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South Bay Storage LLC, S&S Associates, Erwin H. Sokol as  
6 Trustee of the Frances Sokol Trust, and Mark Sokol

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8 **IN THE MATTER OF THE BINDING ARBITRATION BETWEEN**

9 MARINA PACIFIC HOTELS AND SUITES  
10 LLC; SOUTH BAY STORAGE LLC; S&S  
ASSOCIATES; ERWIN H. SOKOL AS  
11 TRUSTEE OF THE FRANCES SOKOL  
TRUST; and MARK SOKOL,

12 Claimants,

13 vs.

14 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP; and BRYAN  
15 JACKSON,

16 Respondents.

LASC CASE No. BC400637  
ADRS Case No. 09-0641-DIJ

[Hon. Dzintra I. Janavs (Ret.), Arbitrator]

**CLAIMANTS' FIRST AMENDED  
STATEMENT OF CLAIMS AGAINST  
RESPONDENTS FOR (1) LEGAL  
MALPRACTICE AND (2) BREACH OF  
FIDUCIARY DUTIES**

17  
18 AND RELATED CROSS-CLAIM.  
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1 Claimants Marina Pacific Hotel and Suites LLC (“MPH”), South Bay Storage LLC (“SBS”),  
2 S&S Associates (“S&S”), Erwin H. Sokol as Trustee of the Frances Sokol Trust, and Mark Sokol  
3 (collectively, “Claimants” or “Clients”) respectfully set forth below their First Amended Restatement  
4 of Claims in this binding Arbitration proceeding against Allen Matkins Leck Gamble Mallory &  
5 Natsis LLP (“Allen Matkins”) and its partner, Bryan Jackson (“Jackson,” and collectively,  
6 “Respondents” or “Counsel”) , as follows:

### 7 INTRODUCTION

8 1. This professional negligence lawsuit concerns two instances of transactional  
9 malpractice arising from the legally-deficient drafting of two commercial construction contracts and  
10 related counseling by Jackson, who is the chief contract contract specialist at the Allen Matkins firm.  
11 One of these contracts concerned a boutique luxury hotel renovation project, and the other concerned  
12 the development of a large self-storage facility. The hotel renovation contract with PCL Construction  
13 Services, Inc. (“PCL”) -- one of the nation’s largest contractors specializing in the construction of  
14 commercial buildings, civil infrastructure projects and heavy industrial complexes (*see*  
15 [www.pcl.com](http://www.pcl.com)) -- failed to include a prevailing party attorneys’ fee and costs provision. Respondents  
16 never discussed with Claimants the need for such a provision, nor did they ever discuss with  
17 Claimants the advisability of seeking third-party beneficiary protection in the prevailing party fee and  
18 cost provisions in PCL’s subcontractor agreements. Claimants asked Jackson to obtain, and he  
19 agreed to provide, the greatest amount of protection possible for owner/developers in the commercial  
20 construction contracts at issue here. Jackson’s failure to discuss with and advise his Clients about the  
21 need to obtain adequate fee-shifting and cost-shifting provisions (including for expert witness fees) in  
22 the context of a \$10 million complex hotel renovation and construct project fell below the applicable  
23 standard of care and proximately caused serious financial harm to Claimants.

24 2. In particular, when the hotel renovation project turned out badly due to serious  
25 construct defects, botched repairs, and chronic delays, Claimants sued PCL, proved both liability and  
26 damages during the course of lengthy expert-driven destructive testing and settlement discussions,  
27 and recently settled the lawsuit for \$4,350,000 on the eve of trial-i.e., for almost 50% of the \$10  
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1 million construction contract cost. It was a case with strong liability claims and construction defect  
2 and repair damages that were certain, well-documented and provable (although not surprisingly  
3 various categories and amounts of claimed damages were hotly disputed). Out of the \$4,350,000  
4 settlement recovery, Claimants paid over \$1,300,000 in contingent attorneys' fees to their litigation  
5 counsel after having incurred costs of nearly \$500,000.

6 3. If there had been a prevailing party attorneys' fee and cost provision, which  
7 reasonably competent owner/developer counsel almost invariably insist upon in comparable  
8 construction deals (especially legal specialists in this area), Claimants either would have received  
9 substantially more money in settlement (to reflect the increased risk of a fee and cost award if the  
10 case went to trial), or, unless such increased settlement monies were offered, they instead would have  
11 gone to trial, prevailed, and had their fees and costs awarded on top of their damages. But for  
12 counsel's professional negligence, in short, Claimants would have recovered approximately \$900,000  
13 more in settlement (i.e., approximately 50% of their costs and fees incurred at the time of the final  
14 settlement conference), or, alternatively, would have rejected a lower settlement, opted for trial, and  
15 obtained approximately the full \$1,800,000 in fees and costs after prevailing at trial.

16 4. It was and is virtually certain that Claimants would have been the prevailing party in  
17 the litigation entitled to recover their fees and costs if they had gone to trial and if the PCL  
18 construction contract had contained an appropriate prevailing party attorneys' fee and cost provision.  
19 It is equally certain that Claimants were the prevailing party for purposes of their settlement with  
20 PCL. There is no question of PCL's ability to pay such costs and fees: it is a massively-large  
21 national (indeed, international) building conglomerate, used to construction defect cases and used to  
22 paying for their negligence in the face of their customer/client's legitimate claims.

