. Fiore, Sr. President

(Printed name and title)

# General Conditions of the Contract for Construction

Where the Construction Manager is NOT a Constructor

## 1992 Construction Manager-Adviser Edition

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS MODIFICATION. AUTHENTICATION OF THIS ELECTRONICALLY DRAFTED AIA DOCUMENT MAY BE MADE BY USING AIA DOCUMENT D401.

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## GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

### ARTICLE 1 GENERAL PROVISIONS

#### 1.1 BASIC DEFINITIONS

##### 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a

Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of addenda relating to bidding requirements).

#### 1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Construction Manager and Contractor, (3) between the Architect and Construction Manager, (4) between the Owner and a Subcontractor or Sub-subcontractor or (5) between any persons or entities other than the Owner and Contractor. The Construction Manager and Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of their duties.

#### 1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

#### 1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by other Contractors and by the Owner's own forces including persons or entities under separate contracts not administered by the Construction Manager.

#### 1.1.5 THE DRAWINGS

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

#### 1.1.6 THE SPECIFICATIONS

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

#### 1.1.7 THE PROJECT MANUAL

The Project Manual is the volume usually assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

### 1.2 EXECUTION, CORRELATION AND INTENT

1.2.1 The Contract Documents shall be signed by the Owner and Contractor as provided in the Agreement. If either the Owner or Contractor or both do not sign all the Contract Documents, the Architect shall identify such unsigned Documents upon request.

1.2.2 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

1.2.3 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

1.2.4 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.5 Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

### 1.3 OWNERSHIP AND USE OF ARCHITECT'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS

1.3.1 The Drawings, Specifications and other documents prepared by the Architect are instruments of the Architect's service through which the Work to be executed by the Contractor is described. The Contractor may retain one contract record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect, and unless otherwise indicated the Architect shall be deemed the author of them and will retain all common law, statutory and other reserved rights, in addition to the copyright. All copies of them, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or

material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner and Architect. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are granted a limited license to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this license shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's copyright or other reserved rights.

## 1.4 CAPITALIZATION

1.4.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to Paragraphs, Subparagraphs and Clauses in the document or (3) the titles of other documents published by the American Institute of Architects.

## 1.5 INTERPRETATION

1.5.1 In the interest of brevity, the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

# ARTICLE 2 OWNER

## 2.1 DEFINITION

2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Owner" means the Owner or the Owner's authorized representative.

2.1.2 The Owner upon reasonable written request shall furnish to the Contractor in writing information which is necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein at the time of execution of the Agreement and, within five days after any change, information of such change in title, recorded or unrecorded.

## 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

2.2.1 The Owner shall, at the request of the Contractor, prior to execution of the Agreement and promptly from time to time thereafter, furnish to the Contractor reasonable evidence

that financial arrangements have been made to fulfill the Owner's obligations under the Contract. [Note: Unless such reasonable evidence were furnished on request prior to the execution of the Agreement, the prospective contractor would not be required to execute the Agreement or to commence the Work.]

2.2.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site.

2.2.3 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities. Unless otherwise provided under the Contract Documents, the Owner, through the Construction Manager, shall secure and pay for the building permit.

2.2.4 Information or services under the Owner's control shall be furnished by the Owner with reasonable promptness to avoid delay in orderly progress of the Work.

2.2.5 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work.

2.2.6 The Owner shall forward all communications to the Contractor through the Construction Manager and shall contemporaneously provide the same communications to the Architect.

2.2.7 The foregoing are in addition to other duties and responsibilities of the Owner enumerated herein and especially those in respect to Article 6 (Construction by Owner or by Other Contractors), Article 9 (Payments and Completion) and Article 11 (Insurance and Bonds).

## 2.3 OWNER'S RIGHT TO STOP THE WORK

2.3.1 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or persistently fails to carry out Work in accordance with the Contract Documents, the Owner, by written order signed personally or by an agent specifically so empowered by the Owner in writing, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

## 2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails

within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a second even-day period. If the Contractor within such second seven-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the cost of correcting such deficiencies, including compensation for the Construction Manager's and Architect's and their respective consultants' additional services and expenses made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect, after consultation with the Construction Manager. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

### ARTICLE 3 CONTRACTOR

#### 3.1 DEFINITION

**3.1.1** The Contractor is the person or entity identified as such in the Agreement and is referred to throughout this Agreement as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

**3.1.2** The plural term "Contractors" refers to persons or entities who perform construction under Conditions of the Contract that are administered by the Construction Manager, and that are identical or substantially similar to these Conditions.

#### 3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

**3.2.1** The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the Owner pursuant to Subparagraph 2.2.2 and shall at once report to the Construction Manager and Architect errors, inconsistencies or omissions discovered. The Contractor shall not be liable to the Owner, Construction Manager or Architect for damage resulting from errors, inconsistencies or omissions in the Contract Documents unless the Contractor recognized such error, inconsistency or omission and knowingly failed to report it to the Construction Manager and Architect. If the Contractor performs any construction activity knowing it involves a recognized error, inconsistency or omission in the Contract Documents without such notice to the Construction Manager and Architect, the Contractor shall assume appropriate responsibility for such performance and shall bear an appropriate amount of the attributable costs for correction.

**3.2.2** 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 activities. Errors, inconsistencies or omissions discovered shall be reported to the Construction Manager and Architect at once.

**3.2.3** The Contractor shall perform the Work in accordance with the Contract Documents and submittals approved pursuant to Paragraph 3.12.

#### 3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

**3.3.1** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under this Contract, subject to overall coordination of the Construction Manager as provided in Subparagraphs 4.6.3 and 4.6.4.

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

**3.3.3** The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Construction Manager or Architect in their administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

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

#### 3.4 LABOR AND MATERIALS

**3.4.1** Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

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

#### 3.5 WARRANTY

3.5.1 The Contractor warrants to the Owner, Construction Manager and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Construction Manager or Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

### 3.6 TAXES

3.6.1 The Contractor shall pay sales, consumer, use and similar taxes for the Work or portions thereof provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

### 3.7 PERMITS, FEES AND NOTICES

3.7.1 Unless otherwise provided in the Contract Documents, the Owner shall secure and pay for the building permit and the Contractor shall secure and pay for all other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required when bids are received or negotiations concluded.

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

3.7.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations. However, if the Contractor observes that portions of the Contract Documents are at variance therewith, the Contractor shall promptly notify the Construction Manager, Architect and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

3.7.4 If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Construction Manager, Architect and Owner, the Contractor shall assume full responsibility for such Work and shall bear the attributable costs.

### 3.8 ALLOWANCES

3.8.1 The Contractor shall include in the Contract Sum all

allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities against which the Contractor makes reasonable objection.

3.8.2 Unless otherwise provided in the Contract Documents:

- .1 materials and equipment under an allowance shall be selected promptly by the Owner to avoid delay in the Work;
- .2 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .3 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum and not in the allowances;
- .4 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Clause 3.8.2.2 and (2) changes in Contractor's costs under Clause 3.8.2.3.

### 3.9 SUPERINTENDENT

3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

### 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULE

3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information and the Construction Manager's approval a Contractor's Construction Schedule for the Work. Such schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project construction schedule to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

3.10.2 The Contractor shall cooperate with the Construction Manager in scheduling and performing the Contractor's Work to avoid conflict, delay in or interference with the Work of

other Contractors or the construction or operations of the Owner's own forces.

**3.10.3** The Contractor shall prepare and keep current, for the Construction Manager's and Architect's approval, a schedule of submittals which is coordinated with the Contractor's Construction Schedule and allows the Construction Manager and Architect reasonable time to review submittals.

**3.10.4** The Contractor shall conform to the most recent schedules.

### **3.11 DOCUMENTS AND SAMPLES AT THE SITE**

**3.11.1** The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, addenda, Change Orders and other Modifications, in good order and marked currently to record changes and selections made during construction, and in addition approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Construction Manager and Architect and shall be delivered to the Construction Manager for submittal to the Owner upon completion of the Work.

### **3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES**

**3.12.1** Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

**3.12.2** Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

**3.12.3** Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

**3.12.4** Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required the way the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Subparagraph 4.6.12.

**3.12.5** The Contractor shall review, approve and submit to the Construction Manager, in accordance with the schedule and sequence approved by the Construction Manager, Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents. The Contractor shall cooperate with the Construction Manager in the coordination of the Contractor's Shop Drawings, Product Data, Samples and similar submittals with related documents submitted by other Contractors. Submittals made by the Contractor which are not

required by the Contract Documents may be returned without action.

**3.12.6** The Contractor shall perform no portion of the Work requiring submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Construction Manager and Architect. Such Work shall be in accordance with approved submittals.

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

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

**3.12.9** The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Construction Manager and Architect on previous submittals.

**3.12.10** Informational submittals upon which the Construction Manager and Architect are not expected to take responsive action may be so identified in the Contract Documents.

**3.12.11** When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the Construction Manager and Architect shall be entitled to rely upon the accuracy and completeness of such calculations and certifications.

### **3.13 USE OF SITE**

**3.13.1** The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

**3.13.2** The Contractor shall coordinate the Contractor's operations with, and secure the approval of, the Construction Manager before using any portion of the site.

### **3.14 CUTTING AND PATCHING**

3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner's own forces or of other Contractors by cutting, patching, excavating or otherwise altering such construction. The Contractor shall not cut or otherwise alter such construction by other Contractors or by the Owner's own forces except with written consent of the Construction Manager, Owner and such other Contractors; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the other Contractors or the Owner the Contractor's consent to cutting or otherwise altering the Work.

### 13.5 CLEANING UP

13.5.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Construction Manager may do so with the Owner's approval and the cost thereof shall be charged to the Contractor.

### 13.16 ACCESS TO WORK

3.16.1 The Contractor shall provide the Owner, Construction Manager and Architect access to the Work in preparation and progress wherever located.

### 13.17 ROYALTIES AND PATENTS

3.17.1 The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of patent rights and shall hold the Owner, Construction Manager and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

### 13.18 INDEMNIFICATION

3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Construction Manager, Architect, Construction Manager's and Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from

performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

3.18.2 In claims against any person or entity indemnified under this Paragraph 3.18 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 Paragraph 3.18 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' compensation acts, disability benefit acts or other employee benefit acts.

3.18.3 The obligations of the Contractor under this Paragraph 3.18 shall not extend to the liability of the Construction Manager, Architect, their consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Construction Manager, Architect, their consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

## ARTICLE 4 ADMINISTRATION OF THE CONTRACT

### 4.1 ARCHITECT

4.1.1 The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

### 4.2 CONSTRUCTION MANAGER

4.2.1 The Construction Manager is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Construction Manager" means the Construction Manager or the Construction Manager's authorized representative.

4.3 Duties, responsibilities and limitations of authority of the Construction Manager and Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Construction

Manager, Architect and Contractor. Consent shall not be unreasonably withheld.

**4.4** In case of termination of employment of the Construction Manager or Architect, the Owner shall appoint a construction manager or architect against whom the Contractor makes no reasonable objection and whose status under the Contract Documents shall be that of the former construction manager or architect, respectively.

**4.5** Disputes arising under Paragraphs 4.3 and 4.4 shall be subject to arbitration.

#### **4.6 ADMINISTRATION OF THE CONTRACT**

**4.6.1** The Construction Manager and Architect will provide administration of the Contract as described in the Contract Documents, and will be the Owner's representatives (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 12.2. The Construction Manager and Architect will advise and consult with the Owner and will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with other provisions of the Contract.

**4.6.2** The Construction Manager will determine in general that the Work is being performed in accordance with the requirements of the Contract Documents, will keep the Owner informed of the progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work.

**4.6.3** The Construction Manager will provide for coordination of the activities of other Contractors and of the Owner's own forces with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other Contractors and the Construction Manager and Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall constitute the schedules to be used by the Contractor, other Contractors, the Construction Manager and the Owner until subsequently revised.

**4.6.4** The Construction Manager will schedule and coordinate the activities of the Contractors in accordance with the latest approved Project construction schedule.

**4.6.5** The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the

Work, and will endeavor to guard the Owner against defects and deficiencies in the Work.

**4.6.6** The Construction Manager, except to the extent required by Subparagraph 4.6.4, and Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraph 3.3, and neither will be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. Neither the Construction Manager nor the Architect will have control over or charge of or be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

**4.6.7 Communications Facilitating Contract Administration.** Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall communicate through the Construction Manager, and shall contemporaneously provide the same communications to the Architect. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with other Contractors shall be through the Construction Manager and shall be contemporaneously provided to the Architect.

**4.6.8** The Construction Manager will review and certify all Applications for Payment by the Contractor, including final payment. The Construction Manager will assemble each of the Contractor's Applications for Payment with similar Applications from other Contractors into a Project Application and Project Certificate for Payment. After reviewing and certifying the amounts due the Contractors, the Construction Manager will submit the Project Application and Project Certificate for Payment, along with the applicable Contractors' Applications and Certificates for Payment, to the Architect.

**4.6.9** Based on the Architect's observations and evaluations of Contractors' Applications for Payment, and the certifications of the Construction Manager, the Architect will review and certify the amounts due the Contractors and will issue a Project Certificate for Payment.

**4.6.10** The Architect will have authority to reject Work which does not conform to the Contract Documents, and to require additional inspection or testing, in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed, but will take such action only after notifying the Construction Manager. Subject to review by the Architect, the Construction Manager will have the authority to reject Work which does not conform to the Contract Documents. Whenever the Construction Manager considers it necessary or advisable for implementation of the intent of the Contract Documents, the Construction Manager will have authority to require additional inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed.

The foregoing authority of the Construction Manager will be subject to the provisions of Subparagraphs 4.6.18 through 4.6.20 inclusive, with respect to interpretations and decisions of the Architect. However, neither the Architect's nor the Construction Manager's authority to act under this Subparagraph 4.6.10 nor a decision made by either of them in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect or the Construction Manager to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons performing any of the Work.

**4.6.11** The Construction Manager will receive from the Contractor and review and approve all Shop Drawings, Product Data and Samples, coordinate them with information received from other Contractors, and transmit to the Architect those recommended for approval. The Construction Manager's actions will be taken with such reasonable promptness as to cause no delay in the Work of the Contractor or in the activities of other Contractors, the Owner, or the Architect.

**4.6.12** The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken with such reasonable promptness as to cause no delay in the Work of the Contractor or in the activities of the other Contractors, the Owner, or the Construction Manager, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

**4.6.13** The Construction Manager will prepare Change Orders and Construction Change Directives.

**4.6.14** Following consultation with the Construction Manager, the Architect will take appropriate action on Change Orders or Construction Change Directives in accordance with Article 7 and will have authority to order minor changes in the Work as provided in Paragraph 7.4.

**4.6.15** The Construction Manager will maintain at the site for the Owner one record copy of all Contracts, Drawings, Specifications, addenda, Change Orders and other Modifications, in good order and marked currently to record all changes and selections made during construction, and in addition approved Shop Drawings, Product Data, Samples and

similar required submittals. These will be available to the Architect and the Contractor, and will be delivered to the Owner upon completion of the Project.

**4.6.16** The Construction Manager will assist the Architect in conducting inspections to determine the dates of Substantial Completion and final completion, and will receive and forward to the Architect written warranties and related documents required by the Contract and assembled by the Contractor. The Construction Manager will forward to the Architect a final Project Application and Project Certificate for Payment upon compliance with the requirements of the Contract Documents.

**4.6.17** If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

**4.6.18** The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of the Construction Manager, Owner or Contractor. The Architect's response to such requests will be made with reasonable promptness and within any time limits agreed upon. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Paragraph 4.6, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations until 15 days after written request is made for them.

**4.6.19** Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

**4.6.20** The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

## 4.7 CLAIMS AND DISPUTES

**4.7.1 Definition.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

**4.7.2 Decision of Architect.** Claims, including those alleging an error or omission by the Construction Manager or Architect, shall be referred initially to the Architect for action as provided in Paragraph 4.8. A decision by the Architect, as

provided in Subparagraph 4.8.4, shall be required as a condition precedent to arbitration or litigation of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed. The decision by the Architect in response to a Claim shall not be a condition precedent to arbitration or litigation in the event (1) the position of Architect is vacant, (2) the Architect has not received evidence or has failed to render a decision within agreed time limits, (3) the Architect has failed to take action required under Subparagraph 4.8.4 within 30 days after the Claim is made, (4) 45 days have passed after the Claim has been referred to the Architect or (5) the Claim relates to a mechanic's lien.

**4.7.3 Time Limits on Claims.** Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. An additional Claim made after the initial Claim has been implemented by Change Order will not be considered unless submitted in a timely manner.

**4.7.4 Continuing Contract Performance.** Pending final resolution of a Claim including arbitration, unless otherwise agreed in writing, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

**4.7.5 Waiver of Claims; Final Payment.** The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

- .1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 failure of the Work to comply with the requirements of the Contract Documents; or
- .3 terms of special warranties required by the Contract Documents.

**4.7.6 Claims for Concealed or Unknown Conditions.** If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or

both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.8.

**4.7.7 Claims for Additional Cost.** If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.3. If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with the procedure established herein.

#### **4.7.8 Claims for Additional Time.**

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

**4.7.8.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time and could not have been reasonably anticipated, and that weather conditions had an adverse effect on the scheduled construction.

**4.7.9 Injury or Damage to Person or Property.** If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, of any of the other party's employees or agents, or of others for whose acts such party is legally liable, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after first observance. The notice shall provide sufficient detail to enable the other party to investigate the matter. If a Claim for additional cost or time related to this Claim is to be asserted, it shall be filed as provided in Subparagraphs 4.7.7 or 4.7.8.

### **4.8 RESOLUTION OF CLAIMS AND DISPUTES**

**4.8.1** The Architect will review Claims and take one or more of the following preliminary actions within ten days of receipt of a Claim: (1) request additional supporting data from the claimant, (2) submit a schedule to the parties indicating when the Architect expects to take action, (3) reject the Claim in

whole or in part, stating reasons for rejection, (4) recommend approval of the Claim by the other party or (5) suggest a compromise. The Architect may also, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim.

**4.8.2** If a Claim has been resolved, the Architect will prepare or obtain appropriate documentation.

**4.8.3** If a Claim has not been resolved, the party making the Claim shall, within ten days after the Architect's preliminary response, take one or more of the following actions: (1) submit additional supporting data requested by the Architect, (2) modify the initial Claim or (3) notify the Architect that the initial Claim stands.

**4.8.4** If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Architect, the Architect will notify the parties in writing that the Architect's decision will be made within seven days, which decision shall be final and binding on the parties but subject to arbitration. Upon expiration of such time period, the Architect will render to the parties the Architect's written decision relative to the Claim, including any change in the Contract Sum or Contract Time or both. If there is a surety and there appears to be a possibility of a Contractor's default, the Architect may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

## 4.9 ARBITRATION

**4.9.1 Controversies and Claims Subject to Arbitration.** Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, except controversies or Claims relating to aesthetic effect and except those waived as provided for in Subparagraph 4.7.5. Such controversies or Claims upon which the Architect has given notice and rendered a decision as provided in Subparagraph 4.8.4 shall be subject to arbitration upon written demand of either party. Arbitration may be commenced when 45 days have passed after a Claim has been referred to the Architect as provided in Paragraph 4.7 and no decision has been rendered.

**4.9.2 Rules and Notices for Arbitration.** Claims between the Owner and Contractor not resolved under Paragraph 4.8 shall, if subject to arbitration under Subparagraph 4.9.1, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, unless the parties mutually agree otherwise. Notice of demand for arbitration shall be filed in writing with the other party to the Agreement between the Owner and Contractor and with the American Arbitration Association, and copies shall be filed with the Construction Manager and Architect.

**4.9.3 Contract Performance During Arbitration.** During arbitration proceedings, the Owner and Contractor shall comply with Subparagraph 4.7.4.

**4.9.4 When Arbitration May Be Demanded.** Demand for arbitration of any Claim may not be made until the earlier of (1) the date on which the Architect has rendered a final written decision on the Claim, (2) the tenth day after the parties have presented evidence to the Architect or have been given reasonable opportunity to do so, if the Architect has not rendered a final written decision by that date, or (3) any of the five events described in Subparagraph 4.7.2.

**4.9.4.1** When a written decision of the Architect states that (1) the decision is final but subject to arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

**4.9.4.2** A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.9.1 and 4.9.4 and Clause 4.9.4.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

**4.9.5 Limitation on Consolidation or Joinder.** No arbitration arising out of or relating to the Contract Documents shall include, by consolidation or joinder or in any other manner, the Construction Manager, the Architect, or the Construction Manager's or Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Construction Manager, Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, other Contractors as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No persons or entities other than the Owner, Contractor or other Contractors as defined in Subparagraph 3.1.2 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a dispute not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

**4.9.6 Claims and Timely Assertion of Claims.** A party who files a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded. When a party fails to include a Claim through oversight, inadvertence or excusable neglect, or when a Claim has matured or been acquired subsequently, the arbitrator or arbitrators may permit amendment.

**4.9.7 Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

## ARTICLE 5 SUBCONTRACTORS

### 5.1 DEFINITIONS

**5.1.1** A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include other Contractors or subcontractors of other Contractors.

**5.1.2** A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

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

**5.2.1** Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Construction Manager for review by the Owner, Construction Manager and Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Construction Manager will promptly reply to the Contractor in writing stating whether or not the Owner, Construction Manager or Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Construction Manager to reply promptly shall constitute notice of no reasonable objection.

**5.2.2** The Contractor shall not contract with a proposed person or entity to whom the Owner, Construction Manager or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

**5.2.3** If the Owner, Construction Manager or Architect has reasonable objection to a person or entity proposed by the

Contractor, the Contractor shall propose another to whom the Owner, Construction Manager or Architect has no reasonable objection. The Contract Sum shall be increased or decreased by the difference in cost occasioned by such change and an appropriate Change Order shall be issued. However, no increase in the Contract Sum shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

**5.2.4** The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner, Construction Manager or Architect makes reasonable objection to such change.