23 5. Jackson and his firm also were negligent in advising Claimants about their storage  
24 facility construction contract. They failed to discuss with Claimants the need for, and to include in  
25 the contract, an owner's completion-notice right rather than the general contractor completion-notice  
26 right. By including a general contractor completion-notice right, the general contractor filed a notice  
27 of completion which triggered subcontractor lien notices that delayed funding for the completion of  
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1 the project. Counsel was aware that Claimants had obtained construction financing, and counsel was  
2 negligent in not realizing that the inclusion and exercise of a general contractor completion notice  
3 right would trigger subcontractor lien notices that would delay and impede final funding by the  
4 lender.

5 6. After recognizing this error, Jackson obtained an oral agreement from the contractor  
6 not to file the notice of completion itself, but to permit the owner/developer to do in due time, in its  
7 discretion. However, Jackson's failure to confirm his instruction to the general contractor not to file  
8 the notice of completion, and the contractor's supposed oral agreement in that regard. This failure  
9 further highlights counsel's apparent negligence on this point. These errors not only resulted in fix-it  
10 legal fees ballooning to excessive levels (reflected in Respondents' \$170,000 fee receivable cross-  
11 claim) but also delayed the completion of the storage facility, resulting in loss of business income,  
12 increased labor costs, increased interest charges, and other direct and foreseeably indirect damages.

13 7. By this arbitration, Claimants seek to extinguish the supposed \$170,000 in fees  
14 allegedly owed to Respondents. They also seek to obtain recompense for the serious monetary losses  
15 they have suffered due to Counsel's failure to exercise due and ordinary care expected of  
16 construction contract specialists when drafting commercial construction contracts on behalf of  
17 owner/developers such as Claimants, in the amount of \$1,800,000, plus interest and related costs.  
18 (Because the damages due to the legally-deficient PCL construction contract are so much larger than  
19 the damages caused by the legally-deficient storage facility construction contract, this First Amended  
20 Statement of Claims sets forth substantially more allegations regarding the former than it does  
21 regarding the latter.)

### 22 THE PARTIES

23 8. Claimant MPH is and at all times herein mentioned was a limited liability company  
24 doing business in Los Angeles County, California.

25 9. Claimant SBS is and at all times herein mentioned was a limited liability company  
26 doing business in Los Angeles County, California.

27 10. Claimant S&S is and at all times herein mentioned was a company doing business in  
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1 Los Angeles County, California.

2 11. Claimant Erwin H. Sokol is and at all times herein mentioned was the Trustee of the  
3 Frances Sokol Trust.

4 12. Claimant Mark Sokol is and at all times herein mentioned was an individual residing  
5 in Los Angeles County, California.

6 13. Respondent Allen Matkins is and at all times herein mentioned was a law firm  
7 structured as a limited liability partnership doing business in Los Angeles County, California.

8 14. Respondent Jackson is and at all times herein mentioned was a lawyer practicing law  
9 in Los Angeles County, California and a partner in the Allen Matkins law firm.

10 15. It is elementary that a law partner and partnership, however innocent of wrongdoing,  
11 may be held vicariously liable for the malpractice of a fellow partner. Because Jackson is an Allen  
12 Matkins partner, the Allen Matkins partnership also is responsible for Jackson's professional  
13 negligence that harmed Claimants in this case.

14 **BACKGROUND OF THE ENGAGEMENT**

15 16. The Sokols are hoteliers and commercial property developers. Through their  
16 membership interests, they own MPH, which is the owner of record of that certain hotel property  
17 located at 1697 Pacific Avenue, Venice, California 90291, previously known as the Best Western  
18 Marina Pacific Hotel and Suites and currently known as Hotel Erwin (the "Hotel"). Through their  
19 membership interests, the Sokols also own SBS, which is the owner of record of that certain large  
20 self-storage facility located at 1234 W. Anaheim Street, Harbor City, California 90710 (the "South  
21 Bay Storage facility").

22 17. The Hotel, which overlooks the Venice Beach boardwalk and the Pacific Ocean,  
23 currently consists of six (6) stories, comprising one hundred and twenty-two (122) guestrooms and  
24 two levels of parking, one at street level and one semi-subterranean.

25 18. In 2005, the Hotel only had five (5) stories and it needed to be improved and upgraded  
26 in order to rebrand it from a Best Western hotel to a higher-end, luxury boutique hotel, which would  
27 become Hotel Erwin. During that time and to that end, the Sokols began investigating in earnest the  
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1 possibility of upgrading the Hotel by, among other major improvements, adding an entirely new sixth  
2 floor and associated thirty (30) ocean view luxury guest suites, plus a new roof-top deck and bar (the  
3 “Hotel upgrade project” or “Hotel project”). To that end, the Sokols, as owner/developers, entered  
4 into discussions with PCL as prime contractor about the Hotel upgrade project.

5 19. Because the Hotel project would cost over \$10,000,000, would require substantial  
6 construction financing, and would disrupt the ongoing and prospective business of the Hotel during  
7 the construction process (thereby impacting the Sokols’ revenues, income, and liabilities), and  
8 because of PCL’s size and sophistication, the Sokols decided to retain a legal specialist with  
9 particular expertise in the negotiation and drafting of complex commercial construction contracts.  
10 For that purpose they reached out to Jackson, and retained him, because Jackson held himself out and  
11 marketed his legal services publicly to actual and prospective clients, including the Claimants here, as  
12 an experienced corporate and transactional attorney with substantial experience and specialized  
13 expertise in negotiating and drafting complex commercial construction contracts. Among other  
14 representations, Jackson held himself out as a specialist in construction contract negotiation and  
15 drafting by virtue of his admission into the American College of Real Estate Lawyers, his role as the  
16 Chair of the Allen Matkins Green Building and Sustainable Construction Group and Past Chair of  
17 Allen Matkins’ Construction Transactional Group, Chair of the Los Angeles County Bar Association  
18 Subsection on Construction Law, past Chair of the Real Property Section, his membership on the  
19 Planning Committee for the USC Real Estate and Business Symposium, and his numerous  
20 publications on construction contract issues.

21 20. Based upon Jackson’s purported specialization and highly-trained expertise as a  
22 construction contract lawyer, and his representation and promise to the Sokols (in response to their  
23 request) that he was able and willing to draft the construction contract with the highest degree of  
24 protection afforded to owner/developers such as Claimants, the Sokols decided to retain Jackson and  
25 his firm (Allen Matkins) to negotiate and draft the construction contract with PLC for the protection  
26 of Claimants’ interests with respect to the hotel construction project. They also retained Jackson and  
27 the Allen Matkins firm, for the same reasons, to negotiate and draft the construction contract with  
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1 respect to the development of the South Bay Storage facility.

2 **THE LEGALLY-DEFICIENT PCL CONSTRUCTION CONTRACT**

3 21. Construction lenders typically require the owner/developer to use a standard form  
4 construction contract issued by the AIA (the American Institute of Architects) for the original  
5 contractor. Owner-oriented construction contracts have been standardized by the American College  
6 of Real Estate Lawyers in the form of the “A (Owner-Contractor)” AIA construction contract  
7 exemplars that are available online for a fee at [www.acrel.org/Public/search/?Search=Publications](http://www.acrel.org/Public/search/?Search=Publications). If  
8 the standard AIA form construction contract does not contain all of the provisions that the  
9 owner/developer would like, or has provisions that the owner/developer does not like, and if the  
10 contractor will agree to the changes, then the owner/developer can make changes by insertions,  
11 modifications, riders and exhibits to the standard AIA contract forms. Thus, for example, AIA  
12 owner/contractor forms do not automatically include prevailing party attorneys’ fee and cost-shifting  
13 provisions as between the owner and contractor. But the parties are free to add such a provision as  
14 they see fit under the circumstances of their particular deal and project, and typically do so at the  
15 insistence of counsel for owner/developers with the consent of the builder/contractor.

16 22. On December 22, 2005, PCL signed a contract with MPH, which Jackson had  
17 negotiated and drafted, to build and supervise the construction of the Hotel project (the “Construction  
18 Contract”), a true and correct copy of which is attached hereto as Exhibit A and incorporated herein  
19 by this reference. The Construction Contract is a modified and amended form of AIA Document  
20 A117 - Electronic Format, the “Abbreviated Form of Agreement Between Owner and Contractor for  
21 Construction Projects of Limited Scope where the basis of payment is the Cost of the Work Plus a  
22 FEE with our without a Guaranteed Maximum Price.” PCL agreed to perform the work for a  
23 guaranteed maximum price (“GMP”) of \$10,175,747, including a contractor’s fee of approximately  
24 \$530,489.

25 23. When contracting parties are forced into litigation to resolve a dispute, and are  
26 required to engage the services of an attorney, any profit from the underlying transaction or “upside”  
27 from the litigation itself can quickly evaporate with the payment of the attorney’s fees incurred to  
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1 prosecute or defend the litigation. This problem can be compounded substantially by litigation costs,  
2 especially when expert witness assistance is required and expert witness fees are incurred. The  
3 hourly rate for attorneys has dramatically increased in the Los Angeles legal market in recent years,  
4 and construction expert fees also are very high. As a consequence, in a relatively short time,  
5 escalating attorneys' fees and expert witness costs can eliminate all the profit from a transaction or  
6 the potential "upside" from any litigation. Even if the matter is handled by the attorney on a  
7 contingency basis, such that the attorney is paid a fee from a portion of the gross or net recovery, the  
8 funds paid to the attorney are still lost income to the fee-paying party, and expert witness costs  
9 typically are paid off the top of any recovery in contingent commercial construction defect litigation.

10 24. To avoid the loss to a contracting party incurred by paying attorney's fees in litigation  
11 arising from or related to a contract, contracts typically contain a provision that the prevailing or  
12 successful party is entitled to recover attorney's fees from the other, as well as costs. In complex  
13 commercial construction contracts, the recovery of costs pursuant to such fee- and cost-shifting  
14 provisions often include expert witness fees, as complex commercial construction defect litigation  
15 invariably requires expert assistance regarding liability issues (usually involving destructive testing)  
16 and damage issues (usually involving estimates of the cost of repairs, business interruption damages,  
17 increased financing charges, and related items and categories of damages).

18 25. This type of prevailing party attorneys' fee and cost provision (the "Prevailing Party  
19 Fee and Cost Provision") is a standard and, indeed, essential term that experienced counsel  
20 representing owner/developers typically require in a construction contract to provide additional  
21 protection in the event of construction defect litigation arising out of or related to the construction  
22 contract. PCL and other large prime contractors almost always agree to include in high-dollar  
23 construction contracts such a Prevailing Party Fee and Cost Provision in order to close the deal, at the  
24 insistence of the owner/developer's counsel. PCL would have done so here had it been included in  
25 the modified AIA construction contract form prepared and negotiated by Jackson, as PCL routinely  
26 does so in other comparable construction deals.

27 26. Jackson also failed to consider or request from PCL, to discuss with Claimants, or to  
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1 include in the PCL Construction Contract an additional protective provision requiring that PCL  
2 ensure that its own contracts with the subcontractors it used in connection with the Hotel project also  
3 included language in the applicable prevailing party attorneys' fee and cost provisions making  
4 Claimants express third-party beneficiaries of those provisions. Such third-party beneficiary  
5 provisions are far from unusual in similar deals, and at the very least should have been considered  
6 and discussed intelligently with Claimants during the contract negotiations with PCL, before it  
7 entered into any subsequent agreements with its subcontractors.