### 5.3 SUBCONTRACTUAL RELATIONS

**5.3.1** By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner, Construction Manager and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner, Construction Manager and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors shall similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

### 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

**5.4.1** Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

- .1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor in writing; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

5.4.2 If the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted.

## ARTICLE 6 CONSTRUCTION BY OWNER OR BY OTHER CONTRACTORS

### 6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION WITH OWN FORCES AND TO AWARD OTHER CONTRACTS

6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, which include persons or entities under separate contracts not administered by the Construction Manager. The Owner further reserves the right to award other contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided elsewhere in the Contract Documents.

6.1.2 When the Owner performs construction or operations with the Owner's own forces, including persons or entities under separate contracts not administered by the Construction Manager, the Owner shall provide for coordination of such forces with the Work of the Contractor, who shall cooperate with them.

6.1.3 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in this Article 6 and in Articles 3, 10, 11 and 12.

### 6.2 MUTUAL RESPONSIBILITY

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

6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner's own forces or other Contractors, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Construction Manager and Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's own forces or other Contractors' completed or partially completed construction is

fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

6.2.3 Costs caused by delays or by improperly timed activities or defective construction shall be borne by the party responsible therefor.

6.2.4 The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed construction or partially completed construction or to property of the Owner or other Contractors as provided in Subparagraph 10.2.5.

6.2.5 Claims and other disputes and matters in question between the Contractor and other Contractors shall be subject to the provisions of Paragraph 4.7 provided the other Contractors have reciprocal obligations.

6.2.6 The Owner and other Contractors shall have the same responsibilities for cutting and patching as are described for the Contractor in Paragraph 3.14.

### 6.3 OWNER'S RIGHT TO CLEAN UP

6.3.1 If a dispute arises among the Contractor, other Contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish as described in Paragraph 3.15, the Owner may clean up and allocate the cost among those responsible as the Construction Manager, in consultation with the Architect, determines to be just.

## ARTICLE 7 CHANGES IN THE WORK

### 7.1 CHANGES

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Construction Manager, Architect and Contractor; a Construction Change Directive requires agreement by the Owner, Construction Manager and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

7.1.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally

contemplated are so changed in a proposed Change Order or Construction Change Directive that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

## 7.2 CHANGE ORDERS

7.2.1 A Change Order is a written instrument prepared by the Construction Manager and signed by the Owner, Construction Manager, Architect and Contractor, stating their agreement upon all of the following:

- .1 a change in the Work;
- .2 the amount of the adjustment in the Contract Sum, if any; and
- .3 the extent of the adjustment in the Contract Time, if any.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

## 7.3 CONSTRUCTION CHANGE DIRECTIVES

7.3.1 A Construction Change Directive is a written order prepared by the Construction Manager and signed by the Owner, Construction Manager and Architect, directing a change in the Work and stating a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

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

- .1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 unit prices stated in the Contract Documents or subsequently agreed upon;
- .3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Construction Manager and

Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Construction Manager on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Construction Manager may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

- .1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers compensation insurance;
- .2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- .4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .5 additional costs of supervision and field office personnel directly attributable to the change.

7.3.7 Pending final determination of cost to the Owner, amounts not in dispute may be included in Applications for Payment. The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Construction Manager. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

7.3.8 If the Owner and Contractor do not agree with the adjustment in Contract Time or the method for determining it, the adjustment or the method shall be referred to the Construction Manager for determination.

7.3.9 When the Owner and Contractor agree with the determination made by the Construction Manager concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately issued through the Construction Manager and shall be recorded by preparation and execution of an appropriate Change Order.

#### 7.4 MINOR CHANGES IN THE WORK

7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order issued through the Construction Manager and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

### ARTICLE 8 TIME

#### 8.1 DEFINITIONS

8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

8.1.2 The date of commencement of the Work is the date established in the Agreement. The date shall not be postponed by the failure to act of the Contractor or of persons or entities for whom the Contractor is responsible.

8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

#### 8.2 PROGRESS AND COMPLETION

8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

#### 8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in progress of the Work by an act or neglect of the Owner's own forces, Construction Manager, Architect, any of the other Contractors or an employee of any of them, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by other causes which the Architect, based on the recommendation of the Construction Manager, determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.7.

8.3.3 This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

### ARTICLE 9 PAYMENTS AND COMPLETION

#### 9.1 CONTRACT SUM

9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

#### 9.2 SCHEDULE OF VALUES

9.2.1 Before the first Application for Payment, the Contractor shall submit to the Architect, through the Construction Manager, a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Construction Manager and Architect may require. This schedule, unless objected to by the Construction Manager or Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

#### 9.3 APPLICATIONS FOR PAYMENT

9.3.1 At least fifteen days before the date established for each progress payment, the Contractor shall submit to the Construction Manager an itemized Application for Payment for Work completed in accordance with the schedule of values. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner, Construction Manager or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for elsewhere in the Contract Documents.

9.3.1.1 Such applications may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives but not yet included in Change Orders.

9.3.1.2 Such applications may not include requests for payment of amounts the Contractor does not intend to pay to a Subcontractor or material supplier because of a dispute or other reason.

9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

#### 9.4 CERTIFICATES FOR PAYMENT

9.4.1 The Construction Manager will assemble a Project Application for Payment by combining the Contractor's applications with similar applications for progress payments from other Contractors and, after certifying the amounts due on such applications, forward them to the Architect within seven days.

9.4.2 Within seven days after the Architect's receipt of the Project Application for Payment, the Construction Manager and Architect will either issue to the Owner a Project Certificate for Payment, with a copy to the Contractor, for such amount as the Construction Manager and Architect determine is properly due, or notify the Contractor and Owner in writing of the Construction Manager's and Architect's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1. Such notification will be forwarded to the Contractor by the Construction Manager.

9.4.3 The issuance of a separate Certificate for Payment or a Project Certificate for Payment will constitute representations made separately by the Construction Manager and Architect to the Owner, based on their individual observations at the site

and the data comprising the Application for Payment submitted by the Contractor, that the Work has progressed to the point indicated and that, to the best of the Construction Manager's and Architect's knowledge, information and belief, quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to minor deviations from the Contract Documents correctable prior to completion and to specific qualifications expressed by the Construction Manager or Architect. The issuance of a separate Certificate for Payment or a Project Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a separate Certificate for Payment or a Project Certificate for Payment will not be a representation that the Construction Manager or Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed the Contractor's construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

#### 9.5 DECISIONS TO WITHHOLD CERTIFICATION

9.5.1 The Construction Manager or Architect may decide not to certify payment and may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Construction Manager's or Architect's opinion the representations to the Owner required by Subparagraph 9.4.3 cannot be made. If the Construction Manager or Architect is unable to certify payment in the amount of the Application, the Construction Manager or Architect will notify the Contractor and Owner as provided in Subparagraph 9.4.2. If the Contractor, Construction Manager and Architect cannot agree on a revised amount, the Construction Manager and Architect will promptly issue a Certificate for Payment for the amount for which the Construction Manager and Architect are able to make such representations to the Owner. The Construction Manager or Architect may also decide not to certify payment or, because of subsequently discovered evidence or subsequent observations, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Construction Manager's or Architect's opinion to protect the Owner from loss because of:

- .1 defective Work not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims;
- .3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;

- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or another contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 persistent failure to carry out the Work in accordance with the Contract Documents.

**9.5.2** When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

## 9.6 PROGRESS PAYMENTS

**9.6.1** After the Construction Manager and Architect have issued a Project Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Construction Manager and Architect.

**9.6.2** The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in similar manner.

**9.6.3** The Construction Manager will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Owner, Construction Manager and Architect on account of portions of the Work done by such Subcontractor.

**9.6.4** Neither the Owner, Construction Manager nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

**9.6.5** Payment to material suppliers shall be treated in a manner similar to that provided in Subparagraphs 9.6.2, 9.6.3 and 9.6.4.

**9.6.6** A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

## 9.7 FAILURE OF PAYMENT

**9.7.1** If, through no fault of the Contractor, 1) the Construction Manager and Architect do not issue a Project Certificate for Payment within fourteen days after the Construction Manager's receipt of the Contractor's Application for Payment or 2) the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Construction Manager and Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner, Construction Manager and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, which shall be accomplished as provided in Article 7.

## 9.8 SUBSTANTIAL COMPLETION

**9.8.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use.

**9.8.2** When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor and Construction Manager shall jointly prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Contractor shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. Upon receipt of the list, the Architect, assisted by the Construction Manager, will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the list, which is not in accordance with the requirements of the Contract Documents, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. The Contractor shall then submit a request for another inspection by the Architect, assisted by the Construction Manager, to determine Substantial Completion. When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate.

**9.8.3** Upon Substantial Completion of the Work or designated portion thereof and upon application by the Contractor and certification by the Construction Manager and Architect, the Owner shall make payment, reflecting adjustment in retainage, if any, for such Work or portion hereof as provided in the Contract Documents.

## 9.9 PARTIAL OCCUPANCY OR USE

**9.9.1** The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Subparagraph 11.3.11 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor and Construction Manager shall jointly prepare and submit a list to the Architect as provided under Subparagraph 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect after consultation with the Construction Manager.

**9.9.2** Immediately prior to such partial occupancy or use, the Owner, Construction Manager, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

**9.9.3** Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

## 9.10 FINAL COMPLETION AND FINAL PAYMENT

**9.10.1** Upon completion of the Work, the Contractor shall forward to the Construction Manager a written notice that the Work is ready for final inspection and acceptance and shall also forward to the Construction Manager a final Contractor's Application for Payment. Upon receipt, the Construction Manager will forward the notice and Application to the Architect who will promptly make such inspection. When the Architect, based on the recommendation of the Construction Manager, finds the Work acceptable under the Contract Documents and the Contract fully performed, the Construction Manager and Architect will promptly issue a final Certificate for Payment stating that to the best of their knowledge, information and belief, and on the basis of their observations and inspections, the Work has been completed in

accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in said final Certificate is due and payable. The Construction Manager's and Architect's final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

**9.10.2** Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect through the Construction Manager (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

**9.10.3** If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Construction Manager and Architect so confirm, the Owner shall, upon application by the Contractor and certification by the Construction Manager and Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect through the Construction Manager prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of Claims. The making of final payment shall constitute a waiver of Claims by the Owner as provided in Subparagraph 4.4.5.

**9.10.4** Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final

Application for Payment. Such waivers shall be in addition to the waiver described in Subparagraph 4.7.5.

## ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

### 10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall submit the Contractor's safety program to the Construction Manager for review and coordination with the safety programs of other Contractors.

10.1.2 In the event the Contractor encounters on the site material reasonably believed to be asbestos or polychlorinated biphenyl (PCB) which has not been rendered harmless, the Contractor shall immediately stop Work in the area affected and report the condition to the Owner, Construction Manager and Architect in writing. The Work in the affected area shall not thereafter be resumed except by written agreement of the Owner and Contractor if in fact the material is asbestos or polychlorinated biphenyl (PCB) and has not been rendered harmless. The Work in the affected area shall be resumed in the absence of asbestos or polychlorinated biphenyl (PCB), or when it has been rendered harmless, by written agreement of the Owner and Contractor, or in accordance with final determination by the Architect on which arbitration has not been demanded, or by arbitration under Article 4.

10.1.3 The Contractor shall not be required pursuant to Article 7 to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

10.1.4 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Construction Manager, Architect, their consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material is asbestos or polychlorinated biphenyl (PCB) and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Owner, anyone directly or indirectly employed by the Owner or anyone for whose acts the Owner may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Subparagraph 10.1.4.

10.1.5 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance encountered on the site by the Contractor, the Contractor shall, upon recognizing the

condition, immediately stop Work in the affected area and report the condition to the Owner, Construction Manager and Architect in writing. The Owner, Contractor, Construction Manager and Architect shall then proceed in the same manner described in Subparagraph 10.1.2.

10.1.6 The Owner shall be responsible for obtaining the services of a licensed laboratory to verify a presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor, Construction Manager and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor, the Construction Manager and the Architect will promptly reply to the Owner in writing stating whether or not any of them has reasonable objection to the persons or entities proposed by the Owner. If the Contractor, Construction Manager or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor, the Construction Manager and the Architect have no reasonable objection.

### 10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

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

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

10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

10.2.4 When use for storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Clauses 10.2.1.2, 10.2.1.3 and 10.2.1.4 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Clauses 10.2.1.2, 10.2.1.3 and 10.2.1.4, except damage or loss attributable to acts or omissions of the Owner, Construction Manager or Architect or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 3.18.

10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner, Construction Manager and Architect.

10.2.7 The Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

### 10.3 EMERGENCIES

10.3.1 In an emergency affecting safety or persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.7 and Article 7.

## ARTICLE 11 INSURANCE AND BONDS

### 11.1 CONTRACTOR'S LIABILITY INSURANCE

11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;
- .2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 claims for damages insured by usual personal injury liability coverage which are sustained (1) by a person as a result of an offense directly or indirectly related to employment of such person by the Contractor, or (2) by another person;
- .5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle; and
- .7 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

11.1.2 The insurance required by Subparagraph 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

11.1.3 Certificates of insurance acceptable to the Owner shall be submitted to the Construction Manager for transmittal to the Owner with a copy to the Architect prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2. Information concerning reduction of coverage shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

### 11.2 OWNER'S LIABILITY INSURANCE

11.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally,

the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance unless specifically required by the Contract Documents.

### 11.3 PROPERTY INSURANCE

11.3.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance in the amount of the initial Contract Sum as well as subsequent modifications thereto for the entire Work at the site on a replacement cost basis without voluntary deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.3 to be covered, whichever is earlier. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work.

11.3.1.1 Property insurance shall be on an "all-risk" policy form and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, falsework, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's services and expenses required as a result of such insured loss. Coverage for other perils shall not be required unless otherwise provided in the Contract Documents.

11.3.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor, then the Owner shall bear all reasonable costs properly attributable thereto.

11.3.1.3 If the property insurance requires minimum deductibles and such deductibles are identified in the Contract Documents, the Contractor shall pay costs not covered because of such deductibles. If the Owner or insurer increases the required minimum deductibles above the amounts so identified or if the Owner elects to purchase this insurance with voluntary deductible amounts, the Owner shall be responsible for payment of the additional costs not covered because of such increased or voluntary deductibles.

11.3.1.4 Unless otherwise provided in the Contract Documents, this property insurance shall cover portions of the Work stored off the site after written approval of the Owner at the value established in the approval, and also portions of the Work in transit.

11.3.1.5 The insurance required by this Paragraph 11.3 is not intended to cover machinery, tools or equipment owned or rented by the Contractor which are utilized in the performance of the Work but not incorporated into the permanent improvements. The Contractor shall, at the Contractor's own expense, provide insurance coverage for owned or rented machinery, tools or equipment which shall be subject to the provisions of Subparagraph 11.3.7.

11.3.2 Boiler and Machinery Insurance. The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Construction Manager, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

11.3.3 Loss of Use Insurance. The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

11.3.4 If the Contractor requests in writing that insurance for risks other than those described herein or for other special hazards be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

11.3.5 If during the Project construction period the Owner insures properties, real or personal or both, adjoining or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

11.3.6 Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Paragraph 11.3. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

**11.3.7 Waivers of Subrogation.** The Owner and Contractor waive all rights against each other and against the Construction Manager, Architect, Owner's other Contractors and own forces described in Article 6, if any, and the subcontractors, sub-subcontractors, consultants, agents and employees of any of them, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work, except such rights as the Owner and Contractor may have to the proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Construction Manager, Construction Manager's consultants, Architect, Architect's consultants, Owner's separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

**11.3.8** A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 11.3.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

**11.3.9** If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Paragraph 4.9. If after such loss no other special agreement is made, replacement of damaged property shall be covered by appropriate Change Order.

**11.3.10** The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection be made, arbitrators shall be chosen as provided in Paragraph 4.9. The Owner as fiduciary shall, in that case, make settlement with insurers in accordance with directions of such arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

**11.3.11** Partial occupancy or use in accordance with Paragraph 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

#### **11.4 PERFORMANCE BOND AND PAYMENT BOND**

**11.4.1** The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

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

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

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

**12.1.1** If a portion of the Work is covered contrary to the Construction Manager's or Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by either, be uncovered for their observation and be replaced at the Contractor's expense without change in the Contract Time.

**12.1.2** If a portion of the Work has been covered which the Construction Manager or Architect has not specifically requested to observe prior to its being covered, the Construction Manager or Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner. If such Work is not in accordance with the Contract Documents, the Contractor shall pay such costs unless the condition was caused by the Owner or one of the other Contractors in which event the Owner shall be responsible for payment of such costs.

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

**12.2.1** The Contractor shall promptly correct Work rejected by the Construction Manager or Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. The Contractor shall bear costs of correcting such rejected Work, including additional testing and inspections and compensation for the

Construction Manager's and Architect's services and expenses made necessary thereby.

12.2.2 If, within one year after the date of Substantial Completion of the Work or designated portion thereof, or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. This period of one year shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work. This obligation under this Subparagraph 12.2.2 shall survive acceptance of the Work under the Contract and termination of the Contract. The Owner shall give such notice promptly after discovery of the condition.

12.2.3 The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

12.2.4 If the Contractor fails to correct nonconforming Work within a reasonable time, the Owner may correct it in accordance with Paragraph 2.4. If the Contractor does not proceed with correction of such nonconforming Work within a reasonable time fixed by written notice from the Architect issued through the Construction Manager, the Owner may remove it and store the salvable materials or equipment at the Contractor's expense. If the Contractor does not pay costs of such removal and storage within ten days after written notice, the Owner may upon ten additional days' written notice sell such materials and equipment at auction or at private sale and shall account for the proceeds thereof, after deducting costs and damages that should have been borne by the Contractor, including compensation for the Construction Manager's and Architect's services and expenses made necessary thereby. If such proceeds of sale do not cover costs which the Contractor should have borne, the Contract Sum shall be reduced by the deficiency. If payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

12.2.5 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or other Contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

12.2.6 Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to

comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

### 12.3 ACCEPTANCE OF NONCONFORMING WORK

12.3.1 If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## ARTICLE 13 MISCELLANEOUS PROVISIONS

### 13.1 GOVERNING LAW

13.1.1 The Contract shall be governed by the law of the place where the Project is located.

### 13.2 SUCCESSORS AND ASSIGNS

13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

### 13.3 WRITTEN NOTICE

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

### 13.4 RIGHTS AND REMEDIES

13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

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

## 13.5 TESTS AND INSPECTIONS

13.5.1 Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Construction Manager and Architect timely notice of when and where tests and inspections are to be made so the Construction Manager and Architect may observe such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

13.5.2 If the Construction Manager, Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Subparagraph 13.5.1, the Construction Manager and Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Construction Manager and Architect of when and where tests and inspections are to be made so the Construction Manager and Architect may observe such procedures. The Owner shall bear such costs except as provided in Subparagraph 13.5.3.

13.5.3 If such procedures for testing, inspection or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, the Contractor shall bear all costs made necessary by such failure including those of repeated procedures and compensation for the Construction Manager's and Architect's services and expenses.

13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Construction Manager for transmittal to the Architect.

13.5.5 If the Construction Manager or Architect is to observe tests, inspections or approvals required by the Contract Documents, the Construction Manager or Architect will do so promptly and, where practicable, at the normal place of testing.

13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

## 13.6 INTEREST

13.6.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the

absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

## 13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

13.7.1 As between the Owner and Contractor:

- .1 **Before Substantial Completion.** As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;
- .2 **Between Substantial Completion and Final Certificate for Payment.** As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
- .3 **After Final Certificate for Payment.** As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

## ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

### 14.1 TERMINATION BY THE CONTRACTOR

14.1.1 The Contract may terminate the Contract if the Work is stopped for a period of 30 days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor, for any of the following reasons:

- .1 issuance of an order of a court or other public authority having jurisdiction;
- .2 an act of government, such as a declaration of national emergency, making material unavailable;

- .3 because the Construction Manager or Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.2, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents;
- .4 if repeated suspensions, delays or interruptions by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less; or
- .5 the Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

**14.1.2** If one of the above reasons exists, the Contractor may, upon seven additional days' written notice to the Owner, Construction Manager and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

**14.1.3** If the Work is stopped for a period of 60 days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner, Construction Manager and Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.2.

## **14.2 TERMINATION BY THE OWNER FOR CAUSE**

**14.2.1** The Owner may terminate the Contract if the Contractor:

- .1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

**14.2.2** When any of the above reasons exist, the Owner, after consultation with the Construction Manager, and upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

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

**14.2.3** When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

**14.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Construction Manager's and Architect's services and expenses made necessary thereby, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall, upon application, be certified by the Architect after consultation with the Construction Manager, and this obligation for payment shall survive termination of the Contract.

## **14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE**

**14.3.1** The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

**14.3.2** An adjustment shall be made for increases in the cost of performance of the Contract, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of this Contract.

**14.3.3** Adjustments made in the cost of performance may have a mutually agreed fixed or percentage fee.

**SUPPLEMENTARY GENERAL CONDITIONS**  
(AIA Document 201/CMa 1992 Edition)

The following supplements modify, change, delete from, or add to the "General Conditions of the Contract for Construction", AIA Document A201/CMa 1992 Edition. Where any article of the General Conditions is modified or deleted by these supplements, the unaltered provisions of that article, paragraph, sub-paragraph or clause shall remain in effect.

1.1.1 REVISE the last sentence to read as follows: "The Contract Documents include the Project Manuals and Bidding Documents, and consist of the Invitation to Bid, the Instructions to Bidders, Addenda, the Bid Form, the Non-Collusion Affidavit, Qualifications Questionnaire, the Agreement with Attachments, Amendments to the Agreement, approved and executed Change Orders, the Payment and Performance Bonds, Certificates of Insurance, the Supplementary Conditions, the General Conditions, and the Drawings and Specifications, and any other documents enumerated in the Owner-Contractor Agreement."

1.1.8 ADD: MISCELLANEOUS DEFINITIONS

1.1.8.1 ADD "The term 'Product' as used throughout the Contract Documents include materials, systems and equipment."

1.1.8.2 ADD "The term 'indicated' refers to graphic representations, notes or schedules on the Drawings, or other paragraphs or schedules in Specifications and similar requirements in Contract Documents. Where terms such as 'shown', 'noted', 'scheduled' and 'specified' are used, it is to help locate the reference; no limitation on location is intended except as specifically noted."

1.1.8.3 ADD "The terms such as 'directed', 'requested', 'authorized', 'selected', 'approved', 'required' and 'permitted' mean 'directed by the Architect/Construction Manager', 'requested by the Architect/Construction Manager' and similar phrases. However, no implied meaning shall be interpreted to extend the Architect's responsibility into the Contractor's area of construction supervision."

1.1.8.4 ADD "The terms such as 'directed', 'requested', 'authorized', 'selected', 'approved', 'required' and 'permitted' mean 'directed by the Architect/Construction Manager', 'requested by the Architect/Construction Manager' and similar phrases. However, no implied meaning shall be interpreted to extend the Architect's responsibility into the Contractor's area of construction supervision. The Contractor at all times retains the responsibility for determining the means and methods of construction that he employs when performing the Work, as set forth in paragraph 3.3.1 of the General Conditions."

1.1.8.5 ADD "The term 'furnish' is used to mean 'supply and deliver to the Project site, ready for unloading, unpacking, assembly, installation and similar operations'."

1.1.8.6 ADD "The term 'install' is used to describe operations at the Project site including the actual unloading, unpacking, assembly, erection, placing, anchoring, applying, working to dimensions, finishing, curing, protecting, cleaning and similar operations'."

1.1.8.7 ADD "The term 'provide' means to furnish and install complete and ready for the intended use'."

1.1.8.8 ADD "The term 'an installer' is an entity engaged by the Contractor, either as an employee, subcontractor or sub-subcontractor, for performance of a particular construction activity, including installation, erection, application and similar operations. Installers are required to be experienced in the operations they are engaged to perform.

The term 'experienced' when used with the term 'installer' means having a minimum of five previous projects similar in size and scope to this Project and familiar with the precautions required, and has complied with requirements of the authority having jurisdiction."

1.1.8.9 ADD "The term Prime Contractor and Contractor have the same Definition as per Article 3.1 and are used interchangeably in the documents.

1.2.3 ADD "In the event of conflicts or discrepancies among the Contract Documents, interpretations will be based on the following priorities with the highest being #1 descending to #13:

1. Approved and executed Change Orders
2. Amendments to the Agreement
3. Owner-Contractor Agreement with Attachments
4. Supplementary Conditions
5. General Conditions
6. Addenda
7. Instructions to Bidders
8. Bid Form
9. Payment and Performance Bonds, Certificates of Insurance, and other submissions required to be submitted with the Executed Agreement
10. Non-Collusion Affidavit, Qualifications Questionnaire, and other submissions required to be submitted with the Bid
11. Any other documents enumerated in the Agreement
12. Invitation to Bid
13. Drawings and Specifications

In the case of an inconsistency between Drawings and Project Manual or within either document not clarified by addendum, the better quality or greater quantity of Work shall be provided.

1.2.6 ADD "In case of discrepancy between the Drawings and Project Manual such conflict shall be promptly referred to the Construction Manager for review with, and direction from, the Architect for interpretation and final decision."

1.2.7 ADD "Where the Work is shown in complete detail on only half or portion of a Drawings or there is an indication of continuation, the remainder being shown in outline, the work drawn out in detail shall be understood to apply to other like portions of the structure. On all Work of a remodeling nature or installation within the present buildings, it will be the responsibility of the Contractor, by personal inspection, to satisfy himself as to the correctness of any information given which may affect the quantity, size, and quality of materials required for a satisfactorily completed Contract, whether or not such information is indicated on the Drawings or within the Project Manual.

1.3.1 ADD to the paragraph the following "pursuant to Section 5 of the contract between the Architect and the District, the drawings belong to the District".

2.1.2 DELETE in its entirety.

2.2.1 DELETE in its entirety.

2.2.2 DELETE in its entirety.

2.2.5 DELETE "The Contractor will . . . of the Work," and insert the following:

"All Prime Contractors to be furnished the following number of sets of drawings and specifications:

	No. Drawings	No. Specs
<b>Contract No. 1: General Trades</b>	<b>5</b>	<b>5</b>
<b>Contract No. 2: Masonry</b>	<b>3</b>	<b>3</b>
<b>Contract No. 3: Structural and Misc. Steel</b>	<b>3</b>	<b>3</b>
<b>Contract No. 4: Roofing</b>	<b>2</b>	<b>2</b>
<b>Contract No. 5: Carpet &amp; Resilient Flooring</b>	<b>2</b>	<b>2</b>
<b>Contract No. 6: Wood Flooring</b>	<b>2</b>	<b>2</b>

<b>Contract No. 7:</b> Auditorium Seating	<u>2</u>	<u>2</u>
<b>Contract No. 8:</b> Telescoping Bleachers	<u>2</u>	<u>2</u>
<b>Contract No. 9:</b> Plumbing	<u>3</u>	<u>3</u>
<b>Contract No. 10:</b> HVAC	<u>3</u>	<u>3</u>
<b>Contract No. 11:</b> Fire Protection	<u>3</u>	<u>3</u>
<b>Contract No. 12:</b> Electrical	<u>3</u>	<u>3</u>
<b>Contract No. 13:</b> Technology	<u>2</u>	<u>2</u>

2.4.1 In lines 3, 6, and 8, change seven day to read a three day. ADD the following as the last sentence of 2.4.1: "Nothing in this paragraph shall obligate the Owner to carry out the Work for the benefit of any Contractor." Add in line 16 after "...and Architect" the words " and Attorney's fees".

3.3.1 REVISE the last sentence to read as follows: ". . . . subject to the overall coordination of the Construction Manager as provided in Subparagraphs 4.6.3 and 4.6.4, and in Subparagraph 4.9.7."

3.6 ADD the following 3.6 TAXES.

3.6.2 Select materials may qualify for tax exempt status under the statutes governing the imposition of Sales and Use Tax in the Commonwealth, including but not limited to Act 45 of 1998, effective July 1, 1998. It shall solely be the Contractor's responsibility to determine the extent to which tax exemptions created by Act 45 for the benefit of tax exempt entities such as the Owner and created by Act 45 in connection with the purchase of building machinery and equipment apply to the Contractor's Work.

3.6.3 The Contractor shall consider fully the provisions of the statutes governing the imposition of Sales and Use Tax in the Commonwealth, shall pay all such taxes as may be due directly to the appropriate governmental authorities and shall be entitled to no adjustment in the Contract Price on account of any error or omission on the part of the Contractor in estimating the amount of Sales and Use Tax that may be due.

3.8 DELETE 3.8, ALLOWANCES, in its entirety.

3.9.1 ADD the following: "At the request of the Construction Manager, the Contractor's superintendent shall attend Project meetings, including those project meetings which are prior to the start of the Contractor's Work or subsequent to the completion of the Contractor's Work."

3.9.2 ADD "The Owner and Construction Manager have the right, but not the obligation, to reject or require replacement of the Contractor's project manager, superintendent, foreman, or employees anytime during the course of the Project should Owner or Construction Manager reasonably believe they are incompetent, negligent, incompatible with other Contractors, Owner, Construction Manager or Architect, not working in harmony with others on the site, or are otherwise unsatisfactory."

3.10.1 DELETE in its entirety and ADD the following:

3.10.1 The Contractor, within fifteen (15) days after being awarded the Contract, shall prepare and submit for the Construction Manager's information an estimated progress schedule for the Work. The progress schedule shall be related to the entire Project to the extent required by the Contract Documents and shall provide for expeditious and practical execution of the Work. This schedule shall indicate the dates for the starting and completion of the various stages of construction, shall be revised as required by the conditions of the Work, and shall be subject to the Construction Manager's approval and shall meet or improve the completion milestones set for the project.

3.10.2 At the end of subparagraph 3.10.2, ADD the following language:

". . . Prime Contractors are required to cooperate and consult with each other during the construction of this project. Each Prime Contractor shall schedule and execute his work so as to cause the least delay to other Contractors. Each Prime Contractor is financially responsible to the Owner, Architect and Construction Manager for claims filed by another Prime Contractor on the Project for delay or other failure of the Prime Contractor. Each Prime Contractor shall indemnify, defend and hold harmless the Owner, Architect and Construction Manager for any claims, losses or delays of any kind whatsoever by or to other Prime Contractors arising from delays or other failures of such Prime Contractor to follow its progress schedule.

3.10.4 DELETE in its entirety and replace with the following:

3.10.4.1. General Scheduling Obligations.

1. The Work under the Contract Documents shall be planned, scheduled, executed, reported and accomplished using the "Critical Path Method", in calendar days (excluding Saturdays, Sundays and legal holidays). The provisions of the General Requirements and the directions of the Construction Manager are to be followed by Contractor in scheduling his construction activities. Nothing herein relieves the obligations of the Contractor and other Prime Contractors to schedule their own construction activities and to select their own means and methods of construction. The Construction Manager shall resolve all coordination and scheduling issues between and among the Contractors.

2. The primary objectives of the requirements of this Subparagraph are: (1) to insure adequate planning and execution of the Work by Contractor by having a schedule of construction activities for all the Prime Contractors and their Subcontractors in interim form covering the first 75 days of construction within thirty (30) days of the Notice to Proceed and in final form within seventy-five (75) days of the Notice to Proceed; (2) to assist Construction Manager in evaluating progress of the Work; (3) to provide for optimum coordination by Contractor of his trades and Subcontractors, and of his Work with the work or services provided by other Prime Contractors; (4) to permit the timely prediction or detection of events or occurrences which may affect the timely prosecution of the Work; and (5) to provide a mechanism or tool for use by Construction Manager and Contractor in monitoring any actions of Contractor which may be required to comply with the requirements of the Contract Documents relating to the completion of the various portions of the Work by the Completion Dates specified in the Contract Documents.

3. Contractor is responsible for determining the sequence and logic of activities, the time estimates of the detailed construction activities and the means, methods, techniques and procedures to be employed with regard to his portion of the Work. The Construction Schedule shall represent Contractor's best judgment of how he shall prosecute the Work in compliance with the requirements of the Contract Documents. Contractor shall ensure that the Construction Schedule is current and accurate and is properly and timely monitored, updated and revised as Project conditions and the Contract Documents may require, and as may be directed by Construction Manager.

4. Contractor shall consult with his major Subcontractors relating to the preparation of his construction plan and Construction Schedule. Major Subcontractors shall receive copies of those portions of Contractor's Construction Schedule which relate to their Work and shall be continually advised of any updates or revisions to the Construction Schedule as the Work progresses. When Contractor submits his Construction Schedule to the Construction Manager or makes any proposed updates or revisions to such Schedule, it shall be concluded by Owner and Construction Manager that Contractor has consulted with and has the concurrence of his major Subcontractors. Contractor shall be solely responsible for ensuring that all Subcontractors comply with the requirements of the Construction Schedule for their portions of the Work.

5. Contractor shall provide the basic data as required by Construction Manager relating to activities, durations and sequences as part of Contractor's draft of the Construction Schedule. This data shall reflect Contractor's actual construction plan for the Project, and shall fully comply with all requirements of the Contract Documents.
6. Contractor shall submit his data in a form or format acceptable to the Construction Manager.
7. To carry out the intent of this Subparagraph, Contractor agrees that the preconstruction meeting, the provision of review and comment by the Construction Manager, and the reasonable exercise of any rights by Construction Manager or Owner, shall not be grounds for any claim against Owner, Construction Manager or other representative of the Owner by Contractor or any of his Subcontractors or Sub-Subcontractors, alleging interference, lack of cooperation, delay, disruption, harassment, negligence or hindrance by Owner or Construction Manager, and Contractor covenants not to sue therefor.
8. It is understood and agreed that the Construction Schedule is to represent Contractor's best plan and estimate for the Work; however, Contractor acknowledges that the Construction Schedule may have to be revised from time-to-time as the Project proceeds. Contractor further acknowledges and agrees that Owner and Construction Manager do not guarantee that: (1) Contractor can start work activities on the "early start" or "late start" dates or complete work activities on the "early finish" or "late finish" dates shown in the schedule, or as same may be updated or revised; (2) Contractor can proceed at all times in the sequence established by the Construction Schedule, or that Contractor can rely upon the utilization of only the resources and manpower he initially plans for the performance of the Work; (3) Contractor's Construction Schedule shall not have to be modified in order to obtain the agreement of any Prime Contractors to the schedule; or (4) Contractor's Construction Schedule shall not have to be modified or changed by direction of Construction Manager. Any changes, modifications or adjustments made by Contractor to the Construction Schedule shall be in full compliance with all requirements of the Contract Documents.
9. Contractor acknowledges and agrees that his Construction Schedule must be flexible in order to accommodate and allow for his coordination with the construction activities of the other Prime Contractors.
10. The review by Owner or Construction Manager of the Construction Schedule or any other schedule or plan of construction of Contractor, does not constitute an agreement by Owner or Construction Manager of any start or finish date in the schedule or specific durations or sequences for activities of the Contractor; further, nothing herein shall be construed as modifying or changing, or excusing the performance of Contractor of required portions of the Work by the Completion Dates as set forth in the Contract Documents.
11. The Completion and Milestone Dates set forth in the Contract Documents represent Contract requirements and are of the essence to the Contract Documents and to the coordination of the Work by Contractor. Completion Dates represent the latest allowable completion time for those phases or portions of the Work to which each Completion Date relates.
12. Review and comment by the Construction Manager of Contractor's Construction Schedule, or any revisions or updates thereto, shall not relieve Contractor of the responsibility for accomplishing each portion or phase of the Work within each and every applicable Completion Date. Omissions and errors in the approved or accepted Construction Schedule, or any revisions or updates shall not excuse performance which is not in compliance with the Contract Documents. Review by the Construction Manager does not make Owner, Construction Manager or Architect liable to Contractor for time or cost overruns flowing from such omissions or errors.

13. Should Contractor intend or plan to complete the Work, or any portion thereof, earlier than any applicable Completion Date or the Contract Time, Contractor shall give timely and reasonable Notice of this fact to the Construction Manager. Construction Manager shall have the discretion to agree to or reject such early completion plan by Contractor. The Construction Manager shall have no duty or obligation to agree to, or to cooperate with Contractor regarding any early completion plan or proposal by Contractor and shall not be liable for any damages of Contractor because of the rejection by Construction Manager of said plan.

14. Unless otherwise specifically provided in the Contract Documents, Contractor acknowledges that Owner, Construction Manager and Architect have contemplated in their planning and in their budgeting for professional services, that the Work shall be performed on a 5-day work week basis, utilizing a single 8-hour shift per day. Owner and Construction Manager shall have the sole discretion of approving or rejecting a variance in the work week, number of shifts, or shift length. Unless otherwise agreed by Owner or Construction Manager, Contractor shall bear the cost of, and pay Owner, for additional staff and supervisory personnel and inspectors of any public authority having jurisdiction of the Work, necessary to support any variance in the contemplated work week, number of shifts or shift length.

**3.10.4.2        Interim Construction Schedule.**

1. As set forth in Subparagraph 3.10.4.1, within thirty (30) days following the award, Contractor, in consultation with the Construction Manager, shall complete a draft of his Construction Schedule.

2. The Construction Manager shall provide each Contractor with a draft of time-scaled graphic network of activities and computer listing of all activities needed for inclusion in an Interim Construction Schedule. The graphic representation and computer printouts shall be carefully reviewed by Contractor. Any revisions, additions and/or deletions to these documents that are reasonably desired by Contractor shall be brought to the attention of the Construction Manager. The Construction Manager shall, if consistent with the requirements of the Contract Documents, incorporate Contractor's proposed revisions and shall thereafter deliver the completed Construction Schedule and other reports to Contractor and the other Prime Contractors.

3. Construction Manager shall have the right to require Contractor to modify any Contractor data or any portion of Contractor's Construction Schedule, or other schedules provided by Contractor in compliance of the Contract Documents, with Contractor bearing the expense thereof, and which Construction Manager reasonably determines to be: (1) impracticable; (2) based upon erroneous calculations or estimates; (3) unreasonable; (4) not in compliance with the requirements of the Contract Documents; (5) required in order to ensure proper coordination by Contractor of the Work of others and with the Work or services being provided by others; (6) necessary to avoid undue interference with the construction activities of other Prime Contractors or those of any utility owners or adjoining property owners; (7) necessary to ensure completion of the Work by the Completion Dates set forth in the Contract Documents; and (8) not in accordance with Contractor's actual operations. The right of Construction Manager to establish the final Construction Schedule and to render final construction decisions on the content of the Construction Schedule is subject to the right of the Contractor to proceed in accordance with the provisions of the Contract Documents establishing the right of arbitration against another Prime Contractor.

**3.10.4.3.        Final Construction Schedule.**

1. After the completion of the Interim Construction Schedule, Contractor, in consultation with the Construction Manager, shall complete a draft of his Final Construction Schedule.

2. The Construction Manager shall provide Contractor with a draft of time-scaled graphic network of activities and computer listing of all activities included in the Final Construction Schedule. The graphic representation and computer printouts shall be carefully reviewed by Contractor. Any revisions, additions and/or deletions to these documents that are reasonably desired by Contractor shall be brought to the attention of the Construction Manager. The Construction Manager shall, if consistent with the requirements of the Contract Documents, incorporate Contractor's proposed revisions and shall thereafter deliver the completed Construction Schedule and other reports to Contractor and the other Prime Contractors and the Construction Manager for his review and comment.

3. Construction Manager shall have the right to require Contractor to modify any Contractor data or any portion of Contractor's Final Construction Schedule, or other schedules provided by Contractor in compliance of the Contract Documents, with Contractor bearing the expense thereof, and which Construction Manager reasonably determines to be: (1) impracticable; (2) based upon erroneous calculations or estimates; (3) unreasonable; (4) not in compliance with the Contract Documents; (5) required in order to ensure proper coordination by Contractor of the Work of others and with the Work or services being provided by others; (6) necessary to avoid undue interference with the construction activities of other Prime Contractors or those of any utility owners or adjoining property owners; (7) necessary to ensure completion of the Work by the Completion Dates set forth in the Contract Documents; and (8) not in accordance with Contractor's actual operations. The right of Construction Manager to establish the final Construction Schedule and to render final construction decisions on the content of the Construction Schedule is subject to the provisions of the Contract Documents establishing the right of arbitration against another Prime Contractor.

#### 3.10.4.4. Construction Schedule Content.

1. The Final Construction Schedule shall consist of a time-scaled, detailed network graphic representation of all activities which are part of Contractor's construction plan and an accompanying computerized mathematical analysis of these activities. The graphic network shall include, but not be limited to, the following information: (1) Project name; (2) completed Work ready for use by next Contractor, Owner, etc.; (3) Responsibility coding of activities relating to different areas of responsibility, such as subcontracted Work which is distinctly separate from that being done by Contractor directly; (4) Trade coding of different categories of Work as distinguished by craft or crew requirements; (5) different categories of Work as distinguished by equipment requirements; (6) different categories of Work as distinguished by materials; (7) distinct and identifiable subdivisions of Work such as structural slabs, beams, columns; (8) Area coding of location of Work within the Project that necessitates different times or crews to perform; (9) outage schedules for existing utility services that shall be interrupted during the performance of the Work; (10) acquisition and installation of equipment and materials supplied and/or installed by Owner or Prime Contractors; (11) material to be stored on Site; and (12) dates for completion of Work.

2. For all major equipment and materials to be fabricated or supplied for the Project, the Construction Schedule shall show a sequence of activities including: (1) preparation of Shop Drawings, Sample and all required submissions; (2) a reasonable time for review of Shop Drawings, Samples, and submissions or such time as specified in the Contract Documents; (3) shop fabrication, delivery, and storage; (4) erection or installation; and (5) testing of equipment and materials.

3. The Construction Schedule shall include late dates for the completion of Work that are no later than the required Completion Dates. The time-scaled graphic network shall be drawn based upon the early start dates of activities shown on the graphic.

4. All activity durations shall be given in calendar days. No activity shall have duration of

more than twenty (20) days.

3.10.4.5. Contractor Approval and Certification.

Approval by Contractor of the drafting and computerization of the Construction Schedule, and of schedule revisions, shall be evidence of the Contractor's agreement that the proposed schedule or schedule revision to the Construction Schedule is a true and accurate representation of his plan to complete the Work, including all Change Orders that are in Contractor's possession as of the foregoing date, that the schedule or schedule revision fully complies with the requirements of the Contract Documents, that he shall prosecute the Work in accordance with this schedule revision, subject to any change therein which is implemented in accordance with the Contract Documents and that he has met and coordinated with and obtained the approval of said schedule revision by all other parties that are affected thereby.

3.10.4.6. Updating of Construction Schedule/Progress Reports.

1. On or about the dates established by the Construction Manager, Contractor shall arrange for his Superintendent to meet at the Site with the Construction Manager and Construction Manager to review Contractor's report of actual progress. Said report shall set forth up-to-date and accurate progress data, shall be based upon Contractor's best judgment and shall be prepared by Contractor in consultation with all Subcontractors.