8 27. Jackson failed to communicate and advise Claimants that the construction agreement  
9 he drafted did not include a Prevailing Party Fee and Cost Provision, nor did the subcontractor  
10 contracts contain any similar fee and cost protections for Claimants as third-party beneficiaries,  
11 which would have afforded the protection for Claimants that they wanted, needed and deserved.  
12 While Jackson discussed numerous individual and particularized issues pertaining to the Hotel  
13 project that were incorporated in exhibits to the Construction Contract, Jackson never discussed or  
14 raised any issue or question with his clients about the appropriateness of and need for fee- and cost-  
15 shifting provisions in the PCL prime construction contract and also in the subcontractor agreements  
16 (on an express third party beneficiary basis).

17 28. Jackson knew or was negligent in not knowing, and never explained to Claimants as  
18 he should have done, that under the so-called "American Rule" each party to a lawsuit will normally  
19 bear its own attorneys' fees incurred in the lawsuit unless a contract, statute or rule provides for a  
20 prevailing party attorneys' fee provision; and, further, that the standard form AIA construction  
21 contract Jackson was modifying did not contain such a provision, nor did any statute or rule do so  
22 under the circumstances of Claimants' construction deal with PCL. Jackson also knew or was  
23 negligent in not knowing, and failed to ever disclose or discuss with Claimants, that Claimants would  
24 not have the protection of a prevailing party fee or cost award in PCL's subcontractor agreements  
25 unless such express third-party-beneficiary protection were negotiated and insisted upon as part of  
26 their contract with PCL.

1           29.     The absence of a Prevailing Party Fee and Cost Provision in the prime construction  
2 contract is particularly disadvantageous and prejudicial to an owner/developer in this not-at-all-  
3 atypical situation. This prejudice and disadvantage was exacerbated by the fact that the construction  
4 defects here, during the time the rooms were flooded and during the time the rooms were being  
5 repaired, caused business interruption and brand damage which further reduced Claimants' income  
6 and ability to pay attorneys' fees and costs.

7           30.     This is not a case involving a close call about a disputed or debatable legal question or  
8 judgment call in which reasonable differences of opinion could be made by skilled practitioners.  
9 Jackson's failure to discuss with his clients the need for a Prevailing Party Fee and Cost Provision  
10 and to include it in the Construction Contract were not, in short, based upon any informed  
11 professional, business or legal judgments or analyses. While it is true that an attorney does not  
12 ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he  
13 may make in his practice, a construction contract specialist certainly is expected, however, to possess  
14 knowledge of the plain and elementary point that an owner/developer will typically wish to have a  
15 Prevailing Party Fee and Cost Provision under the circumstances present in this case, and to discuss  
16 that important issue with his or her client.

17           31.     There can be no legitimate reason for having failed to include such fee and cost  
18 provisions both in the prime PCL Construction Contract and in the PCL subcontractor agreements  
19 without first discussing that issue in depth with the owner/developers. The need for a Prevailing  
20 Party Fee and Cost Provision from the owner/developer's perspective is particularly acute when  
21 dealing with a large, litigious, and well-financed commercial builder such as PCL, which is the  
22 largest general contracting organization in Canada and the sixth largest in the United States, with  
23 annual construction volume exceeding \$5 billion. (*See* <http://www.pcl.com/index.aspx>). While it is  
24 possible that some owner/developers may not want to have a Prevailing Party Fee and Cost Provision  
25 in a modified AIA construction contract, that would only rarely be the case, as in situation in which  
26 the owner's funds or construction financing are shaky and there is concern that the owner/developer  
27 may be sued for non-performance. But that was not true here. Claimants had no funding or  
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1 financing problems with respect to their payment obligations to PCL under the Construction Contract  
2 that would justify not wanting a Prevailing Party Fee and Cost Provision.

3 32. Adequately capitalized and financed owner/developers such as Claimants need to have  
4 a Prevailing Party Fee and Cost Provision in a modified AIA construction contract to provide added  
5 protection in the form of the potential for the recovery of fees and costs in the event the  
6 owner/developer must sue the prime contractor for breach of contract, negligence and breach of  
7 warranty - the proto-typical construction defect claims - which is what the Sokols were required to do  
8 here as against PLC. (Claimants non-payment of final sums allegedly due to PCL, as reflected in its  
9 cross-complaint, was motivated by the substantial construction defects Claimants discovered  
10 regarding the Hotel project, not because Claimants lacked adequate funds to make that payment,  
11 which they in fact possessed.)

12 33. Moreover, although Claimants were sufficiently capitalized and financed to pay the  
13 construction costs and fee contemplated under the PLC Construction Contract, in the event of  
14 litigation arising from construction defects caused or permitted by PLC, Claimants could not afford  
15 to pay extraordinary out-of-pocket attorneys' fees and high expert and discovery costs. PCL, in  
16 contrast, not only is a multi-billion-dollar company but had ample insurance coverage (directly and  
17 through its insured subcontractors) to pay all or a substantial part of its litigation fees and costs.  
18 Notably, all of PCL's own agreements with its subcontractors with respect to the Hotel project  
19 contain prevailing party attorneys' fee and cost provisions, many of which also expressly provide for  
20 the payment of expert witness fees incurred by the prevailing party.