2. The progress report of Contractor shall show the activities, or portions of activities, completed during the reporting period, the actual start and finish dates for these activities, remaining durations and/or estimated dates for completion of Work for activities currently in progress.

3. The Construction Manager shall produce a computerized update work sheet for Contractor to complete as a part of this process.

4. Contractor shall submit a written report with the updated progress analysis which shall include, but not be limited to, a description of problem areas, current and anticipated delaying factors and their impact, explanations of corrective actions taken or planned, any newly planned activities or changes in sequence, and proposed logic for a recovery schedule, if required, as further described herein. The report shall also include: (1) a narrative describing actual Work accomplished during the reporting period; (2) a list of major construction equipment used on the Project during the reporting period and any construction equipment idle during the reporting period; (3) the total number of personnel by craft actually engaged in the Work during the reporting period, with such total stated separately as to office, supervisory, and field personnel; (4) a manpower and equipment forecast for the succeeding thirty (30) days, stating such total as to office, supervisory and field personnel; (5) a list of Contractor-supplied materials and equipment, indicating current availability and anticipated job Site delivery dates; and (6) changes or additions to Contractor's supervisory personnel, if any, since the preceding progress report.

5. Application for Payment: Except as provided in Subparagraph 3.10.4.7., Contractor understands and agrees that the submission and approval of progress updates and the receipt of progress reports are an integral part and basic element of the Applications for Payment; and that Contractor shall not be entitled to any progress payment under the Contract Documents until Contractor has fully complied with the requirements of this Subparagraph.

6. Contractor shall be solely responsible for expediting the delivery of all materials and equipment to be furnished by or to him so that the progress of construction shall be maintained according to the currently approved Construction Schedule for the Work. Contractor shall notify Construction Manager in writing, and in a timely and reasonable manner, whenever Contractor determines or anticipates that the delivery date of any material

or equipment to be furnished by Contractor shall be later than the delivery date indicated by the Construction Schedule, or required consistent with the completion requirements of the Contract Documents, subject to schedule updates as herein provided.

7. Contractor shall ensure that off the Site activities do not control the critical path of the Construction Schedule and instead, that the critical path relates to activities on the Site.

3.10.4.7. Initial Progress Payment. The completed Construction Schedule, including the schedule of values, shall be required for each Application for Payment. However, one initial provisional progress payment may be payable in the sole discretion of Construction Manager if he determines Contractor is complying with this Subparagraph during the development of the Construction Schedule and schedule of values as required herein. However, no more than one Application for Payment shall be approved until all of the requirements of this Subparagraph have been met.

3.10.4.8. Float Time. Float or slack time associated with one chain of activities is defined as the amount of time between earliest start date and latest start date or between earliest finish date and latest finish date for such activities, as calculated as part of the Construction Schedule. Float or slack time shown on the Construction Schedule is reserved for the exclusive use and benefit of Owner. Contractor specifically agrees that float time may be used by Owner in conjunction with review of construction activities or to resolve Project problems. Contractor agrees that there shall be no basis for any modification of the Completion and Milestone Dates or an extension of the Contract Time, or a claim for additional compensation as a result of any Project problem, Change Order or delay which only results in the loss of available positive float on the Construction Schedule.

3.10.4.9. Default. Failure of Contractor to comply with the requirements of this Subparagraph shall constitute default by Contractor of his obligations under the Contract Documents sufficient for termination of Contractor.

- 3.12.5 Change first sentence to read, "The Contractor shall review, approve and submit to the Architect, in accordance with the schedule and sequence approved by the Architect and Construction Manager, Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents".
- 3.15.2 ADD "after twenty-four (24) hours written notice has been given to the Contractor's representative by the Construction Manager of the cleanup requirement, the work shall be undertaken by the Owner as allowed by paragraph 2.4, and the cost thereof shall be borne by the Contractor."
- 3.18.1 DELETE in its entirety and substitute the following:

3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the Owner, Architect and Construction Manager and consultants, agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to, attorneys' fees and defense costs arising out of or resulting from performance of the Work, to the extent caused in whole or in part by the acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts or omissions they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18. The Contractor agrees to and does hereby assume on behalf of the Owner, Architect and Construction Manager the defense of any action at law or in equity which may be brought against such indemnities by reason of claims for which indemnity is owed hereunder, and will pay on behalf of such indemnities, upon their demand, the amount of any judgment that may be entered against such indemnities in any such action. In the event that any such claim, loss, cost, expense, liability, damage or injury arises or is made, asserted, threatened against the Owner for which the

Contractor or its insurer does not admit coverage, or if the Owner reasonably determines such coverage to be inadequate, the Owner shall have the right to withhold from any payments due or to become due to the Contractor an amount sufficient to protect the Owner from such claim, loss, cost, expense, liability, damage or injury, including attorneys' fees and expenses reasonably necessary for the defense thereof.

3.18.3 DELETE in its entirety.

4.4 DELETE "Against whom the Contractor makes no reasonable objection and whose status . . ., respectively".

4.5 DELETE in its entirety.

4.6.7 Place a period after Construction Manager in the first sentence and delete "... and shall contemporaneously provide the same communications to the Architect."

Place a period after Construction Manager in the last sentence and delete "... and shall be contemporaneously provided to the Architect."

4.6.10 ADD to the last line the following:

A decision by the Owner in consultation with the Architect, and/or the Construction Manager, shall be final and binding on all parties to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed. However, neither the Architect's nor the Construction Manager's nor the Owners authority to act under this subparagraph, nor a decision made by either of them in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect, Construction Manager or Owner to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons performing any of the Work.

4.6.11 DELETE in its entirety and substitute the following:

4.6.11 "The Contractor shall provide all Shop Drawings, Product Data and Samples to the Architect in quantity and format as is required by the Contract Documents. The Contractor shall ensure conformance to the requirements of the Contract Documents."

4.6.12 DELETE from the second sentence "such" and "as to cause no delay in the Work of the Contractor . . ., or the Construction Manager.".

4.6.14 INSERT "and upon approval of the Owner, or in accordance with any delegation of authority by Owner to Construction Manager" after "Construction Manager,".

4.6.17 DELETE the last sentence in its entirety.

4.6.18 ADD the following to the end of the paragraph:

" . . . provided, however, that the Architect shall not have the authority to bind the Owner to accept work to which the Owner objects as being deficient or otherwise inconsistent with the Contract Documents."

4.7.2 DELETE in its entirety.

4.7.3 DELETE in its entirety.

4.7.4 DELETE in its entirety.

4.8.1 DELETE in its entirety.

4.8.2 DELETE in its entirety.

4.8.3 DELETE in its entirety.

4.8.4 **DELETE** in its entirety.

4.7.6 ADD at the end of the first sentence, ". . . with contemporaneous notification to the Construction Manager and to the Architect."

4.9 **DELETE** in its entirety and substitute the following:

4.9.1 If at any time during the course of construction a dispute should arise between the Owner and the Prime Contractor with respect to any matter or thing arising out of or related to this contract or project, unless otherwise agreed to in writing, the Prime Contractor shall proceed diligently with the performance of this work under the Contract while the parties attempt to resolve the dispute according to this section. As such, no dispute shall interfere with the progress of the project and the Prime Contractor shall continue with its work.

4.9.1.1 Notice of each such claim, dispute, and other matter shall be delivered to Construction Manager by Contractor in strict compliance with the provisions of the Contract Documents. Written supporting data shall be submitted to Construction Manager, within thirty (30) days after such occurrence.

4.9.1.2 The time periods set forth in this Paragraph relate solely to the administration of pending claims and disputes and are neither intended to, nor shall they, modify or affect any requirements under the Contract Documents relating to Notice and the time required therefore or any other time requirements of this Contract. Receipt of such a claim by the Construction Manager does not constitute a waiver of Contractor's obligations under the Construction Documents.

4.9.1.3 The rendering of a decision by Owner with respect to any such claim, dispute, or other matter is a condition precedent to any further action under this Subparagraph. Such decision shall be final and binding upon Contractor unless Contractor notifies Construction Manager in writing of Contractor's exception to such decision within thirty (30) days of Contractor's receipt of the decision thereon.

4.9.2 If the dispute is a demand or assertion by the Prime Contractor seeking, as a matter of right, an amount in addition to the Contract amount provided herein, the decision of the Owner or its Agent, with respects to the demand or assertion, shall be binding upon and followed by the Prime Contractor. If the Prime Contractor is aggrieved by the decision of the Owner, then following completion of the Contract work, the Prime Contractor shall first seek resolution of the demand or assertion through mediation with a mediator mutually agreeable to the Owner and Prime Contractor. The Owner, at his sole discretion, shall decide if mediation will be the acceptable method for this step in the dispute resolution. If mediation is approved by the Owner, the mediation shall proceed in accordance with the rules or agreement established by the mediator and continue until such time as the parties are able to settle the demand or assertion or the mediator declares an impasse. Conclusion of the mediation as provided herein shall be a condition precedent to the commencement of an action as provided in Section 4.9.3 below.

4.9.3 If the mediation described in Section 4.9.1 above is unsuccessful or not approved by the Owner, the Prime Contractor shall provide the Owner with written notification of its intention to seek resolution of the dispute, claim or matter either through binding arbitration in accordance with the Pennsylvania Uniform Arbitration Act 42 Pa. CSA 7301, et.seq.or through litigation in the Clearfield County Court of Common Pleas. Any arbitration proceeding will be in Clearfield County. The Prime Contractor acknowledges that before it proceeds to arbitration or litigation, the Owner shall have the exclusive right to elect

whether the dispute, claim or matter shall be decided through arbitration or litigation, and shall so advise the Prime Contractor of its election within thirty (30) days of the written notification referenced herein above. Should the Owner elect to proceed in arbitration, the demand for arbitration shall be filed in accordance with the Pennsylvania Uniform Arbitration Act 42 Pa. CSA 7301, et.seq.. If the Owner elects to proceed with litigation, the complaint commencing such an action must be filed with the Court of Common Pleas of Clearfield County which shall have exclusive jurisdiction and venue to resolve any claims. The parties irrevocably agree that this Contract was negotiated and executed in the Commonwealth of Pennsylvania and the County of Clearfield. No such demand shall be brought, however, until completion of all the work under this Contract or the termination of this Contract. All claims, demands, assertions or other matters in question shall be brought in a single arbitration or lawsuit. The Prime Contractor shall be deemed to have waived any claim against the Owner unless the Prime Contractor gives the Owner written notice of such claim within ten (10) days of the time that the Prime Contractor first had knowledge of the facts giving rise to such claim. To the extent that Owner elects to proceed with litigation, the Owner and Prime Contractor hereby expressly waive any right to trial by jury of a claim, demand, action or cause of action relating to the work arising under this agreement whether now existing or hereafter arising, and whether sounding in contract or tort or otherwise, and the Owner and Prime Contractor hereby agree and consent that any such claim, demand, action or cause of action shall be decided by trial without a jury and that any party to this agreement may file an original counterpart or a copy of this section with any court as written evidence of the consent of the parties to the waiver of their rights to trial by jury. To the extent that the Owner elects to arbitrate the dispute, the parties may engage in discovery in accordance with the Pennsylvania Rules of Civil Procedure.

- 4.9.3.1 If the Contractor makes a claim against the Owner for costs and damages to the Contractor in the performance of the Work, the Contractor shall be liable to the Owner and shall pay the Owner for a percentage of all costs incurred by the Owner in investigating, analyzing, negotiating, arbitrating and/or litigating the claim, which percentage shall be equal to the percentage of the Contractor's total claim which is determined through arbitration or litigation to be false or to have no basis in law or in fact.
- 4.9.4 Statute of Limitations. Any action under either 4.9.2 or 4.9.3 above must be filed by Prime Contractor within two years of the last day it performed work on the project. Prime Contractor acknowledges that this decrease in the Statute of Limitations is a material part of the consideration it has given to the Owner in order to enter into this Prime Contract. This provision shall not be construed as an extension of any Statute of Limitations including that governing claims against any surety bond relating to the project.
- 4.9.5 The Construction Manager is responsible for making all coordination decisions not mutually agreed to by the affected Contractors. Disputes between the Construction Manager and one or more other Contractors, and disputes between two or more Contractors pertaining to the creation, application, and modification of the project schedule, the furnishing of resources to meet the project schedule, and coordination between and among the Contractors shall be submitted promptly to the Construction Manager for a final construction decision. The final construction decision of the Construction Manager will at all times be consistent with the content and intent of the Contract Documents. The final construction decision of the Construction Manager will be observed, accepted, and fully followed by all Contractors and their Subcontractors and Sub-Subcontractors on the project, subject only to the commencement of a proceeding at the request of the Construction Manager or other Contractor. The progress of the work in

accordance with the final construction decision of the Construction Manager shall not be delayed, pending any such proceeding.

- 4.9.5.1 In the event of a dispute between or among Contractors that result in the issuance of a final construction decision by Construction Manager, Contractor's sole and exclusive remedy for all claims is the commencement of common-law arbitration against the other Contractors, pursuant to the provisions of applicable law. The damage remedy in such proceedings hereby provided in favor of the Contractor shall be exclusive remedy for disputes between the Contractors.
- 4.9.5.2 In the event of a dispute between Contractor and the Construction Manager or Owner that results in the issuance of a final construction decision by Construction Manager, Contractor's sole and exclusive remedy for all claims is use of and resort to the provisions of Paragraph 4.9. The remedies provided therein against the Owner in connection with actions by the Construction Manager shall be exclusive.
- 4.9.5.3 The Contractors shall have no right of action against the Construction Manager in connection with any disputes.

5.2.1 DELETE "after due investigation" from the second sentence.

DELETE "Failure of the Construction Manager to reply promptly shall constitute notice of no reasonable objection."

ADD the following as the last sentence: "Nothing in this paragraph shall obligate the Owner, Construction Manager or Architect to conduct an investigation of any Contractor or Subcontractor."

5.2.3 DELETE the second and third sentence of the paragraph and insert "There shall be no adjustment in the Contract Sum because of such substitution."

6.1.1 DELETE the last sentence in its entirety.

6.1.1 ADD the following: "This Project will be performed with multiple Prime Contractors as indicated in Section 01010 - "Bid Package Descriptions". The Contractors shall be aware that schedule adjustments will be required to coordinate with the Work of other Contractors."The Contractor will adhere to the scheduling requirements of the Contract Documents and will follow the final construction decision of the Construction Manager in accordance with the Contract Documents.

6.2.4 DELETE the word "wrongfully" from the first line of subparagraph 6.2.4.

6.2.5 REVISE the third and fourth lines of this Subparagraph to read as follows: ". . . subject to the provisions of Paragraph 4.9."

6.2.7 ADD in its entirety the following:

6.2.7 Should the Contractor cause damage to the work or property of any separate Contractor or other Contractor or Owner's work or property, the Contractor shall, upon due notice, promptly attempt to settle with the separate Contractor or other Contractor by agreement, or otherwise resolve the dispute. If such separate trade Contractor or other Contractor initiates any action for the recovery of additional costs or damages whether by litigation, arbitration or otherwise against the Owner, the Construction Manager or the Architect on account of any damage alleged to have been caused by the Contractor, the Owner, Construction Manager or Architect shall notify the Contractor who shall defend such proceedings at the Contractor's expense, and if any judgment or award against the Owner,

Construction Manager or Architect arises therefrom, the Contractor shall pay or satisfy it and shall reimburse the Owner, Construction Manager or Architect for all attorney's fees and court costs which the Owner, Construction Manager or Architect has incurred.

7.3.6.6 ADD as a new subparagraph 7.3.6.6 to read as follows:

"An allowance for overhead and profit, included in the total cost to the Owner, shall be based on the following schedule;

- .1 For the Contractor, for any Work performed by the Contractor's own forces, fifteen percent (15%) of the cost;
- .2 For the Contractor, for any Work performed by his Subcontractor, five percent (5%) of the amount due the Subcontractor;
- .3 For each subcontractor or sub-subcontractor involved, for any Work performed by that subcontractor's own forces, fifteen percent (15%) of the cost;
- .4 For each subcontractor, for any Work performed by his sub-subcontractor, five percent (5%) of the amount due the sub-subcontractor;
- .5 In order to facilitate checking of quotations for extras or credits, all proposals, except those so minor that their propriety can be seen by inspection, shall be accompanied by a complete itemization of costs including labor, materials and Subcontracts. Labor and materials shall be itemized in the manner prescribed above. When major cost items are Subcontracts, they shall be itemized also. In no case will a change involving over \$200 be approved without such itemization.

8.2.1 DELETE the second sentence of the paragraph and insert the following:

8.2.1 " By bidding and by executing the agreement, the Contractor confirms that the contract time is a reasonable period for performing the work. The Contractors are responsible to provide the Construction Manager a detailed Construction Schedule of their work within 15 business days after the date of written notice of Bid Award and a Construction Progress Schedule will be developed and updated periodically, all in accordance with the provisions of Paragraph 4.9"

8.3.2 REVISE the second line of this Subparagraph to read as follows: ". . . in accordance with the provisions of Paragraph 4.9."

8.3.3 DELETE in its entirety. REVISE to read as follows:

8.3.3 "No payment or compensation or claim for additional costs or damages shall be made to the Contractor as compensation for damages for any delays, disruptions, hindrances or acceleration from any cause whatsoever in the progress of the Work, notwithstanding whether such delays be avoidable or unavoidable. The Contractor's sole remedy for delays shall be an EXTENSION OF TIME ONLY, pursuant to and only in accordance with this Paragraph 8.3, such extension to be a period equivalent to the time lost by reason of any and all of the aforesaid causes, as determined by the Construction Manager. In consideration for this grant of a time extension, the Owner, the Construction Manager and/or Architect shall not be held responsible for any loss or damage or increased costs sustained by the Contractor through any delays caused by the Owner, Construction Manager or Architect or any other Contractor or on account of the aforesaid causes or any other cause of delay. In the event the Contractor shall choose to litigate this clause or issue and loses said litigation, the Contractor shall reimburse the Owner, Construction Manager, and the Architect for their reasonable attorney's and expert witness fees and all other costs and expenses incurred by them in the litigation."

8.3.4 ADD the following to 8.3 Delays and Extensions of Time:

8.3.4 . Contractor agrees that, as the work progresses, it is likely that changes will be made to the Construction Schedule as set forth in Paragraphs 3.10.1, 3.10.2, 3.10.3 and 3.10.4. Contractor agrees that it will make no claim for, or be entitled to, an increase in the Contract Sum for any delay, disruption, hindrance or acceleration resulting from any such changes to the Construction Schedule, and that its sole remedy therefore, if any, shall be an extension of time.

9.3.1 ADD "The form of Application for Payment shall be AIA Document G702, Application and Certification for Payment, supported by AIA Document G702, continuation sheet, or similar as approved by the Construction Manager."

9.4.4 ADD Article 9.4.4 PREVAILING MINIMUM WAGES:

9.4.4 "The attached Minimum Wage Rates for Labor performed on the Project as determined by the Commonwealth of Pennsylvania, Department of Labor and Industry, and by inclusion are hereby made a part of these Supplementary Conditions of the Contract for Construction. The Contractor shall obtain a copy of the Wage Rates for the various crafts and classifications and post same in a conspicuous place. In submitting each Application for Payment, the Contractor warrants that no employee of the Contractor, his subcontractors or sub-subcontractors was paid less than the minimum hourly rate as posted for his particular craft or trade or classification for all work performed. The Contractor shall submit, as requested by the Owner, Architect or Construction Manager, Payroll Classification for Public Works Project on the required form, properly executed and notarized."

9.5.1.7 REVISE in its entirety to read "Unsatisfactory Prosecution of the Work in accordance with the Contract Documents."

9.5.1.8 ADD "Failure to comply with government statutes, regulations and laws."

9.6.3 REVISE "The Construction Manager will on request," to "The Owner, Architect or Construction Manager may, on request and at the Owner's, Architect's or Construction Manager's discretion,"

9.6.7 ADD "RETAINAGE:

9.6.7 The Owner shall retain ten percent (10%) of all amounts due the Contractor until the Work is fifty percent (50%) completed. When the Work is fifty percent (50%) completed, one-half of the amount retained by the Owner will be returned to the Contractor, provided the Contractor provides written consent of surety to such reduction in retainage to the Construction Manager along with its Application for Payment, provided the Architect approved the application and reduction of retainage, and further provided that the Contractor is making satisfactory progress and there is no specific cause for greater withholding. Payments are subject to the provisions of Paragraph 9.6.

The Owner shall retain five percent (5%) of all amounts due the Contractor after the Work is fifty percent (50%) completed, provided, however, that in the event a dispute arises between the Owner and any Prime Contractor, which dispute is based upon increased costs claimed by one prime Contractor occasioned by damages or delays or other actions of another prime Contractor, additional retainage in the sum of one and one-half times the amount of any possible liability may be withheld until such time as a final resolution is agreed to by all parties directly or indirectly involved, unless the Contractor causing the additional claim furnishes a bond satisfactory to the Owner to indemnify the Owner against the claim.

The Owner may increase retainage back to 10% in the event that contractor fails to maintain progress per the project schedule or fails to correct deficiencies in the work.

All monies retained by the Owner may be withheld from the Contractor until conditions for

Final Completion and final Payment are met."

9.6.5 REVISE to read, "Payment to material suppliers shall be treated in a manner similar to that provided in Section 9.6 in its entirety."

9.6.8.1 ADD "The Owner, Architect or Construction Manager may require proof of payment to subcontractors, subcontractors, and suppliers, at any time and from time to time."

9.8.1 ADD the following

9.8.1.1 Inspections for Substantial Completion will be conducted at the completion of the work or any portion of the work.