21 34. Jackson either knew or was negligent in not recognizing -- and in either case was  
22 negligent for failing to discuss with Claimants -- that the failure to include a Prevailing Party Fee and  
23 Cost Provision in the PCL Construction Contract (and to obtain third-party-beneficiary protection in  
24 the fee- and cost-shifting provisions of PCL's subcontracts) would cause direct and indirect damages  
25 and harm to Claimants that are entirely foreseeable and likely to occur in the event Claimants had to  
26 sue PCL for construction defects regarding the Hotel project. These deleterious effects are basic and  
27 fundamental, as the absence of a Prevailing Party Fee and Cost Provision would:  
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1 (A) make it more difficult to find a competent plaintiffs' attorney specializing in  
2 construction defect litigation to take the case on a contingent fee basis (as the "upside" in such  
3 litigation would be substantially less than if a solid fee- and cost-shifting clause existed);

4 (B) require the own/developer to accede to a larger contingency fee percentage in  
5 the absence of a Prevailing Party Fee and Cost Provision in the applicable construction  
6 agreement, because the relatively-few plaintiff construction defect attorneys in the Los  
7 Angeles legal market (and in other jurisdictions) who accept complex commercial construction  
8 defect cases against well-funded international building companies without a fee-shifting  
9 agreement almost invariably require a higher contingent fee percentage than in cases that have  
10 a solid fee-shifting agreement (especially one that provides for cost-shifting of expert witness  
11 fees), because of the increased risk involved;

12 (C) reduce the value of the case from both a settlement and trial perspective  
13 (because it reduced the litigation risk exposure of PCL, which had a greater relative ability to  
14 fund an expensive trial, while increasing the relative litigation risk exposure of Claimants,  
15 which had comparatively less ability to fund an expensive trial); and, for that reason,

16 (D) make the case more likely to settle for a lesser amount than the case was worth,  
17 even given a very strong liability case against PCL, due to the risk of un-recoverable attorneys'  
18 fees and costs at trial, even taking account of the higher possible recovery at trial discounted  
19 by the relatively small risk of not prevailing overall on the issue of liability and net-positive  
20 damages.

21 35. All of these detriments, liabilities, and disadvantages that were foreseeable and  
22 virtually certain to result from the absence of a Prevailing Party Fee and Cost Provision in the PCL  
23 Construction Contract should have been but were not discussed with Claimants.

24 36. If these serious and important issues relating to the inclusion or non-inclusion of fee-  
25 shifting and cost-shifting provisions in the prime PCL Construction Contract and in PCL's  
26 subcontractor agreements (on an express third party beneficiary basis) had been discussed with  
27 Claimants, as Respondents' were duty-bound to do, Claimants would have insisted at the very least  
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1 that a Prevailing Party Fee and Cost Provision be included in the Construction Contract. They also  
2 would have sought to obtain third-party beneficiary protection in the subcontracts as well, which also  
3 in all likelihood would have been granted. Given that PCL routinely agrees to include such  
4 Prevailing Party Fee and Cost Provisions in its complex commercial construction contracts, and  
5 routinely insists on their inclusion in its contracts with subcontractors, PCL would have agreed to  
6 include such a provision in the Construction Contract it negotiated with MPH if Respondents had  
7 insisted that it be done as a condition to closing the deal. If PCL refused to do so, however,  
8 Claimants -- if they had been properly advised of the need for such provisions by their Counsel, as he  
9 should have done -- simply would have refused to do the deal with PCL at the outset. Claimants  
10 instead would have done the Hotel project with another reputable builder that would have agreed to  
11 such a provision, which is standard and not at all unusual in these types of agreements. There is no  
12 shortage of competent and experienced builders in Los Angeles willing and able to do \$10 million  
13 commercial renovations. Los Angeles' skyline attests to that fact.

14 37. In summary, Respondents' failure to consider, discuss with, and advise Claimants  
15 about the need for appropriate fee- and cost-shifting protections in the prime PCL Construction  
16 Contract and in PCL's subcontracts relating to the Hotel project constitute legally deficient  
17 representation by an experienced construction contract lawyer, falling short of the skill, prudence,  
18 and diligence that lawyers of ordinary skill and capacity who specialize in construction contract  
19 drafting commonly possess and exercise in the performance of the tasks which they undertake when  
20 representing an owner/developer in similar circumstances.

21 **THE PCL CONSTRUCTION DEFECT LITIGATION AND THE OVERWHELMING**  
22 **EVIDENCE ESTABLISHING PCL'S LIABILITY AND MPH'S DAMAGES**

23 38. In December 2007 during a heavy winter rainstorm, water intruded through the deck  
24 waterproofing and under the sliding glass door sills of the Hotel, including through and around the  
25 sliding glass doors on newly-constructed sixth floor of the Hotel, as well as on lower floors in which  
26 PLC also had installed new glass doors. All 30 rooms on the sixth floor were flooded, as were many  
27 rooms on the fifth, fourth, and third floors. Water intrusion caused damage to drywall, insulation,  
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1 and flooring. Emergency crews had to be called in and drywall was removed, mold remediated, and  
2 walls, floors, and fixtures dried. All 30 deluxe rooms on the sixth floor of the Hotel, which were  
3 completed and ready for use, were completely disassembled. All furnishings, paintings, plasma  
4 televisions, and bathroom fixtures were covered with dust and debris. In addition to water intrusion  
5 through decks and doors, water has also intruded through the roof and roof flashing installed by PCL  
6 throughout the entire roof system.

7 39. Claimants immediately notified PCL of the damage. PCL at first refused to accept  
8 responsibility for the water intrusion, which is a result of defective construction that deviated from  
9 installation requirements, architectural drawings, and specifications. Eventually, however, PCL  
10 performed *ad hoc* repairs in an attempt to prevent water further water intrusion. The hotel's sixth  
11 floor, including all 30 rooms, was vacant and uninhabitable while this attempted repair work was  
12 being done from December 2007 through August 2008, which resulted in a substantial interruption of  
13 the Hotel's business and a loss of business income.

14 40. Unfortunately, PCL's repairs failed and additional episodes of rain-related water  
15 intrusion occurred in 2008 and the beginning of 2009, causing additional flooding and damage.  
16 During the removal of damaged drywall, structural hold downs were observed to be improperly  
17 installed, many without bolts, many with improperly fastened bolts, and many where the anchor bolt  
18 was out of alignment. In addition, when drywall was removed, fire blocking, which was supposed to  
19 be installed, was observed to be missing. The anchor bolts, hold downs, and fire blocking are life  
20 safety issues. Improper construction of these anchor bolts subjected occupants of the hotel to injury  
21 or death in the event of an earthquake.

22 41. Due to PCL's refusal to admit responsibility for various categories of defects  
23 discovered in the Hotel and its delay and refusal to carry out appropriate and necessary repairs, MPH  
24 commenced a lawsuit against PCL in the Central Civil West Division of the Los Angeles County  
25 Superior Court on February 24, 2009, alleging claims against PCL for breach of contract, negligence,  
26 and breach of implied warranty (Case No. BC408324 [the "PCL Construction Defect Action"]). On  
27 July 7, 2009, MPH filed a first amended complaint, alleging the same causes of action, against PCL,  
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1 the architect on the project, Profeta Royalty Architecture, and the project manager, Build-Tech  
2 Construction Consultants. For its part, PCL filed a cross-complaint against MPH for its failure to  
3 pay the \$524,397 retention fee to PCL, as well as asserting various indemnity-related breach of  
4 contract and negligence claims against various subcontractors. (PCL went on to file amended cross-  
5 complaints asserted the same claims, as amended.) The case was assigned to the Honorable William  
6 F. Highberger, who subsequently entered a Case Management Order which provided for discovery  
7 and destructive testing protocols, and a series of mediation sessions driven by the parties' respective  
8 construction defect and damage experts.

9 42. As a result of PCL's negligence and contractual breaches, Claimants suffered  
10 substantial damages including costs of repair, construction management, loss of use, diminution in  
11 value, business interruption loss, additional financing costs, prevention of the MPH's re-branding of  
12 the hotel resulting in damages, and other related damages totaling more than \$20 million. MPH's  
13 alleged damages were comprised, in the aggregate, for "Liquidated Damages" as defined under the  
14 PCL Construction Contract for delays in completion through October 2007 totaling \$1,504,425;  
15 additional costs for "Height Bust" totaling \$ 475,306; cost to repair the existing construction defects  
16 at the Hotel, totaling \$3,889,668; business interruption costs due to PCL ineffective and time-  
17 consuming attempted repairs at the Hotel in 2007 through 2008, totaling \$3,208,200; future business  
18 disruption damages due to future repairs, totaling \$6,937,685; additional financing costs due to past  
19 and future business interruptions due to the repairs, totaling \$3,840,000; expert fees and costs totaling  
20 \$183,000; for a total estimated amount of cumulative alleged damages totaling \$20,038,284.

21 43. PLC, for its part, made several responses based on its view of the state of the evidence  
22 and based upon the opinions of its retained experts that disclaimed some categories of damages and  
23 purported to reduce the estimated costs of repairs and other amounts of other categories of damages.  
24 For example, PCL contended that MPH would not be able to recover additional financing costs  
25 because they could not prove that the lender would have provided lower interests rates but for the  
26 construction defects, based on the loan underwriter's deposition testimony. PCL further contended  
27 that MPH would not be able to recover "Liquidated Damages" due to construction delays because the  
28

1 MPH through the owner's project representative authorized numerous change orders permitting the  
2 delays. PCL argued that there was no "height bust," and that if any existed, it was not its fault, and  
3 that MPH was responsible for many of the problems it was complaining about.

4 44. Notwithstanding these assertions and defenses, however, as a result of months of  
5 comprehensive destructive testing and other discovery efforts, and the provision of numerous expert  
6 reports, the liability of PCL for serious construction defects and negligent supervisory services  
7 became irrefutable. PCL's own experts conceded as much as to the core construction defect claims,  
8 as it was impossible to credibly do otherwise. Thus, while the parties disputed the cause and scope of  
9 the construction defects and related problems at the Hotel, key aspects of PCL's liability were  
10 effectively conceded regarding construction defects and business interruption costs in particular  
11 (although the amount of such costs were disputed).

12 45. The simple point of the damage analysis here, however, is that whatever the merits of  
13 PCL's defenses to certain categories of MPH's damage claims, the core construction defect claims  
14 and related business interruption claims in particular were extremely strong, liability was certain, and  
15 the related repair costs correspond to the amount that PCL (and the subcontractors) agreed to pay in  
16 settlement, as discussed below. It was hardly a "nuisance" settlement, corresponding, as it did, to  
17 nearly 50% of the total cost and fee of the actual PLC Construction Contract.