9.8.3 ADD the following

9.8.3 "The items on the list attached to the Certificate of Substantial Completion will have a value of 150% of the worth affixed to them. These amounts will be deducted from the payment and held until the items are completed or corrected. If not corrected within the time frame noted in the Certificate of Substantial Completion, the Owner shall deduct the value from the Contractor's final payment and complete the work at its discretion."

9.10.1 ADD the following:

9.10.1.1 If more than one inspection for Final Completion is required, the Prime Contractor will be billed for the professional fees and services of the Architect and Construction Manager.

9.10.5 ADD as new subparagraph 9.10.5 the following language:

9.10.5 "The final payment including the retainage shall become due in 30 days following the date of the Architect's issuance of a final Certificate for Payment provided that the Contractor has submitted all documents as required by subparagraph 9.10.2 and elsewhere in the Project Manual. The final payment may be reduced by an amount, as certified by the Architect, to equal 1-1/2 times the cost required to complete any remaining uncompleted items. Final payment of any amount so withheld shall be paid forthwith upon completion of these items."

9.10.6 ADD as new subparagraph 9.10.6 the following language:

9.10.6 If more than one inspection of Substantial Completion or Final Completion is required, the Contractor will be billed for the professional fees and services of the Architect and Construction Manager. Following Substantial Completion, in the event Contractor or its subcontractor fails to complete the list of items of the work instructed by the Architect and/or Construction Manager to be corrected or completed within 60 days after the date of substantial completion, the Owner may: 1) Exercise any available remedies to correct or complete deficient work or retain a third party to correct or complete such work at the cost of the defaulting Contractor; and 2) Retain and deduct from any payment or retention otherwise due to the defaulting Contractor any fees or expenses for services required to be provided by the Architect and/or Construction Manager more than 60 days after the date of Substantial Completion:

9.11.1 ADD as new paragraph the following language:

The Contractor shall begin the Work on the date indicated in or established by the Notice to Proceed and shall carry the Work forward expeditiously to achieve Contract Milestones and Substantial Completion on or before times stipulated in the Contract Documents, and Section 01015 of the Specifications.

Should the Contractor fail to complete the work in accordance with the Contract Documents, the Contractor shall be liable for the sum of \$1,500.00 daily, assessable as liquidated damages and not as a penalty and paid to the Owner.

This schedule of completion of the Work shall be considered of the essence of the Contract, and for the cost of extra inspections, salaries of contingent forces, and other expenses entailed by the Owner resulting from the Contractor's delay in completing the work of the Contract within the Contract Time, the Owner shall be entitled to liquidated damages, and not a penalty, for each calendar day that the Work is not substantially complete, subject to adjustments of the Contract Time as provided in the General Conditions. Liquidated damages are necessary, in that it is impossible to precisely calculate the monetary loss to the Owner as the result of any delay in implementation.

The Owner shall have the right to deduct the total amount of any liquidated damages for which the Contractor may be liable under this article from any monies otherwise due the Contractor under the Contract, including any retained percentage which may be under the control of the Owner.

The Surety on the Performance Bond furnished by the Contractor shall be liable for any liquidated damages for which the Contractor may be liable to the extent the Contractor has not made settlement therefore with the Owner.

In the event that the Work must be conducted beyond the normal working hours specified or if the project is not completed by the specified duration, the Contractors shall reimburse the Consultants (A/E, CM, etc.) for all their expenses. Expenses shall be calculated at the cost times 2.75 on labor and costs times 1.15 on all other items.

The reimbursement set forth above are in addition to liquidated damages, if any, and shall be paid to the Consultants by the Contractors prior final payment or the amounts shall be deducted from Contractors final payment.

Reimbursement to the Consultants for additional work expenses shall not apply to the extent that their overtime or extension is the fault of the Consultant or beyond the reasonable control of the Contractor.

If after notification in accordance the Contract Documents, a Contractor fails to perform in accordance with the latest updated project schedule, the Owner may opt to supplement a Contractors Work with additional supervision, labor, material, equipment, etc. in order to help maintain the on time completion of the work and minimize delays to the project. The Contractor will be responsible for all costs associated with such action by the Owner, CM, or Consultants.

10.1.2 DELETE in its entirety and insert the following:

10.1.2 In the event the Contractor encounters on the site materials reasonably believed to be asbestos or polychlorinated biphenyl (PCB) or hazardous waste which has not been rendered harmless, the Contractor shall immediately stop Work in the area affected and report the condition to the Owner, Construction Manager and Architect in writing. The Work in the affected area shall not thereafter be resumed except by written agreement of the Owner and Contractor if in fact the material is asbestos or polychlorinated biphenyl (PCB) or hazardous waste and has not been rendered harmless. The Work in the affected area shall be resumed in the absence of asbestos or polychlorinated biphenyl (PCB) or hazardous waste or when it has been rendered harmless by written agreement of the Owner and Contractor.

10.1.4 DELETE in its entirety and insert the following:

10.1.4 To the extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Construction Manager, Architect, Architect's consultants and agents, and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material is asbestos or polychlorinated biphenyl (PCB) or hazardous waste and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Owner, anyone directly or indirectly employed by the Owner, or anyone for whose acts the Owner may be liable. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity, which would otherwise exist as to a party or person described in this subparagraph.

10.2 ADD the following:

10.2.8 "The Contractor shall furnish 4 sets of Material Safety Data Sheets (MSDS) to the Construction Manager for all materials used on the Project in accordance with government requirements. In addition, the Contractor shall maintain one set of MSDS on the site for periodical inspection by the Owner, Architect and Construction Manager. The Contractor shall be responsible for compliance with OSHA and the Hazard Communications Standard.

"Any fines imposed against the Owner, Architect or Construction Manager by the federal, state or local Occupational Safety and Health Administration or other governmental entities because of the Trade Contractor's noncompliance with safety standards, laws, ordinances or regulations will be deducted from Trade Contractor's original contract amount and/or offset against any unpaid contract balance as proper remuneration for the Owner, Architect or Construction Manager."

11.1.1.1 DELETE semicolon (;) at end and ADD "..., including private entities performing Work at the site and exempt from the coverage on account of number of employees or occupation, which entities shall maintain voluntary compensation coverage at the same limits specified for mandatory coverage for the duration of the Project."

11.1.1.2 DELETE semicolon (;) at end and ADD "... or persons or entities excluded by statute from the requirements of Clause 11.1.1.2 but required by the Contract Documents to provide the insurance required by that Clause;"

11.1.7 ADD the words "blanket, oral and written" after the word "involving" in the first line of subparagraph 11.1.1.7.

11.1.1.8. ADD as new subparagraph 11.1.1.8 the following language:

11.1.1.8. Liability insurance shall include all major divisions of coverage and be on a comprehensive basis including:

1. Premises-Operations (including X, C and U as applicable).
2. Independent Contractors.
3. Products and Completed Operations.
4. Personal Injury Liability with Contractual Liability Exclusion deleted.
5. Contractual, including specified Provision of Contractor's Obligations under Paragraph 3.18.
6. Owned, Non-owned and Hired Motor Vehicles.
7. Broad Form Property Damage including Completed Operations.
8. Umbrella Excess Liability.

If the General Liability coverages are provided by a Commercial General Liability Policy on a

claims-made basis, the policy date or retroactive date shall predate the Contract; the termination date of the policy or applicable extended reporting period shall be no earlier than the termination date of coverages required to be maintained after final payment, certified in accordance with subparagraph 9.10.2.

11.1.2.1 ADD "The insurance required by Subparagraph 11.1.1 shall be written for not less than the following, or greater if required by law:

For the duration of the Contract, the Contractor and each subcontractor shall, at their own expense, purchase and maintain in a company or companies licensed to do business in the Commonwealth of Pennsylvania, Statutory Workmen's Compensation including Occupation Disease as required by the laws of the Commonwealth of Pennsylvania and also Employer's Liability Insurance with limits not less than the following:

Statutory - Amounts and coverage as required by the laws of the Commonwealth of Pennsylvania.

Employers Liability: \$500,000.00 each accident.

\$500,000.00 disease [Policy Limit].

\$500,000.00 disease [Each Employee].

For the duration of these Contracts, the Contractor and each subcontractor shall, at their own expense, purchase and maintain in a company or companies licensed to do business in the Commonwealth of Pennsylvania, Comprehensive General Liability, with limits not less than the following:

Per Occurrence Limit:

\$1,000,000.00

Products and Completed Operations Aggregate:

\$1,000,000.00

General Aggregate Limit:

\$2,000,000.00

Personal and Advertising Injury:

\$1,000,000.00

Fire Damage (Any one Fire):

\$ 100,000.00

Medical Payments (Each Person):

\$ 5,000.00

Products and completed operations shall be maintained for two (2) years after final payment. Provide a "Project Aggregate" CG 25 03 endorsement for all insurance policies.

Umbrella Liability: \$5,000,000.00 each occurrence/aggregate for all Contracts; \$10,000 retention for self insured hazards, each occurrence.

For the duration of this Contract, the Contractor and each subcontractor shall, at their own expense, purchase and maintain in a company or companies licensed to do business in the Commonwealth of Pennsylvania, Comprehensive Automobile Liability Pennsylvania,

Single Combined Limit: \$1,000,000.00

Coverage to include "non-owned" and "hired" car.

11.1.4 ADD as new, subparagraph 11.1.4, the following language:

11.1.4 If this insurance is written on the Comprehensive General Liability policy form, the Certificates shall be AIA Document G705, Certificate of Insurance. If this insurance is written on a Commercial General Liability policy form, ACORD Form 25S will be acceptable.

Furnish two (2) copies of Certificates herein required; furnish two (2) copies of any endorsements that are subsequently issued amending coverages or limits; and furnish two (2) copies of Certificates at time of policy renewal indicating such renewal. The certificates shall set forth evidence of all coverages required by the Contract Documents, and shall specifically certify the following:

11.1.4.1 The coverage afforded under these policies will not be cancelled, non-renewed materially changed, with the limits reduced without a minimum of thirty (30) days prior written notice, by certified mail, being given to the Owner (the certificate holder named in the lower left hand corner of ACORD Form 25S).

11.1.4.2 The West Branch Area School District (Owner), Roth Marz Partnership P.C. (Architect) and The Quandel Group, Inc. (Construction Manager) and any others listed in the certificates of Insurance are named as additional insureds for all required coverages except workers' compensation, in and as their interests appear.

11.3.1.1 ADD "The form of policy for this coverage shall be Completed Value."

11.3.1.3 After the first sentence of subparagraph 11.3.1.3, ADD the following language: "The property insurance required hereby shall be written with a deductible of \$ 5,000 per occurrence."

11.3.9 End the third sentence after the word "reach" and DELETE the following from the paragraph "or in accordance with an award by arbitration in which case the procedure shall be as provided in Paragraph 4.9".

11.3.10 DELETE in its entirety and insert the following:

10.3.10 The Owner, as trustee, shall have power to adjust and settle any loss with the insurers unless one of the parties in interest shall object, in writing within five days after the occurrence of loss, to the Owner's exercise of this power, and if such objection be made, the Architect shall decide. The Owner as trustee shall, in that case, make settlement with the insurers in accordance with the directions of Architect.

11.4 DELETE 11.4 in its entirety and insert the following:

11.4.1 The Contractor shall furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds shall be obtained from a company authorized to do business in the State of Pennsylvania, and the cost thereof shall be included in the Contract Sum. The amount of each bond shall be equal to 100 percent of the Contract Sum. Companies shall be rated at AM BEST Rating A or better.

11.4.2 The Contractor shall deliver the required bonds to the Owner after receiving written intention to award and contemporaneously with executing the Agreement.

11.4.3 The Contractor shall require the attorney-in-fact who executes the required bonds on behalf of the surety to affix thereto a certified and current copy of the power of attorney.

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

12.2.1 In the last sentence ADD " and Attorney's " ... services."

13.1 ADD the following to 13.1:

13.1.2 Nondiscrimination: By submitting a bid and executing Contract Documents, the Contractor shall be deemed to agree as follows:

13.1.2.1 As required by P.L. 30; 24 PS 7-755 - That no Contractor, Subcontractor or any person acting on his or their behalf shall, by reason of race, creed or color, discriminate in the hiring of an employee for work hereunder against any citizen of the Commonwealth

- of Pennsylvania who is qualified and available to perform work to which the employment relates, or thereafter discriminate against or intimidate any employee so hired; that the Owner may deduct from the contract price a penalty of \$5.00 for each person for each calendar day during which such person was discriminated against or intimidated in violation of the foregoing provisions; and that this contract may be canceled by the Owner, and all money due or to become due hereunder may be forfeited for a second or any subsequent violation.

13.1.2.2 That the Contractor will comply with the Pennsylvania Human Relations Act in providing equal employment opportunities in connection with all work performed by him at the job site, pursuant to the provisions of Act No. 222, October 27, 1955, as amended and supplemented, known as the "Pennsylvania Human Relations Act".

(a) Contractor shall not discriminate against any employee, applicant for employment, independent contractor or any other person because of race, color, religious creed, ancestry, age, sex, national origin, handicap or disability.

13.1.3 Commonwealth Prevailing Wage Act: Work of this Project will be governed by requirements of and subject to regulations of Commonwealth Prevailing Wage Act, Decision of the Secretary of Labor and Prevailing Minimum Wage Predeterminations bound in as part of the Contract Documents.

13.1.4 Site Excavation: Contractor shall agree that, not less than three (3) working days prior to beginning, excavation or demolition Work as defined in Act 172 of Commonwealth of Pennsylvania, amending Act 287 of 12/10/74, he shall request the information required by Section 5 of the Act and shall inform each operator employed at the site of the Work of the information received with respect to location of underground installations. Contractor shall agree to report immediately, to the user of the underground installations and to the Owner and Architect, any break in its lines or dent, gouge, groove or other damage to such lines, to their coating or cathodic protection, made or discovered in the course of the excavation or demolition Work.

13.1.5 Anti-pollution Legislation and Erosion Control: Contractors shall comply with all applicable statutes, rules, and regulations enumerated in Section 00110.

13.1.6 Steel Products Procurement Act: In accordance with the "Steel Products Procurement Act", Act 3 of 1978, all steel products used in construction of this Project shall be of steel produced in the United States. (In accordance with Act 161 of 1982, cast iron products used in the construction of this Project shall be produced in the United States.) Refer to Act 141 of 1984 for definitions of steel or cast iron products.

13.3.1 ADD "Written notice to the Owner shall be deemed to have been duly served if delivered in person or sent by Registered or Certified mail to: **Mr. Thomas Giles, Superintendent of Schools for West Branch Area School District, 356 Allport Cutoff, Morrisdale, PA 18658-9312.**

13.4.3 ADD as new subparagraph 13.4.3 the following language:

13.4.3 Should the Contractor suffer injury or damage to person or property because of an act or omission of the Owner or of any of the Owner's employees or agents for whose act the Owner is allegedly liable, the claim shall be made in writing to the Owner within thirty (30) days after the first observance of such injury or damage, otherwise such claim shall be waived. This clause shall not allow claims for injury or damages, which are otherwise precluded by these Contract Documents. Owner shall not be responsible for actions or inactions of other Contractors.

13.4.4 ADD as new paragraph 13.4.4, the following language:

13.4.4 In the event Contractor shall breach any obligation imposed by the Contract Documents, in addition to all other damages, losses, costs and relief, whether in law or equity, which

Owner may recover, Owner also shall be entitled to an award for any reasonable attorneys' fees incurred in attempting to enforce or recover upon the Contract Documents by reason of the Contractor's breach.

13.6.1 DELETE subparagraph 13.6.1 in its entirety and substitute in lieu thereof the following language:

13.6.1 The final payment due the Contractor from the Owner shall bear interest at the lowest rate of interest of the bond issue of the Owner, such interest commencing after the date that such payment shall become due and payable to the Contractor.

13.8 ADD as new paragraph 13.8 the following language:

13.8 WAIVER OF LIENS

13.8.1 Neither the Contractor nor any subcontractor nor anyone furnishing labor or materials to the Contractor in connection with the work shall have the right to file or otherwise assert any mechanic's or materialman's lien or other lien against the work or the premises upon which the work is to be located or against any other property of the Owner. The Contractor agrees to indemnify and hold harmless the Owner from all costs, attorneys' fees and other damage arising from any lien filed by anyone claiming by, on behalf of or through the Contractor and, upon notification from Owner of the filing of a lien, Contractor shall promptly take all necessary action to discharge or remove such lien.

13.8.2 The Contractor agrees that, for himself and for all of his subcontractors, the Pennsylvania Mechanic's Lien Law of 1963 is not applicable to the public construction Work and that his rights and those of his subcontractors are determined in accordance with the Public Bond Law and the payment bonds provided for in connection with this Project.

14. ADD the following to ARTICLE 14:

14.1.1 DELETE subparagraph 14.1.1 in its entirety and substitute the following language in lieu thereof:

14.1.1 If the work is stopped for a period of 60 days under final, non-appealable order of any court or other public authority having jurisdiction, through no act or fault of the Contractor or a subcontractor or their agents or any other persons performing any of the work under a contract with the Contractor, then the Contractor may, upon 21 days written notice to the Owner, Construction Manager and the Architect, terminate the Contract and recover from the Owner payment of all Work agreed upon by all parties as being properly executed.

14.1.2 DELETE subparagraph 14.1.2. in its entirety.

14.1.3 DELETE the words "seven additional" from the eighth line of subparagraph 14.1.3 and substitute in lieu thereof the word "twenty one". Also, delete the words "subparagraph 14.1.2" from the last line of subparagraph 14.1.3."

14.2.1.4 DELETE the word "substantial" from subparagraph 14.2.1.4 and substitute in lieu thereof the word "material".

14.2.4 In the third line ADD "and Attorney's" after 'Architect's' and before 'services'.

ADD THE FOLLOWING:

14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:

- 14.4.2.1 Cease operations as directed by the Owner in the notice;
- 14.4.2.2 Take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- 14.4.2.3 Except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing Subcontracts and purchase orders and enter into no further Subcontracts and purchase orders.

14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment from the Owner on the same basis provided in Subparagraph 14.1.1.

**END OF SUPPLEMENTARY GENERAL CONDITIONS**

**EXHIBIT "B"**

# APPLICATION AND CERTIFICATE FOR PAYMENT

OWNER: West Branch Area School District PROJECT: West Branch Jr./Sr. High School

356 Airport Cutoff  
Morrisdale, PA 16858-3312

CONTRACTOR: Leonard S. Fiore, Inc.

5506 Sixth Avenue, Rear  
Altoona, PA 16602

CONSTRUCTION MANAGER: The Quandel Group, Inc.  
ARCHITECT: Roth Manz Partnership P.C.

CONTRACT DATE:

## CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment as shown below, in connection with the Contract Continuation Sheet, is attached.

1. ORIGINAL CONTRACT SUM ..... \$ 3,709,822.00
2. Net change by Change Orders ..... \$ 151,370.00
3. CONTRACT SUM TO DATE (Line 1 + 2) ..... \$ 3,861,192.00
4. TOTAL COMPLETED & STORED TO DATE ..... \$ 3,854,382.00

(Column G on Continuation Sheet)

### 5. RETAINAGE:

- a. 0.4% of Completed Work \$ 17,000.00  
(Columns D + E on Continuation Sheet)
- b. 0.4% of Stored Material \$ 0.00  
(Columns F on Continuation Sheet)

Total Retainage (Line 5a + 5b or  
Total in Column I of Continuation Sheet) \$ 17,000.00

### 6. TOTAL EARNED LESS RETAINAGE .....

(Line 4 less Line 5 Total)

### 7. LESS PREVIOUS CERTIFICATES FOR PAYMENT

- (Line 6 from prior Certificate)
- CURRENT PAYMENT DUE ..... \$ 93,941.65

9. BALANCE TO FINISH INCLUDING RETAINAGE  
(Line 3 less Line 6) \$ 23,810.00

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes Approved in previous months by Owner	149,592.00	11,601.00
Total approved this Month	13,378.00	0.00
<b>TOTALS</b>	<b>162,971.00</b>	<b>11,601.00</b>
<b>NET CHANGES by Change Order</b>	<b>151,370.00</b>	

FROM-ROTH MARZ	14:15	JUN-30-2006	PROJECT NO.	WB086	PERIOD TO:	09/30/05	DISTRIBUTION TO:	OWNER
			PROJECT NO.		% COMPLETE:	100%	CONSTRUCTION	MANAGER
							ARCHITECT	CONTRACTOR

## CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising this application, the Construction Manager and Architect certify to the Owner that to the best of their knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

**AMOUNT CERTIFIED** ..... \$ 93,941.65  
(Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and the Continuation Sheet that changed to conform to the amount certified.)

CONSTRUCTION MANAGER:	The Quandel Group, Inc.							
By:	<u>Roth Manz Partnership P.C.</u>							
ARCHITECT:	Roth Manz Partnership P.C.							
By:	<u>Roth Manz</u>							
Date:	<u>10/27/05</u>							
From-ROTH MARZ	14:15	JUN-30-2006	PROJECT NO.	WB086	PERIOD TO:	09/30/05	DISTRIBUTION TO:	OWNER
			PROJECT NO.		% COMPLETE:	100%	CONSTRUCTION	MANAGER
							ARCHITECT	CONTRACTOR

This certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein, issuance, payment, and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

**EXHIBIT "C"**

# APPLICATION AND CERTIFICATE FOR PAYMENT

INVOICE # 6613

Page 1

OWNER: West Branch Area School District  
356 Airport Cutoff  
Morrisdale, PA 16858-9312

CONTRACTOR: Leonard S. Fiore, Inc.  
5506 Sixth Avenue, Rear  
Altoona, PA 16602

PROJECT: West Branch Jr./Sr. High School  
Additions & Alterations

CONSTRUCTION MANAGER: The Quandrel Group, Inc.

ARCHITECT: Roth Marz Partnership P. C.

## CONTRACT DATE:

T-270  
**CONTRACTOR'S APPLICATION FOR PAYMENT**  
Application is made for payment, as shown below, in connection with the Contract  
Continuation Sheet, is attached.

1. ORIGINAL CONTRACT SUM .....	\$ 3,709,822.00
2. Net change by Change Orders .....	\$ 151,370.00
3. CONTRACT SUM TO DATE (Line 1 + 2) .....	\$ 3,861,192.00
4. TOTAL COMPLETED & STORED TO DATE .....	\$ 3,856,382.00

(Column G on Continuation Sheet)

## RETAINAGE:

a. 0.3% of Completed Work \$ 12,000.00
b. 0.3% of Stored Material \$ 0.00

(Columns D + E on Continuation Sheet)

Total Retainage (Line 5a + 5b or

Total in Column I of Continuation Sheet .....

\$ 12,000.00

## 6. TOTAL EARNED LESS RETAINAGE .....

(Line 4 less Line 5 Total)

\$ 3,844,382.00

## 7. LESS PREVIOUS CERTIFICATES FOR PAYMENT

(Line 6 from prior Certificate)

\$ 3,837,382.00

## 8. CURRENT PAYMENT DUE .....

\$ 7,000.00
-------------

From-ROTH MARZ  
9. BALANCE TO FINISH INCLUDING RETAINAGE  
(Line 3 less Line 6)

\$ 16,810.00

## CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising this application, the Construction Manager and Architect certify to the Owner that to the best of their knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

**AMOUNT CERTIFIED .....** \$ 7,000.00  
(Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and the Continuation Sheet that change to conform to the amount certified)

CONSTRUCTION MANAGER: The Quandrel Group, Inc.

By: Dee S. Fiore Date: 11/29/05

NOTARY SEAL
Peggy M. Scott, Notary Public
City of Altoona, Blair County
My Commission Expires Mar. 19, 2009

Member, Pennsylvania Association of Notaries

15:48  
15. Total changes approved in previous months by Owner  
Total approved this Month  
NET CHANGES by Change Order

162,971.00	11,601.00
0.00	0.00
<b>TOTALS</b>	<b>162,971.00</b>
	<b>11,601.00</b>
	<b>151,370.00</b>

**EXHIBIT "D"**

# APPLICATION AND CERTIFICATE FOR PAYMENT

INVOICE # 6691

Page 1

OWNER:

West Branch Area School District

PROJECT:

West Branch Jr./Sr. High School  
Additions & Alterations

Distribution to:

F-395

358 Airport Cutoff  
Morrisdale, PA 16858-9312

OWNER

CONSTRUCTION  
MANAGER

P.003/004

CONTRACTOR: Leonard S. Flore, Inc.  
5506 Sixth Avenue, Rear  
Altoona, PA 16602

CONSTRUCTION MANAGER: The Quandel Group, Inc.  
ARCHITECT: Roth Marz Partnership P. C.

ARCHITECT  
MANAGER

CONTRACTOR

T-270

## CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract Continuation Sheet, is attached.

1. ORIGINAL CONTRACT SUM. \$ 3,709,822.00

2. Net change by Change Orders \$ 151,370.00

3. CONTRACT SUM TO DATE (Line 1 + 2) \$ 3,861,192.00

4. TOTAL COMPLETED & STORED TO DATE \$ 3,858,990.00

(Column 3 on Continuation Sheet)

### RETAINAGE:

a. 0.3% of Completed Work \$ 12,000.00

(Columns D + E on Continuation Sheet)

b. 0.3% of Stored Material \$ 0.00

(Columns F on Continuation Sheet)

Total Retainage (Line 5a + b or

Total in Column 1 of Continuation Sheet \$ 12,000.00

6. TOTAL EARNED LESS RETAINAGE \$ 3,846,990.00

(Line 4 less Line 5 Total)

7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 from prior Certificate) \$ 3,844,382.00

8. CURRENT PAYMENT DUE

\$ 2,608.00

### BALANCE TO FINISH INCLUDING RETAINAGE

(Line 3 less Line 6) \$ 14,202.00

AMOUNT CERTIFIED \$ 2,608.00  
(Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and the Continuation Sheet that changed to conform to the amount certified.)

CONSTRUCTION MANAGER: The Quandel Group, Inc.

By:

Debby M. Sizemore

Date:

2/12/06

CHANCE ORDER SUMMARY

ADDITIONS

DEDUCTIONS

CHANCE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner	162,971.00	11,601.00
Total approved this Month	0.00	0.00
<b>TOTALS</b>	<b>162,971.00</b>	<b>11,601.00</b>
NET CHANGES by Change Order	151,370.00	

This certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment, and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

**EXHIBIT "E"**

# APPLICATION AND CERTIFICATE FOR PAYMENT

INVOICE # 6840

Page 1

OWNER: West Branch Area School District  
356 Airport Cutoff  
Morrisdale, PA 16858-9312

F-395

CONTRACTOR: Leonard S. Fiore, Inc.  
5506 Sixth Avenue, Rear  
Altoona, PA 16602

P-004/004

CONSTRUCTION MANAGER: The Quandl Group, Inc.  
ARCHITECT: Roth Marz Partnership P. C.



Notary Public  
Pennsylvania  
My Commission expires  
3/19/09

APPLICATION NO.: Twenty-three  
PROJECT NO.: WIB086  
PERIOD TO: 02/28/06  
% COMPLETE: 100%  
DISTRIBUTION TO:  
 OWNER  
 CONSTRUCTION  
 MANAGER  
 ARCHITECT  
 CONTRACTOR

## CONTRACTOR'S APPLICATION FOR PAYMENT

T-270  
Application is made for payment, as shown below, in connection with the Contract.  
Continuation Sheet, is attached.

1. ORIGINAL CONTRACT SUM	\$ 3,709,822.00
2. Net change by Change Orders	\$ 151,370.00
3. CONTRACT SUM TO DATE (Line 1 + 2)	\$ 3,861,192.00
4. TOTAL COMPLETED & STORED TO DATE	\$ 3,858,990.00
(Column G on Continuation Sheet)	
5. RETAINAGE:	
a. 0.0% of Completed Work	\$ 0.00
(Columns D + E on Continuation Sheet)	
b. 0.0% of Stored Material	\$ 0.00
(Columns F on Continuation Sheet)	
Total Retainage (Line 5a + 5b or Total in Column 1 of Continuation Sheet)	
6. TOTAL EARNED LESS RETAINAGE	\$ 3,858,990.00
(Line 4 less Line 6 Total)	
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT	\$ 3,846,990.00
(Line 6 from prior Certificate)	
8. CURRENT PAYMENT DUE	\$ 12,000.00
9. BALANCE TO FINISH INCLUDING RETAINAGE	
(Line 3 less Line 6)	

81486088606

5506 Sixth Avenue, Rear

Altoona, PA 16602

81486088606

5506 Sixth Avenue, Rear

Al

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

LEONARD S. FIORE, INC., )  
Plaintiff ) 1536  
 ) 2006 GN 2536-CD  
v. )  
 )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, )  ORIGINAL  
Defendant )

**PRAECIPE FOR ENTRY OF APPEARANCE**

Please enter my appearance on behalf of the Defendant, West Branch Area School District in the above captioned action. Thank you for your cooperation.

Respectively Submitted,

MILLER & HALL

By 

Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
570-748-4802

FILED *CC A/H Hall*  
M/11:50am  
OCT 30 2006 

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

LEONARD S. FIORE, INC., )  
Plaintiff )  
v. ) 2006 GN 2536-CD  
WEST BRANCH AREA SCHOOL )  
DISTRICT, )  
Defendant )

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of October, 2006, I served a copy of the foregoing Entry of Appearance upon Jackie Bernard, Esquire, Grappone Law Offices, 411 A Logan Blvd., Lakemont, Altoona, Pennsylvania 16602, by United States first class mail, postage prepaid, the original being filed with the Prothonotary of the Court of Common Pleas of Clearfield County, Pennsylvania.

MILLER & HALL

By \_\_\_\_\_



Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802



Law Offices of  
*Miller and Hall*  
138 East Water Street, Lock Haven, PA 17745

*Craig P. Miller, Esquire*  
(570) 748-4802  
(800) 974-1901

*Stuart L. Hall, Esquire*  
Fax: (570) 748-9369

October 26, 2006

William A. Shaw, Jr.  
Clearfield County Prothonotary  
Clearfield County Courthouse  
230 East Market Street  
Clearfield PA 16830

Re: Leonard S. Fiore, Inc., v. West Branch School District  
Clearfield Civil Docket No: 2006 GN 2536-CD

Dear Mr. Shaw:

Enclosed please find an original and one copy of my Praeclipe for Entry of Appearance to be filed in the above-referenced action. Please time stamp the copy and return it to me in the enclosed self addressed stamped envelope. Thank you for your cooperation with this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stuart L. Hall".

Stuart L. Hall

SLH:fmn  
Enclosures  
cc: Jackie Bernard, Esquire w/Enclosure

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

LEONARD S. FIORE, INC., )  
Plaintiff )  
 )  
v. ) 2006 GN 06-1536-CD  
 )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, )  
Defendant ) JURY TRIAL DEMANDED

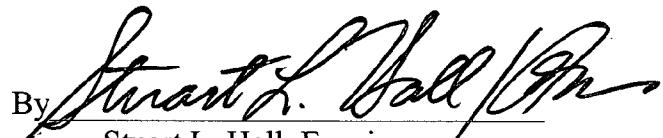
**NOTICE TO PLEAD**

**TO: Leonard S. Fiore, Inc.**

You are hereby notified to plead to the enclosed New Matter within twenty (20) days from the service hereof or a Default Judgment may be entered against you.

Respectfully submitted,

MILLER & HALL

By 

Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802

Date: November 3, 2006

**FILED**

NOV 06 2006

5/10:30 PM  
William A. Shaw  
Prothonotary/Clerk of Courts

6 cases to Att'y

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION – LAW

LEONARD S. FIORE, INC., )  
Plaintiff )  
 )  
v. ) 2006 GN 06-1536-CD  
 )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, )  
Defendant ) JURY TRIAL DEMANDED

**DEFENDANT'S ANSWER WITH NEW MATTER**  
**TO PLAINTIFF'S COMPLAINT**

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted in part, denied in part. It is admitted that Defendant contracted with Plaintiff on or about December 13, 2003. It is admitted that the contract was for a 60,000 square foot addition to the Junior/Senior High School as well as additional renovation of the existing structure. It is denied that a true and correct copy of the contract, along with general and supplemental conditions was attached to the Complaint as Exhibit "A."
5. Admitted in part, denied in part. It is admitted that Plaintiff performed construction work on the Junior/Senior High School building. Whether Plaintiff achieved substantial completion is a legal conclusion to which no response is required. To the extent a response is deemed required, it is denied that Plaintiff performed the construction work and achieved substantial completion on or before May 10, 2005.

6. The contract is a written document which speaks for itself and therefore no response is required to the averments in this paragraph. To the extent a response is deemed required, the averments are denied.

7. The averments in this paragraph state legal conclusions to which no responses are required. To the extent references to Articles 5.1 and 5.3 concern paragraphs in the numerous documents which make up the written contract, the paragraphs speak for themselves and no response is required. To the extent a response is deemed required, the averments are denied.

8. The averments in this paragraph state legal conclusions to which no responses are required. To the extent the paragraphs refer to portions of one or more of the documents which comprise the contract, those documents speak for themselves. To the extent a response is deemed required, the averments are denied.

9. The averments in this paragraph state legal conclusions to which no responses are required. To the extent the averments refer to portions of one or more of the documents which make up the contract, those documents speak for themselves. To the extent a response is deemed required, the averments are denied.

10. The averments in this paragraph state legal conclusions to which no responses are required. To the extent this paragraph references a portion of one of a number of documents which comprise the contract, the language in that document speaks for itself. To the extent a response is deemed required, the averments are denied.

11. Whether applications for payments 20, 21, 22 and 23 have been properly submitted to the owner it is a legal conclusion to which no response is required. To the extent a response is required, it is denied that applications for payment 20, 21, 22 and 23 have been properly

submitted to the owner. Applications 21, 22 and 23 were never even delivered to Defendant. It is admitted that the amounts noted on Exhibits "B," "C," "D," and "E" have not been paid with the exception of \$10,000.00. It is denied those amounts are due as a result of Plaintiff's failure to satisfactorily complete the work.

12. Admitted in part, denied in part. It is admitted that Application 20 was in the amount of \$93,941.65 and was signed on behalf of Leonard S. Fiore, Inc., on September 26, 2005. It is admitted that Application B was signed by the construction manager on October 27, 2005 and by the architect on January 13, 2006. It is admitted that a true and correct copy of the application and certificate for payment were attached to the Complaint as Exhibit "B." The remaining averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

13. The averment that Defendant has breached a contract is a legal conclusion to which no response is required. To the extent a response is required, it is denied that Defendant breached the contract. It is admitted that Defendant did not pay Plaintiff the entire \$93,941.65 listed in the application.

14. Admitted in part, denied in part. It is admitted the document attached to the Complaint as Exhibit "C" was in the amount of \$7,000.00 and purportedly signed on behalf of Leonard B. Fiore, Inc., on October 24, 2005. It is further admitted that the document was purportedly signed by the construction manager on November 29, 2005. The remaining averments in this paragraph are conclusions of law to which no responses are required. By way of further response, the document attached to the Complaint as Exhibit "C" was not signed by the architect or delivered to Defendant.

15. Admitted in part, denied in part. It is admitted that the application attached to the Complaint as Exhibit “D” was in the amount of \$2,608.00. It is denied that it was submitted by Plaintiff for approval and certification on November 23, 2005. It is admitted that the exhibit was purportedly signed by the construction manager on February 16, 2006. The remaining allegations in this paragraph are conclusions to which no responses are required. To the extent responses are deemed required, the allegations are denied. By way of further response, this Application was never delivered to Defendant.

16. Admitted in part, denied in part. It is admitted that the document attached as Exhibit “E” was purportedly signed on behalf of Leonard S. Fiore, Inc., on February 22, 2006. It is denied that the application was in the amount of \$7,000.00. It is admitted that on April 17, 2006, Exhibit “E” was purportedly signed by the construction manager. The remaining averments in this paragraph are conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied. By way of further response, the document attached to the Complaint as Exhibit “E” was not signed by the architect nor delivered to Defendant.

17. Denied. It is denied that these Applications were submitted to Defendant. Applications Exhibits “C,” “D,” and “E” were never delivered to Defendant. By way of further response, Plaintiff made a payment to the contractor in the amount of \$10,000.00 on the Application attached to the Complaint as Exhibit “B.”

18. Defendant does not know what Plaintiff means when it states it has tried unsuccessfully to determine the payment status. Therefore, the averments are denied. By way of further response, Defendant has made a payment of \$10,000.00 to Plaintiff for this application. In addition, Defendant has informed Plaintiff of numerous items which were not completed or were deficient.

19. Denied. By way of further response, Defendant has informed Plaintiff of numerous items which were not completed and of deficiencies in Plaintiff's work. Moreover, Plaintiff has not given Applications 21, 22 or 23 to Defendant for payment.

20. Denied. It is denied that owner has not responded to Plaintiff's inquiries and it is denied that the monies in question are due under the contract. By way of further response, Plaintiff has failed to complete the items required of it under the contract.

21. Admitted in part, denied in part. By way of further response, Defendant has paid Plaintiff in excess of \$3,700,000.00 for work on this project. Despite payments in excess of \$3,700,000.00, Plaintiff refuses to complete the work required under the terms of the contract. Plaintiff also refuses to correct the deficient work which has been brought to its attention by Defendant. It is denied that there are outstanding balances.

22. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

23. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

24. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

**Count One**  
**Breach of Contract**

25. Paragraphs One (1) through Twenty-four (24) of this Answer with New Matter are hereby incorporated by reference as if fully set forth.

26. The averment in this paragraph states legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

27. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied. By way for further response, Applications 21, 22 and 23 were never given to Defendant.

28. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

29. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied. By way of further response, Plaintiff breached the contract between the parties.

30. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

THEREFORE, Defendant West Branch Area School District requests that judgment be entered in its favor and against Plaintiff.

**Count Two**  
**Unjust Enrichment**

Paragraphs One (1) through Thirty (30) of this Answer with New Matter are hereby incorporated by reference as if fully set forth.

31. Admitted.

32. Admitted in part, denied in part. It is admitted that Defendant promised to compensate Plaintiff for quality work done in accordance with the terms of the contract documents. Any inference that Defendant agreed to pay Plaintiff for incomplete work or work which was not done in a workmanlike manner is denied.

33. Admitted in part, denied in part. It is denied that Plaintiff had timely and competent performance. It is admitted that Defendant has refused to pay the full balance which Plaintiff claims is due. Defendant denies the balances alleged due by Plaintiff are due. By way of further response, Plaintiff has failed to complete work required of it under the terms of the contract. In addition, numerous items of Plaintiff's work were not done in a workmanlike manner.

34. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, it is specifically denied that Defendant has been unjustly enriched in the amount of \$113,308.65.

THEREFORE, Defendant West Branch Area School District requests judgment in its favor and against Plaintiff.

**Count Three**  
**Contractor and Subcontractor Payment Act**  
**(The "Act") 73 P.S. §501 et seq.)**

Paragraphs One (1) through Thirty-four (34) are hereby incorporated by reference as if fully set forth.

35. The referenced Act is a written document which speaks for itself. The averments in this paragraph state legal conclusions to which no responses are required.

36. The Act is a written document which speaks for itself. The averments in this paragraph are legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

37. The Act is a written document which speaks for itself. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

38. The Act is a written document which speaks for itself. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

39. Admitted in part, denied in part. It is admitted that Defendant has not paid Plaintiff \$93,941.65 in relation to Application 20. It is denied that Plaintiffs are entitled to \$93,941.65. By way of further response, Defendant made a payment to Plaintiff in the amount of \$10,000.00 concerning Application 20. By way of further response, Plaintiff's work which is the basis of Application 20 was not fully completed and/or completed in a workmanlike manner.

40. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

41. The Act is a written document which speaks for itself. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

42. To the extent this paragraph is referencing a portion of the Act, Defendant's response is that the Act is a written document which speaks for itself. In addition, the

averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

43. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

44. The averments in this paragraph state legal conclusions to which no responses are required. To the extent responses are deemed required, the averments are denied.

THEREFORE, Defendant West Branch Area School District respectfully requests that judgment be entered in its favor and against Plaintiff.

**New Matter**

45. Paragraphs One (1) through Forty-four (44) of this Answer with New Matter are hereby incorporated by reference as if fully set forth.

46. Plaintiff's Complaint fails to state a cause of action upon which relief can be granted.

47. Defendant has made payments to Plaintiff in excess of \$3,700,000.00.

48. Plaintiff breached the terms of the contract documents by failing to complete all work required under the contract.

49. Plaintiff breached the terms of the contract documents by failing to complete the work required under the terms of the contract in a workmanlike manner.

50. Defendant has provided Plaintiff with a punch-list of items noting numerous items which have not been completed or which were not completed in a workmanlike manner.

51. Despite receiving the punch-list of items, Plaintiff continues to refuse to complete the unfinished items and to correct the items which were not done in a workmanlike manner.

52. Defendant has informed Plaintiff that Defendant will pay the amounts referenced in Exhibit "B" minus the \$10,000.00 already paid when Plaintiff completes the items required of it under the terms of the contract.

53. Despite Defendant's offer to pay Plaintiff the amounts noted in Exhibit "B" once Plaintiff corrects the deficient items and completes the work under the contract, Plaintiff refuses to complete and/or correct those items.

54. Plaintiff has failed to mitigate its damages.

55. Defendant has acted in good faith.

56. Plaintiff is precluded from pursuing some or all of its claims in this matter due to Plaintiff's breach of the contract.

57. Plaintiff never delivered Applications 21, 22 and 23 to Defendant for payment and therefore is precluded from pursuing an action for amounts allegedly due under these Applications.

58. Application 21, attached to the Complaint as Exhibit "C," was never signed by the architect.

59. Application 22, attached to the Complaint as Exhibit "D," was never signed by the architect.

60. Application 23, attached to the Complaint as Exhibit "E," was never signed by the architect.

61. The architect withheld its Certificate for payment of Applications 21, 22 and 23.

62. Pursuant to the contract documents, no payment is due Plaintiff for any application for which a certificate for payment has not been signed by the architect.

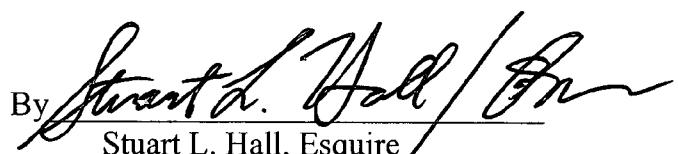
63. Under the terms of the contract documents, Plaintiff is responsible for correcting its non-conforming work.

THEREFORE, Defendant West Branch Area School District requests judgment be entered in its favor and against Plaintiff Leonard S. Fiore, Inc.

Respectfully submitted,

MILLER & HALL

By



Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
570-748-4802

**VERIFICATION**

I, Arleen P. Multhauf, Superintendent of West Branch Area School District, hereby state that the language of the foregoing Answer with New Matter is that of counsel and not necessarily my own; however, I have read the foregoing document and, to the extent it is based upon information that I have given to counsel, it is true and correct to the best of my knowledge, information, and belief.

I understand that false statements made herein are subject to the penalties of 18 Pa.C.S.A. Section 4904 relating to unsworn falsifications to authorities.