18 **THE SETTLEMENT OF THE PCL CONSTRUCTION DEFECT ACTION**

19 46. After several settlement mediations and months of destructive testing, depositions and  
20 the provision and analysis of dueling expert reports, the parties reached a compromise resolution in  
21 principal on July 15, 2011, by means of a Memorandum of Settlement. A formal Mutual Settlement  
22 Agreement and Release of All Claims - Marina Pacific (the "PCL Settlement Agreement") then was  
23 negotiated among the parties over the next several months (the "PCL Settlement Agreement"). (The  
24 PCL Settlement Agreement is subject to a confidentiality provision set forth in Section 13 at page 12  
25 of the Agreement, and is subject to the parties' Confidentiality Agreement in this Arbitration dated  
26 December 13, 2011.) A true and correct copy of the PCL Settlement Agreement is attached hereto as  
27 Exhibit B and incorporated herein by this reference. The PCL Settlement Agreement and related  
28



1 “side” settlement agreements with some individual subcontractors provide, in summary, for the  
2 payment of \$4,350,000 to the Sokols. From that amount, the Sokols paid \$1,300,000 as attorneys’  
3 fees to their attorneys, Robertson & Associates, LLP (the “Robertson firm”). The Sokols previously  
4 incurred out-of-pocket costs totaling almost \$500,000. Thus, the Sokols received \$3,050,000 from  
5 the settlement, exclusive of out-of-pocket costs, as well as eliminating PCL’s \$524,397 retention  
6 cross-claim.

### 7 CAUSATION AND DAMAGES

8 47. Codifying in effect the “American Rule” regarding fee-shifting, California Code of  
9 Civil Procedure section 1021 provides that “Except as attorney’s fees are specifically provided for by  
10 statute, the measure and mode of compensation of attorneys and counselors at law is left to the  
11 agreement, express or implied, of the parties . . . .” A prevailing party is entitled as a matter of right  
12 to recover costs under California Code Civil Procedure section 1032, subdivision (b). Attorney’s fees  
13 authorized by contract, as permitted under Code of Civil Procedure section 1021, are allowable as  
14 recoverable costs by the prevailing party under California Code Civil Procedure section 1033.5,  
15 subdivision (a)(10).

16 48. California Civil Code section 1717, subdivision (a) provides that: “In any action on a  
17 contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to  
18 enforce that contract, shall be awarded . . . to the prevailing party, then the party who is determined to  
19 be the party prevailing on the contract . . . shall be entitled to reasonable attorney’s fees in addition to  
20 other costs. [¶] Reasonable attorney’s fees shall be fixed by the court, and shall be an element of the  
21 costs of suit.” For purposes of an award of attorneys’ fees and costs under Code of Civil Procedure  
22 section 1033.5 and Civil Code section 1717(a), the “party prevailing on the contract shall be the party  
23 who recovered a greater relief in the action on the contract.”

24 49. If MPH’s Construction Contract with PCL had contained the requisite Prevailing Party  
25 Fee and Cost Provision, PCL, and not the Sokols, would have been compelled to pay for the  
26 \$1,300,000 contingency fee to the Robertson firm, and the nearly \$500,000 in costs that Claimants’  
27 incurred. It does not matter that the Robertson firm’s fee agreement with the Sokols provided for a  
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1 contingency fee rather than for hourly billings. A prevailing party who has entered into a contingent  
2 fee arrangement with an attorney is not precluded from an attorney's fee award under Civil Code  
3 section 1717, because a prevailing party with a contingent fee arrangement incurs a liability for  
4 attorney's fees in the amount of the contingent fee, i.e., the applicable percentage of the judgment.  
5 Once a judgment has been entered, the contingency has occurred, and the prevailing party has  
6 "incurred" an obligation to pay fees in the amount provided by the contingent fee agreement that is  
7 an allowable cost under Code Civil Procedure section 1033.5, subdivision (a)(10).

8 50. Here, there is no legitimate doubt or question that MPH was the "prevailing party" as  
9 against PCL on MPH's claims under the Construction Contract. The PCL Settlement Agreement  
10 expressly provides (at Recital G, at pg. 3) that, as between PCL and MPH, MPH is the party  
11 prevailing on the Construction Contract and, further, it provides (at Section 7, at pg. 7) that no part of  
12 the settlement payments included any payment by PCL for attorneys' fees incurred by MPH in  
13 prevailing on its PCL Construction Contract claims. Given the comprehensive expert reports, not just  
14 from MPH but also from PCL, the deposition testimony of the witnesses, as well as the relatively  
15 large amount of the settlement, it cannot seriously be disputed that MPH was the prevailing party for  
16 purposes of the settlement and would have prevailed at trial if the case had not settled.

17 51. As noted previously, while PCL vigorously disputed certain categories of liability and  
18 damages (in particular, as to MPH's claims for damages for business interruption, the "height bust"  
19 issue, and increased financing costs), with respect to the core liability and damage claims for actual  
20 construction defects there was broad consensus even from PCL's experts that serious problems  
21 existed and required compensation. That is why the case settled for \$4,350,000, almost 50% of the  
22 entire contract fee. And that is why PCL conceded that MPH was the prevailing party on its contract  
23 claims for purposes of the settlement, in Recital G in the PCL Settlement Agreement (Exhibit B  
24 hereto). It is more than reasonably certain, therefore, that MPH also would have been the prevailing  
25 party at trial, which is also why the case settled for that relatively high amount of money, even in the  
26 absence of a Prevailing Party Fee and Cost Provision.