West Branch Area School District

Date: November 3, 2006

By

  
Arleen P. Multhauf,  
Superintendent

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

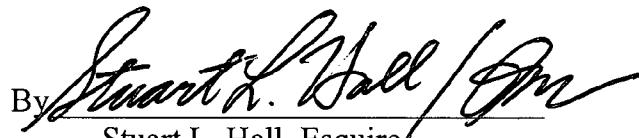
LEONARD S. FIORE, INC., )  
Plaintiff )  
 ) 2006 GN 2536-CD  
v. )  
 )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, ) JURY TRIAL DEMANDED  
Defendant )

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of November, 2006, I served a copy of the foregoing Answer with New Matter upon Jackie Bernard, Esquire, Grappone Law Offices, 411 A Logan Blvd., Lakemont, Altoona, Pennsylvania 16602, by United States first class mail, postage prepaid, the original being filed with the Prothonotary of the Court of Common Pleas of Clearfield County, Pennsylvania.

MILLER & HALL

By



Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802

LEONARD S. FIORE, INC.,

Plaintiff

vs.

WEST BRANCH AREA SCHOOL  
DISTRICT

Defendant

: IN THE COURT OF COMMON  
: PLEAS OF CLEARFIELD  
: COUNTY PENNSYLVANIA

: 2006-1536-CD

: Civil Action - Law

:

:

Counsel of Record for these  
Parties

GRAPPONE LAW OFFICES  
Jackie Atherton Bernard, Esquire  
411 A Logan Blvd., Lakemont  
Altoona, PA 16602  
Telephone No. (814) 946-4405  
Fax No. (814) 946-1396

For the Defendant

Miller & Hall  
Stuart L. Hall, Esquire  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802

GRAPPONE LAW OFFICES  
JOSEPH A. GRAPPONE  
JACKIE A. BERNARD  
411A LOGAN BLVD., LAKEMONT  
ALTOONA, PENNSYLVANIA 16602

(814) 946-4405

FILED  
NOV 27 2006  
Clerk  
10/12/06

William A. Shaw  
Prothonotary/Clerk of Courts

LEONARD S. FIORE, INC.,

Plaintiff

vs.

WEST BRANCH AREA SCHOOL  
DISTRICT

Defendant

: IN THE COURT OF COMMON  
: PLEAS OF CLEARFIELD  
: COUNTY PENNSYLVANIA

: : 2006 -1536-CD

: : Civil Action - Law

: :

**PLAINTIFF'S ANSWER TO NEW MATTER**

AND NOW, comes the Plaintiff, LEONARD S. FIORE, INC., who by and through its attorney, Grappone Law Offices, files this Answer to Defendant's New Matter and in support thereof avers as follows:

45. Plaintiff incorporates by reference hereto the averments of its Complaint as though set forth at length herein.
46. Defendant allegation is a legal conclusion to which no response is required, to the extent that an answer is required, the same is denied in that Plaintiff expended considerable resources performing the contractual work and Defendant has enjoyed the benefit of the Plaintiff's work without justly compensating Plaintiff in violation of the Contract.
47. It is admitted that in accordance with the Contract and change orders, Defendant made payments to Plaintiff for work performed and services rendered in the amount of \$ 3,753,440.35. However, pursuant to the Contract and the change orders, Defendant is obligated to Plaintiff \$3,858,990.00. It is denied that the amount paid Plaintiff is relevant to the outstanding balances due Plaintiff for other work performed pursuant to the Contract and at the request of the Defendant.
48. Denied. Plaintiff performed all work under the contract completely, timely, and in a workmanlike manner. By way of further reply to new matter, the Contract provides for progress payments to Plaintiff. It is further denied that Plaintiff did not complete the work set forth under Payment Application 20. Strict proof to the contrary is demanded at trial.
49. Denied. Plaintiff incorporates the answer set forth in the preceding paragraph and the averments of its complaint.

50. It is denied that Defendant supplied Plaintiff with an accurate and dated punch list. Furthermore, the undated punch list referenced in Defendant's paragraph 50 was only recently provided after the filing of this action.
51. It is denied that the Plaintiff failed to complete unfinished items or that other tasks were not performed in a workmanlike manner. In fact, Plaintiff fully performed until Defendant's breach of the Contract. By way of further answer, Defendant is in possession of Plaintiff's work and Plaintiff believes and therefore avers that any wear and tear is due solely to Defendant and those occupying the property under Defendant. Plaintiff further incorporates herein by reference hereto its answer in the preceding paragraph and paragraph 52.
52. It is admitted that the Defendant has refused to pay Plaintiff under Payment Application 20 and has made payment thereon contingent upon Plaintiff performing additional work. It is denied that Defendant has any right to withhold payment from Plaintiff on a payment application that has been certified and approved by the Defendant's construction manager and architect in conformance with the Contract. Defendant is attempting to treat payment application 20 the same as retainage, which is not authorized under the contract. Any amendments to the Contract must be in writing and signed by both parties. No such amendments to the Contract to support Defendant's demands exist. Plaintiff incorporates herein by reference hereto the averments of its complaint as if set forth at length herein.
53. Denied. Plaintiff incorporates herein by reference hereto its answer in the preceding paragraph. By way of further answer, Plaintiff is entitled to payment for approved and certified payment applications. The demands by Defendant as outline in paragraph 52 and 53 of its New Matter are unilateral modifications to the Contract. Defendant has no contractual basis to withhold payment on an approved and certified payment application nor attach new conditions precedent on payments to Plaintiff. Plaintiff incorporates herein by reference hereto the averments of its complaint as if set forth at length herein.
54. Denied. To the contrary, Plaintiff attempted for months to discuss this matter with Defendant's representatives in an effort to avoid litigation, additional fees, and interest. The Defendant refused to discuss or even address numerous inquiries by Plaintiff and in fact, its governing body, the school board, also repeatedly ignored the Defendant's contractual obligations.
55. It is denied that the Defendant has acted in good faith. Plaintiff incorporates herein by reference hereto the averments of its Complaint and its Answer to New Matter, as if set forth at length herein. Based upon knowledge, information, and belief, Plaintiff avers that the majority of Defendant's school board won election on a "anti-project" platform. As a result of this predisposition and philosophy against the project, Defendant's school board has been obstreperous as to project issues and neglectful of its contractual responsibilities. Defendant's refusal to

comply with the Contract or even address the outstanding amounts owed evidences its bad faith in how it has handled this matter. By way of example, once Plaintiff submits the applications prior to the twenty-fifth day of the month, Defendant is contractually obligated to tender payment by the thirtieth day of the following month, which it has failed to do. Additionally, Defendant is holding hostage the proceeds under Payment Application 20, in direct violation to the terms of the Contract, and insists that Plaintiff continues to work in order to receive payment for work already performed and approved by Defendant's own agents. Plaintiff incorporates herein by reference hereto the averments of its complaint as if set forth at length herein.

56. Denied. Defendant allegation is a conclusion of law without reference to the legal theory upon which it is based and therefore, no response is required. To the extent that an answer is required, the same is denied and the Plaintiff incorporates herein by reference hereto the averments of its Complaint and its Answers to New Matter, as set forth herein.
57. It is denied that the Plaintiff must deliver application payments directly to Defendant in order to receive payment. In fact, the Contract, ordinary business practice and the past practice on this project dictate that all payment applications be forwarded for review, approval and certification to Defendant's agents, the construction manager and the architect. The manager and the architect provide the applications to the Defendant. Plaintiff complied with this procedure in submitting Payment Applications 21, 22, and 23. Plaintiff incorporates by reference herein the averments of its complaint as though set forth at length herein.
58. Admitted in part and denied in part. It is admitted that the Plaintiff does not possess a copy of Payment Application 21, which has been certified by the architect. It is unknown by Plaintiff whether Defendant's architect certified this application. Plaintiff has attempted on numerous occasions to obtain from Defendant an explanation as to the certification status and/or payment status of the outstanding applications. Defendant has failed to offer a reason under the Contract as to the withholding of certification and/or payment and instead, demands that the Plaintiff continue to work without being paid. Any withholding of certification, if the application has not been signed, is thus, unwarranted and unreasonable. Plaintiff incorporates by reference hereto the averments of this reply to new matter and the averments of its complaint, as it set forth at length herein.
59. Admitted in part and denied in part. It is admitted that the Plaintiff does not possess a copy of Payment Application 22, which has been certified by the architect. It is unknown by Plaintiff whether Defendant's architect certified this application. Plaintiff has attempted on numerous occasions to obtain from Defendant an explanation as to the certification status and/or payment status the outstanding applications. Defendant has failed to offer a reason under the Contract as to the withholding of certification and/or payment and instead, demands that the Plaintiff continue to work without being paid. Any withholding of certification, if

the application has not been signed, is thus, unwarranted and unreasonable. Plaintiff incorporates by reference hereto the averments of this reply to new matter and the averments of its complaint, as it set forth at length herein.

60. Admitted in part and denied in part. It is admitted that the Plaintiff does not possess a copy of Payment Application 23, which has been certified by the architect. It is unknown by Plaintiff whether Defendant's architect certified this application. Plaintiff has attempted on numerous occasions to obtain from Defendant an explanation as to the certification status and/or payment status the outstanding applications. Defendant has failed to offer a reason under the Contract as to the withholding of certification and/or payment and instead, demands that the Plaintiff continue to work without being paid. Any withholding of certification, if the application has not been signed, is thus, unwarranted and unreasonable. Plaintiff incorporates by reference hereto the averments of this reply to new matter and the averments of its complaint, as it set forth at length herein.
61. Admitted in part and denied in part. It is admitted that the Plaintiff does not currently possess copies of Payment Applications 21, 22, and 23, signed by the Architect. It is unknown to Plaintiff whether these applications have been certified by the architect, as Defendant has repeatedly refused to verify the certification status and/or payment status for Plaintiff. However, in the event that the applications have not been certified, it is denied that any withholding of certification is warranted or reasonable under the contract where no written explanation for the specific payment applications has been provided. Plaintiff incorporates by reference hereto the averments of its complaint as though set forth at length herein.
62. Admitted in part and denied in part. It is admitted that the contract requires Defendant's agent-architect to approve payment applications for payment. It is denied that Defendant can use a bad faith withholding of approval on payment applications to justify failing to pay for work, which it has benefited and it has used. Plaintiff incorporates by reference hereto the averments of its complaint and its answer to new matter, as if set forth at length herein.
63. Admitted in part and denied in part. Should work of Plaintiff's be nonconforming, Plaintiff is responsible for correcting nonconforming work. It is denied, however, that Defendant can unilaterally modify the terms of the contract by withholding monies which have been approved for payment to Plaintiff by Defendant's construction manager and architect under the guise other work was nonconforming. The very approval and certification by Defendant's agents contradicts the allegation that the work was nonconforming. Plaintiff incorporates herein by reference hereto the averments of its complaint and its answer to new matter.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny and dismiss the Defendant's New Matter and enter judgment in favor of the Plaintiff.

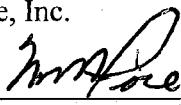
Respectfully submitted,

  
\_\_\_\_\_  
Jackie Atherton Bernard, Esquire

## VERIFICATION

I, Michael A. Fiore, Vice President of Leonard S. Fiore, Inc., verify the statements made in the foregoing Answer and New Matter are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904, relating to unsworn falsification to authorities.

L.S. Fiore, Inc.

BY: 

Michael A. Fiore, vice president

Dated: November 21<sup>st</sup>, 2006

**LEONARD S. FIORE, INC.,**

Plaintiff

**vs.**

**WEST BRANCH AREA SCHOOL  
DISTRICT**

Defendant

**: IN THE COURT OF COMMON  
: PLEAS OF CLEARFIELD  
: COUNTY PENNSYLVANIA**

**: 2006 -1536-CD**

**: Civil Action - Law**

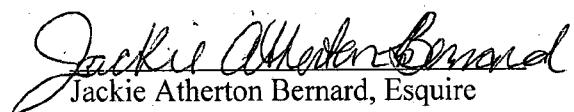
**:**

**CERTIFICATE OF SERVICE**

I, Jackie Atherton Bernard, Esquire, of Grappone Law Office do hereby certify that I have served on the Defendant in the above referenced matter a true and correct copy of Plaintiff's Answer and New Matter on their attorney of record as follows:

Stuart L. Hall, Esquire  
138 East Water Street  
Lock Haven, PA 17745

By sending same United States First Class Mail, postage prepaid, on November 21, 2006.

  
Jackie Atherton Bernard, Esquire  
Grappone Law Office  
411 A Logan Blvd., Lakemont  
Altoona, PA 16602

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DOCKET # 101945  
NO: 06-1536-CD  
SERVICE # 1 OF 1  
COMPLAINT

PLAINTIFF: LEONARD S. FIORE INC.  
vs.  
DEFENDANT: WEST BRANCH AREA SCHOOL DISTRICT

**SHERIFF RETURN**

---

NOW, October 05, 2006 AT 9:00 AM SERVED THE WITHIN COMPLAINT ON WEST BRANCH AREA SCHOOL DISTRICT DEFENDANT AT 356 ALLPORT CUTOFF, MORRISDALE, CLEARFIELD COUNTY, PENNSYLVANIA, BY HANDING TO CINDY GORMONT, ADMINSTRATIVE SECRETARY A TRUE AND ATTESTED COPY OF THE ORIGINAL COMPLAINT AND MADE KNOWN THE CONTENTS THEREOF.

SERVED BY: HUNTER / DEHAVEN

PURPOSE	VENDOR	CHECK #	AMOUNT
SURCHARGE	GRAPPONE	10339	10.00
SHERIFF HAWKINS	GRAPPONE	10339	29.96

**FILED**  
0/2/2006  
DEC 14 2006  
*CS*

William A. Shaw  
Prothonotary/Clerk of Courts

Sworn to Before Me This

So Answers,

\_\_\_\_ Day of \_\_\_\_\_ 2006

*Chester A. Hawkins  
by Marilyn Hamer*  
Chester A. Hawkins  
Sheriff

LEONARD S. FIORE, INC.,  
Plaintiff

vs.

WEST BRANCH AREA SCHOOL  
DISTRICT  
Defendant

: IN THE COURT OF COMMON PLEAS  
: CLEARFIELD COUNTY,  
: PENNSYLVANIA  
:  
: 2006 GN 1536-CD  
:  
: Civil Action - Law  
:  
: Request for Admissions

**AFFIDAVIT OF SERVICE**

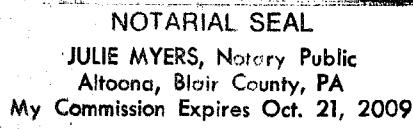
STATE OF PENNSYLVANIA :  
: SS:  
COUNTY OF BLAIR

I, Jackie Atherton Bernard, Esquire, who being duly sworn according to law, depose and say that I served the original and two copies of a Request for Admissions on Stuart L. Hall, Esquire, counsel for Defendant, 138 East Water Street, Lock Haven, PA 17745 on January 25<sup>th</sup>, 2007 by regular mail, postage prepaid.

*Jackie Atherton Bernard*  
Jackie Atherton Bernard, Esquire

Sworn to and subscribed before me January 25, 2007.

*Julie Myers*  
Notary Public



GRAPPONE LAW OFFICES  
JOSEPH A. GRAPPONE  
JACKIE A. BERNARD  
411A LOGAN BLVD., LAKEMONT  
ALTOONA, PENNSYLVANIA 16602

(814) 946-4405

**FILED**

JAN 31 2007  
m/1:30/07  
William A. Shaw  
Prothonotary/Clerk of Courts  
no 41

FILED  
JAN 31 2007  
William A. Shaw  
Prothonotary/Clerk of Courts

100-2007-35

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

LEONARD S. FIORE, INC., )  
Plaintiff )  
 )  
V. )  
 )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, )  
Defendant ) JURY TRIAL DEMANDED

06 1536-0  
2006 CIV 061536-0  
~~2006 CIV 061536-0~~ ORIGINAL

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of January, 2007, I served a copy of Defendant West Branch Area School District's First Request for Production of Documents Directed to Plaintiff upon Jackie Bernard, Esquire, Grappone Law Offices, 411 A Logan Blvd., Lakemont, Altoona, Pennsylvania 16602, by United States first class mail, postage prepaid.

LAW OFFICES OF MILLER & HALL

By \_\_\_\_\_

  
Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802

**FILED**

JAN 31 2007

2007-01-31

William A. Shaw  
Prothonotary/Clerk of Courts  
1 CEN T HIR

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

LEONARD S. FIORE, INC., )  
Plaintiff )  
 )  
v. ) 2006 GN 06-1536-CD  
 )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, )  
Defendant ) JURY TRIAL DEMANDED

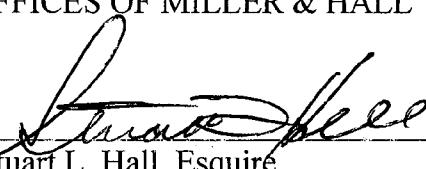


**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of January, 2007, I served a copy of Defendant West Branch Area School District's First Set of Interrogatories Directed to Plaintiff upon Jackie Bernard, Esquire, Grappone Law Offices, 411 A Logan Blvd., Lakemont, Altoona, Pennsylvania 16602, by United States first class mail, postage prepaid.

LAW OFFICES OF MILLER & HALL

By

  
Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802

FILED  
JAN 31 2007  
LAW OFFICES OF MILLER & HALL  
William A. Shaw  
Prothonotary/Clerk of Courts  
1000 10th Street, Suite 1000  
Harrisburg, PA 17101-3100  
717-236-5100  
FAX: 717-236-5101  
E-mail: [william.shaw@pa.gov](mailto:william.shaw@pa.gov)

LEONARD S. FIORE, INC.,  
Plaintiff:

vs.

WEST BRANCH AREA SCHOOL  
DISTRICT

Defendant

: IN THE COURT OF COMMON PLEAS  
: CLEARFIELD COUNTY,  
: PENNSYLVANIA  
:  
: 2006 GN 1536  
:  
: Civil Action - Law  
:  
: REQUEST FOR PRODUCTION OF  
: DOCUMENTS

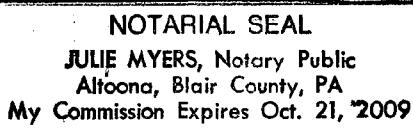
**AFFIDAVIT OF SERVICE**

STATE OF PENNSYLVANIA :  
: SS:  
COUNTY OF BLAIR :  
:

I, Jackie Atherton Bernard, Esquire, who being duly sworn according to law, depose and say that I served the original and two copies of a Request for Production of Documents on Stuart L. Hall, Esquire, counsel for Defendant, 138 East Water Street, Lock Haven, PA 17745 on February 15, 2007 by regular mail, postage prepaid.

*Jackie Atherton Bernard*  
\_\_\_\_\_  
Jackie Atherton Bernard, Esquire

Sworn to and subscribed before me February 15, 2007.



*Julie Myers*  
\_\_\_\_\_  
Notary Public

GRAPPONE LAW OFFICES  
JOSEPH A. GRAPPONE  
JACKIE A. BERNARD  
411A LOGAN BLVD., LAKEMONT  
ALTOONA, PENNSYLVANIA 16602

(814) 946-4405

FILED NO. CC  
M 11:18 AM  
FEB 16 2007  
\_\_\_\_\_  
JW

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

LEONARD S. FIORE, INC., )  
Plaintiff )  
 )  
v. )  
 )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, ) JURY TRIAL DEMANDED  
Defendant )

1536  
2006 GN 2536-CD

ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that on the 22<sup>nd</sup> day of February, 2007, I served a copy of  
Defendant West Branch Area School District's Response to Plaintiff's Request for  
Admissions upon Jackie Bernard, Esquire, Grappone Law Offices, 411 A Logan Blvd.,  
Lakemont, Altoona, Pennsylvania 16602, by United States first class mail, postage  
prepaid.

LAW OFFICES OF MILLER & HALL

By

  
Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802

FILED  
2007-02-23  
FEB 23 2007  
NO CC  
SJC

William A. Shaw  
Prothonotary/Clerk of Courts

LEONARD S. FIORE, INC.,

Plaintiff

VS.

WEST BRANCH AREA SCHOOL  
DISTRICT

Defendant

: IN THE COURT OF COMMON  
: PLEAS OF CLEARFIELD  
: COUNTY PENNSYLVANIA  
:  
: 2006 -1536-CD  
:  
: Civil Action - Law  
:  
: Motion For Partial Summary Judgment  
:

Counsel of Record for these  
Parties

GRAPPONE LAW OFFICES  
Jackie Atherton Bernard, Esquire  
411 A Logan Blvd., Lakemont  
Altoona, PA 16602  
Telephone No. (814) 946-4405  
Fax No. (814) 946-1396

For the Defendant

Miller & Hall  
Stuart L. Hall, Esquire  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802

GRAPPONE LAW OFFICES  
JOSEPH A. GRAPPONE  
JACKIE A. BERNARD  
411 A LOGAN BLVD., LAKEMONT  
ALTOONA, PENNSYLVANIA 16602

(814) 946-4405

FILED *ICC*  
MAY 13 2007 *Atty. Bernard*  
APR 19 2007  
*GW*

William A. Shaw  
Prothonotary/Clerk of Courts

LEONARD S. FIORE, INC., : IN THE COURT OF COMMON  
Plaintiff : PLEAS OF CLEARFIELD  
vs. : COUNTY PENNSYLVANIA  
WEST BRANCH AREA SCHOOL :  
DISTRICT : 2006 -1536-CD  
Defendant : Civil Action - Law  
: Motion for Partial Summary Judgment  
:

**MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOW COMES the Plaintiff, LEONARD S. FIORE, INC., who by and through its attorney, GRAPPONE LAW OFFICE, and respectfully moves your Honorable Court, pursuant to Pennsylvania Rule of Civil Procedure Rule 1035 to enter a summary judgment against Defendant West Branch Area School District ("West Branch") and in favor of the Plaintiff on Count III of the Plaintiff's Complaint, and in support thereof avers as follows:

1. The pleadings are closed and time exists within which to dispose of this Motion without delaying trial.
2. The pleadings of record, discovery responses, this Motion clearly shows that there is no genuine issue as to any material fact to be tried under Count III of the Plaintiff's Complaint:
  - a. The Contractor and Subcontractor Payment Act, 73 P.S. Section 501 et seq. ("the Act") applies to the case at bar AS A MATTER OF LAW relative to the subject matter of Count III of the Plaintiff's Complaint, payment application 20.
    - (i) the subject of the parties contract does not involve six or fewer residential units under 503 (a) of the Act
    - (ii) the subject of the parties' contract does not involve the Contractor purchasing material for its own real property under 503 (b) of the Act.
    - (iii) ALL OF THE ABOVE HAS BEEN ADMITTED BY THE DEFENDANT IN PARAGRAPHS 4, 11, 13 AND 39 OF ITS ANSWER TO THE PLAINTIFF'S COMPLAINT.
  - b. Defendant Owner failed to pay application 20 in full to Contractor Plaintiff as required by the Act. THE DEFENDANT ADMITS THIS FACT IN PARAGRAPHS 11, 13 AND 39 OF ITS ANSWER TO THE PLAINTIFF'S COMPLAINT.
  - c. The Defendant ADMITS to the parties' contract and that it speaks for itself.

d. AS A MATTER OF LAW, under section 505 (a) of the Act, the Owner shall pay the Contractor strictly in accordance the terms of the construction contract.

- (i) pursuant to section 5.3 of the parties' ADMITTED construction contract Owner shall make payment to the Contractor not later than the 30<sup>th</sup> day of month following submission of the application for Payment to the Construction Manager by the Contractor.
- (ii) Defendant Owner ADMITS Application 20 was submitted by the Contractor on September 26, 2005 to the Construction Manager in paragraph 12 of its Answer to the Plaintiff's Complaint.
- (iii) Defendant Owner ADMITS Application 20 was signed by the Construction Manager, On October 27, 2005, in time to comply with section 5.3 of the parties' construction contract as above, and by such signature the Construction Manager and Architect certified to the Owner that based on on-site observations, the Contractor's work progressed to the point of Application 20 and that the quality of the work is in accordance with Contract Documents AND THAT THE CONTRACTOR IS ENTITLED TO PAYMENT OF THE \$93,941.65.
- (iv) DESPITE THESE ADMITTED FACTS in breach of section 9.4.3 of the general conditions of the ADMITTED Construction Contract DEFENDANT OWNER HAS FAILED TO PAY APPLICATION 20 (\$93,941.65), AS REQUIRED UNDER THE ACT.
- (v) The Owner in withholding payment in full under Application 20 has failed to comply with Section 9.5.1 of the construction contract.
- (vi) In light of the certification by the Construction Manager and Architect and the clear and unequivocal terms of the ADMITTED construction contact, the Defendant Owner's opinion of the work is immaterial under the terms of the construction contract that the Defendant prepared. The Defendant simply did not make it material under the construction contract and not a justification to violate the Act.

e. It is an UNDISPUTED FACT that the Defendant Owner failed to produce any notification to the Plaintiff Contractor of any items that under the construction contract could be deemed deficiency items, within seven calendar days from Application 20. AS CERTIFIED BY THE CONSTRUCTION MANAGER AND ARCHITECT, DULY AUTHORIZED TO DO SO UNDER THE CONSTRUCTION CONTRACT, THERE ARE NO DEFICIENCY ITEMS UNDER APPLICATION 20.

f. Section 505 (d) of the Act provides, AS A MATTER OF LAW, that:

- (i) interest equal to 1% per month is due on the unpaid sums due under Application 20 from the time it was due, October 30, 2005

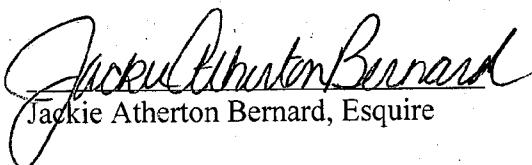
g. Section 512 (a) and (b) of the Act provide, AS A MATTER OF LAW, that:

- (i) a penalty equal to 1% per month is due on the unpaid sums due under Application 20 from the time it was due, October 30, 2005
- (ii) reasonable attorney's fees in an amount set by the Court, together with expenses are to be imposed against the Defendant

3. The Defendant has been in possession of, has been utilizing and continues to benefit from the Plaintiff's work product represented by Application 20 by its continuous use thereof.
4. The Plaintiff is entitled to Judgment against the Defendant under Count III of the Plaintiff's Complaint for Application 20 under the Act, AS A MATTER OF LAW- for the foregoing reasons without any material question of fact to be determined by a trier of fact.

WHEREFORE, the Plaintiff respectfully request that your Honorable Court enter Summary Judgment in favor of the Plaintiff and against the Defendant on Count III of the Plaintiff's Complaint relative only to Application 20 in the sum of \$93,941.65, plus \$15,970.08 in penalties to March 30, 2007, plus \$15,970.08 in interest to March 30, 2007 for a total of \$125,881.81 to March 30, 2007, plus an additional \$1,878.83 each month or fraction thereof until Application 20 is paid in full, plus a reasonable attorney fee of \$12,500.00 and costs.

Respectfully submitted,



Jackie Atherton Bernard  
Jackie Atherton Bernard, Esquire

GRAPPONE LAW OFFICES  
JOSEPH A. GRAPPONE  
JACKIE A. BERNARD  
411A LOGAN BLVD., LAKEMONT  
ALTOONA, PENNSYLVANIA 16602

(814) 946-4405

LEONARD S. FIORE, INC.,

Plaintiff

vs.

WEST BRANCH AREA SCHOOL  
DISTRICT

Defendant

: IN THE COURT OF COMMON  
: PLEAS OF CLEARFIELD  
: COUNTY PENNSYLVANIA  
:  
: 2006 -1536-CD  
:  
: Civil Action - Law  
:  
: Motion for Partial Summary Judgment  
:

### CERTIFICATE OF SERVICE

I, Jackie Atherton Bernard, Esquire, of Grappone Law Office do hereby certify that I have served on the Defendant in the above referenced matter a true and correct copy of Plaintiff's Motion for Partial Summary Judgment on their attorney of record as follows:

Stuart L. Hall, Esquire  
138 East Water Street  
Lock Haven, PA 17745

By sending same United States First Class Mail, postage prepaid, on April 18<sup>th</sup>, 2007.

*Jackie Atherton Bernard*  
Jackie Atherton Bernard, Esquire  
Grappone Law Office  
411 A Logan Blvd., Lakemont  
Altoona, PA 16602

GRAPPONE LAW OFFICES  
JOSEPH A. GRAPPONE  
JACKIE A. BERNARD  
411A LOGAN BLVD., LAKEMONT  
ALTOONA, PENNSYLVANIA 16602

(814) 946-4405

**LEONARD S. FIORE, INC.,**

Plaintiff

vs.

**WEST BRANCH AREA SCHOOL  
DISTRICT**

Defendant

: IN THE COURT OF COMMON  
: PLEAS OF CLEARFIELD  
: COUNTY PENNSYLVANIA

: 2006 -1536-CD

: Civil Action - Law

: Order

:

**PROPOSED ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2007, upon consideration of the foregoing Motion for Partial Summary Judgment, it is hereby ordered, directed, that partial summary judgment is entered against the Defendant and in favor of the Plaintiff in the amount of \$138,381.81 plus \$1,878.83 per month each month or fraction thereof after March 30, 2007, until the Plaintiff is paid in full.

By the Court

\_\_\_\_\_  
J.

GRAPPONE LAW OFFICES  
JOSEPH A. GRAPPONE  
JACKIE A. BERNARD  
411A LOGAN BLVD., LAKEMONT  
ALTOONA, PENNSYLVANIA 16602

(814) 946-4405

LEONARD S. FIORE, INC.,

Plaintiff

vs.

WEST BRANCH AREA SCHOOL  
DISTRICT

Defendant

: IN THE COURT OF COMMON  
: PLEAS OF CLEARFIELD  
: COUNTY PENNSYLVANIA  
:  
: 2006-1536-CD  
:  
: Civil Action - Law  
:  
: Scheduling Order  
:

### SCHEDULING ORDER

AND NOW, this 23 day of April, 2007, upon consideration of the foregoing Motion for Partial Summary Judgment it is hereby ordered:

- 1) a rule is issued upon Defendant to show cause why the Plaintiff is not entitled to the relief requested;
- 2) the Defendant shall file an answer within 30 days;
- 3) Argument on said motion shall be held on May 29, 2007 in Courtroom 1 of the Clearfield County Courthouse before the Honorable F. J. Ammerman; and
- 4) Notice of entry of this Order shall be provided to Defendant by Plaintiff, as moving party.

By the Court



GRAPPONE LAW OFFICES  
JOSEPH A. GRAPPONE  
JACKIE A. BERNARD  
411A LOGAN BLVD., LAKEMONT  
ALTOONA, PENNSYLVANIA 16602

(814) 946-4405

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William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

LEONARD S. FIORE, INC., )  
Plaintiff )  
 )  
 )  
v. ) 2006 GN 06-1536-CD  
 )  
 )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, )  
Defendant ) JURY TRIAL DEMANDED

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William A. Shaw  
Prothonotary/Clerk of Courts  
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 ORIGINAL

**DEFENDANT'S RESPONSE TO MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

1. Admitted.

2. Denied. It is specifically denied there are no genuine issues as to any material fact to be tried under Count III of the Complaint. Numerous issues of fact exist and are the basis of discovery requests. As of this date, Plaintiff has not responded to Defendant's outstanding discovery requests. Factual issues exist including, but not limited to, notice of deficiencies, defective or substandard work and whether a certificate of payment previously issued was nullified in whole or in part.

2a. The averments in this paragraph state legal conclusions to which no responses are required. By way of further response, the obligations of the parties in this matter are determined pursuant to the contract documents which consist of at least the 58 pages attached to the Complaint as Exhibit "A." By way of further response, pursuant to the Contractor and Subcontractor Payment Act, the owner may withhold payment for

deficiency items according to the terms of the construction contract.

2a(iii). Denied. Paragraphs 4, 11, 13 and 39 of Defendant's Answer with New Matter are hereby incorporated by reference as if fully set forth.

2b. Denied. It is denied that Defendant admits that it was required by the Act to pay Application 20 in full. Paragraphs 11, 13 and 39 of Defendant's Answer with New Matter, as well as all other paragraphs of that document are hereby incorporated by reference as if fully set forth. By way of further response, it is admitted that only \$10,000.00 of the \$93,941.65 sought were paid to Plaintiff. It is denied the additional amounts are due Plaintiff and genuine issues of material fact exist concerning that issue.

2c. It is admitted that the parties' contract speaks for itself. Discovery needs to be completed to ascertain all of the documents which constitute part of the contract, including change orders. Pursuant to the documents attached to Plaintiff's Complaint as Exhibit "A," the issuance of a separate certificate for payment or a project certificate for payment will not be a representation that the construction manager or architect has (1) made exhausted or continuous onsite inspections to check the quality or quantity of the Work, (2) reviewed the contractor's construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment. (General Conditions of the Contract for Construction §9.4.3). In

addition, the construction manager or architect may nullify the whole or part of a certificate for payment previously issued, to such extent as may be necessary in the construction manager's or architect's opinion to protect the owner from loss because of:

- .1 Defective work not remedied;
- .2 The other party's claims filed are reasonable evidence indicating probable filing of such claims;
- .3 Failure of the contractor to make payments properly through subcontractors or for labor, materials or equipment;
- .4 Reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 Damage to the Owner or another Contractor;
- .6 Reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to recover actual or liquidated damages for the anticipated delay; or
- .7 Persistent failure to carry out the Work in accordance with the Contract Documents. (Id. at 9.5.1).

As set forth in Defendant's New Matter, Plaintiff failed to complete the work required under the contract, failed to complete the work in a workmanlike manner, failed to complete or correct items on a punch list and failed to mitigate its damages.

2d. Denied. It is denied that, as a matter of law, owner is required to pay contractor and it is denied the construction contract requires such payment. A material issue of fact exists concerning these issues.

(i) Denied. The contract documents speak for themselves. By way of further response, §9.5.1 of the General Conditions allow construction manager or architect to nullify the whole or a part of a certificate for payment previously issued.

(ii) Denied. Paragraph 12 of Defendant's Answer with New Matter speaks for itself.

(iii) Admitted in part, denied in part. It is admitted that Application 20 was signed by the construction manager on October 20, 2005. The remaining averments are conclusions of law to which no responses are required. By way of further response, issues of fact exist concerning whether Plaintiff is entitled to payment and if so, in what amount.

(iv) Denied. It is denied that Defendant is required to pay \$93,941.65. It is admitted Defendant has not paid that entire amount. Material issues of fact exist which will be ascertained through discovery to determine what amount if any, Defendant is owed.

(v) Denied. An issue of fact exists concerning whether or not §9.5.1 of the construction contract or of any other contract documents were complied with. Section

9.5.1 of the General Conditions indicates that a certificate of payment may be nullified in whole or in part.

2e. Denied. It is denied that it is an undisputed fact that Defendant did not notify Plaintiff of deficiency items under the contract. Plaintiff has failed to response to Defendant's discovery responses and it is anticipated that the responses will consist of hundreds, if not thousands, of pages of documents. An issue of fact exists and summary judgment should be denied.

2f. Denied. Section 505 of the Act indicates that the owner shall pay the contractor strictly in accordance with the terms of the construction contract. 505(d) notes that, "except as otherwise agreed by the parties... ." An issue of fact exists concerning even the dates applicable in this matter.

2g. Denied. Section 512 of the Act must be read along with the other sections of the Act and the contract between the parties. Material issues of fact exist concerning whether a payment is due, whether Defendant has complied with the terms of the contract and the dates of various actions. In addition, 512(b) begins by indicating, "notwithstanding any agreement to the contrary...."

3. Denied. Discovery is needed to ascertain what work product is represented by Application 20 which contains no information concerning the work at issue. It is denied that Defendant is utilizing and/or benefitting from the deficient, defective and/or

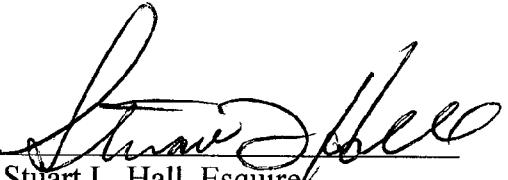
uncompleted work.

4. Denied. For the reasons set forth above, many issues of material fact exist which must be determined before the court can determine whether or not there was a breach of contract.

THEREFORE, Defendant West Branch Area School District respectfully requests that Plaintiff's Motion for Partial Summary Judgment be denied.

Respectfully submitted,  
LAW OFFICES OF MILLER & HALL

By



Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802

**VERIFICATION**

I, Stuart L. Hall, Esquire, Counsel for West Branch Area School District, hereby state that the language of the foregoing Defendant's Response to Motion for Partial Summary Judgment is true and correct to the best of my knowledge, information, and belief.

I understand that false statements made herein are subject to the penalties of 18 Pa.C.S.A. Section 4904 relating to unsworn falsifications to authorities.

LAW OFFICES OF MILLER & HALL

Date: May 18, 2007

By \_\_\_\_\_



Stuart L. Hall, Esquire  
Attorney for Defendant  
West Branch Area School District  
138 East Water Street  
Lock Haven, PA 17745  
570-748-4802

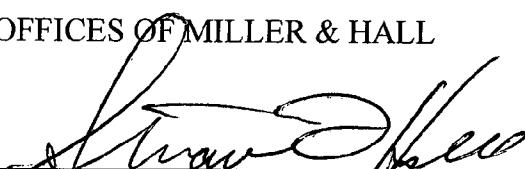
IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

LEONARD S. FIORE, INC., )  
Plaintiff )  
 ) 2006 GN 2536-CD  
v. )  
 )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, ) JURY TRIAL DEMANDED  
Defendant )

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of May, 2007, I served a copy of Defendant's Response to Motion for Partial Summary Judgment upon Jackie Bernard, Esquire, Grappone Law Offices, 411 A Logan Blvd., Lakemont, Altoona, Pennsylvania 16602, by United States first class mail, postage prepaid.

LAW OFFICES OF MILLER & HALL

By 

Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802

VA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

LEONARD S. FIORE,  
Plaintiff

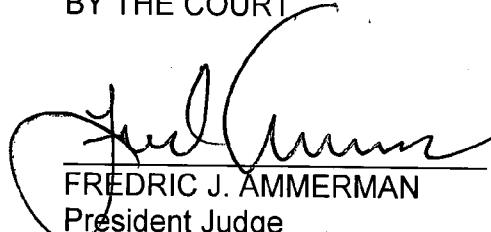
vs.  
WEST BRANCH AREA SCHOOL DISTRICT,  
Defendant

\*  
\*  
\* NO. 06-1536-CD  
\*  
\*

ORDER

NOW, this 30<sup>th</sup> day of May, 2007, following argument on Plaintiff's Motion for  
Partial Summary Judgment, it is the ORDER of this Court that the Motion be and is  
hereby DENIED.

BY THE COURT

  
FREDRIC J. AMMERMAN  
President Judge

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William A. Shaw  
Prothonotary/Clerk of Courts  
Clerk to Atty Grappone, J.  
Atty Hall, S

William A. Shaw  
Prothonotary/Clerk of Courts

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DATE: 6-1-07

You are responsible for serving all appropriate parties.  
The Prothonotary's office has provided service to the following parties:

Plaintiff(s)

Defendant(s)

Special Instructions:

Plaintiff(s) Attorney       Defendant(s) Attorney      Other

LEONARD S. FIORE, INC.,  
Plaintiff:

vs.

WEST BRANCH AREA SCHOOL  
DISTRICT

Defendant

: IN THE COURT OF COMMON PLEAS  
: CLEARFIELD COUNTY,  
: PENNSYLVANIA  
:  
: 2006 GN 1536 *06-1536-CD*  
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: Civil Action - Law  
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: REQUEST FOR PRODUCTION OF  
DOCUMENTS

**AFFIDAVIT OF SERVICE**

STATE OF PENNSYLVANIA

: SS:

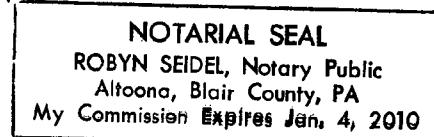
COUNTY OF BLAIR

I, Jackie Atherton Bernard, Esquire, who being duly sworn according to law, depose and say that I served Defendant a Reply to Request for Production of Documents and Answers to Interrogatories on Stuart L. Hall, Esquire, counsel for above named Defendant, 138 East Water Street, Lock Haven, PA 17745 on July 10, 2007 by Fed Ex Ground.

*Jackie Atherton Bernard*  
Jackie Atherton Bernard, Esquire

Sworn to and subscribed before me July 10, 2007.

*Robyn Seidel*  
Notary Public



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Prothonotary/Clerk of Courts

**LEONARD S. FIORE, INC.,**  
Plaintiff:

**vs.**

**WEST BRANCH AREA SCHOOL  
DISTRICT**

Defendant

: **IN THE COURT OF COMMON PLEAS**  
: **CLEARFIELD COUNTY,**  
: **PENNSYLVANIA**  
:  
: **2006 GN 1536**  
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: **Civil Action - Law**  
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Prothonotary/Clerk of Courts

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**AFFIDAVIT OF SERVICE**

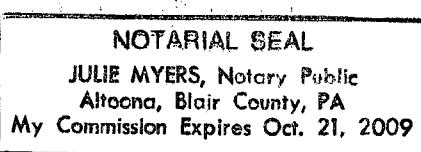
**STATE OF PENNSYLVANIA** :  
: SS:  
**COUNTY OF BLAIR** :

I, Jackie Atherton Bernard, Esquire, of Grappone Law Office, who being duly sworn according to law, depose and say that I served the original and two copies of a Request for Production of Documents and Second Set of Interrogatories on Stuart L. Hall, Esquire, counsel for Defendant, 138 East Water Street, Lock Haven, PA 17745 on February 1, 2008 by regular mail, postage prepaid.

*Jackie Atherton Bernard*  
Jackie Atherton Bernard, Esquire  
Grappone Law Office  
411 A Logan Blvd., Lakemont  
Altoona, PA 16602

Sworn to and subscribed before me February 6, 2008.

GRAPPONE LAW OFFICES  
JOSEPH A. GRAPPONE  
JACKIE A. BERNARD  
411 A LOGAN BLVD., LAKEMONT  
ALTOONA, PENNSYLVANIA 16602  
(814) 946-4405



*Julie Myers*  
Notary Public

S FILED 1cc Atty  
m/10:40am Bernard  
FEB 10 2010 Hall  
Copies to C/17

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA  
CIVIL ACTION - LAW

LEONARD S. FIORE, INC. )  
Plaintiffs ) No.: 06-1536-CD  
v. )  
WEST BRANCH AREA SCHOOL )  
DISTRICT, )  
Defendant )

PRAECIPE TO SETTLE AND DISCONTINUE

Please mark the above captioned matter and the Counterclaim filed by the  
Defendant West Branch Area School District SETTLED and DISCONTINUED. Thank  
you for your cooperation.

Respectfully submitted,

GRAPPONE LAW OFFICES

HALL & LINDSAY, PC

By

Jackie Atherton Bernard  
Attorney for Plaintiff  
411A Logan Boulevard, Lakemont  
Altoona, PA 16602

By

Stuart L. Hall, Esquire  
Attorney for Defendant  
138 East Water Street  
Lock Haven, PA 17745  
(570) 748-4802  
PA Attorney I.D. #72814