27 52. It is a matter of common knowledge among experienced complex litigation  
28

1 practitioners that a defendant's fear of paying more at trial due to the existence of a Prevailing Party  
2 Fee and Cost Provision in a strong liability case against it will induce its willingness to settle at a  
3 higher amount than it would in the absence of a fee-shifting and cost-shifting risk, especially if the  
4 cost-shifting provision covers expert fees which are inevitable and onerous in complex commercial  
5 construction defect litigation. Fee shifting and cost shifting obviously increase the stakes of the case  
6 by making legal expenditures and expert cost outlays not otherwise awardable by rule or statute part  
7 of the potential downside risk and damages. Here, given the absence of the requisite Prevailing Party  
8 Fee and Cost Provision, the risk of unreimbursed litigation fees and costs made it more economical to  
9 settle for a lower amount of money despite a fairly broad consensus between the parties at least on  
10 the core construction defect and repair issues, by making settlement on balance at least no less  
11 favorable than the probable net result of trial. A large potential fee and expert witness cost award,  
12 however, would significantly alter that equation and its risk/benefit calculations based upon  
13 probabilities of liability and damage outcomes.

14 53. There can be no legitimate doubt that the lack of a Prevailing Party Fee and Cost  
15 Provision harmed and prejudiced Claimants by weakening their case against PCL and their  
16 negotiating leverage with it, by reducing the amount of money for damages and costs that MPH could  
17 expect to recover and PCL could expect to pay at trial. The fact of damage caused by Respondents'  
18 professional negligence is certain, as is the fact that Claimants paid \$1,300,000 in attorneys' fees and  
19 incurred almost \$500,000 in costs. Given the disparity in the size and resources of PCL (a multi-  
20 billion-dollar company) and Claimants, fee-shifting and expert-cost-shifting in this context, by  
21 equalizing the bargaining power of parties with asymmetric litigation costs, would have pushed the  
22 settlement amount closer to the expected trial outcome, resulting in a significantly larger recovery by  
23 Claimants. Given this logical and rational economic analysis, if there had been a Prevailing Party Fee  
24 and Cost Provision, MPH would not have settled for only \$4,350,000, but would have insisted on  
25 either receiving at least half of its costs and fees in settlement (i.e., an additional \$900,000 [50% of  
26 Claimants' costs and fees), or, not receiving that increased amount in settlement, MPH simply would  
27 have proceeded to trial in which they were confident of prevailing and recovering all of its fees and  
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1 costs (i.e., approximately \$1,800,000).

2 54. There is no issue of judgment collectability here either: the PCL Construction Defect  
3 Action did not involve a penurious, cash-strapped or judgment-proof defendant. As previously  
4 alleged, PCL's group of independent construction companies together constitutes the largest general  
5 contracting organization in Canada and the sixth largest in the United States, with annual  
6 construction volume exceeding \$5 billion.

7 **THE LEGALLY-DEFICIENT SOUTH BAY STORAGE CONSTRUCTION CONTRACT**

8 55. Jackson also drafted a construction agreement for a project for the South Bay Project,  
9 using a modified version of AIA Document A111 - 1997, "Standard Form of Agreement between  
10 Owner and Contractor where the basis for payment is the COST OF WORKS PLUS A FEE [sic]  
11 with a negotiated Guaranteed Maximum Price" (the "South Bay Construction Contract"). A true and  
12 correct copy of the South Bay Construction Contract is attached hereto as Exhibit C and incorporated  
13 herein by this reference. The South Bay Construction Contract, which governed the construction of  
14 the South Bay Storage facility in Harbor City, California, contains two improvidently-included  
15 provisions requiring the contractor to file a "Notice of Completion" upon completion of the  
16 construction project. (See South Bay Construction Contract § 12.2.2 ["Recording of Notice of  
17 Completion. Within eight (8) calendar days from actual completion of the entire Scope of Work  
18 under this Contract, the Contractor shall prepare and record a valid Notice of Completion and serve it  
19 upon all necessary entities and individuals as required under California law"]; see also *id.* § 14.6  
20 ["Notice of Completion. At the completion of the Project, the Contractor shall file and record a valid  
21 Notice of Completion with the County Recorder in accordance with applicable law."] ) These  
22 provisions, when implemented by the contractor, triggered the requirement under the California  
23 Mechanics' Lien Law, at California Civil Code section 3116, that all sub-contractors file mechanics  
24 liens within 30 days of the "Notice of Completion" being served.

25 56. When, as is true here, a construction contract provides that a portion of the funds (i.e.,  
26 the retention) is to be withheld until after a proper Notice of Completion has been recorded, and,  
27 further, when, as here, a construction lender's distribution of further funding requires the satisfaction  
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1 and release of any mechanic's liens, it is common for sophisticated construction contract counsel  
2 representing the owner/developer to insert a provision in the construction contract designating the  
3 owner/developer or the owner's project representative to either make the determination the applicable  
4 date of completion and/or file the applicable notice of completion. That is what should have  
5 happened here: Jackson should have drafted the South Bay Construction Contract with language  
6 similar to the language Jackson included in the PCL Construction Contract granting the owner or his  
7 project representative the right to file and serve the Notice of Completion upon determining the  
8 applicable date of completion for purposes of that Notice.

9 57. After being apprised of and recognizing his error, Jackson spoke to the contractor of  
10 the South Bay Project and advised him not to file the "Notice of Completion" because it would  
11 trigger the filing of the mechanics liens by the subcontractors which would then complicate the  
12 release of the final funding for the project. Jackson failed to memorialize his instructions to the  
13 contractor in writing. The contractor proceeded to file the "Notice of Completion" causing the sub-  
14 contractors to file their mechanics liens and complicate the funding. As a result, Claimants had to  
15 initiate a lengthy escrow process causing Claimants to incur approximately \$170,000 in excessive  
16 and unnecessary legal fees and related costs.

#### 17 **RESPONDENTS' CLAIMS ARE TIMELY**

18 58. Allen Matkins and Jackson continued performing legal services for Claimants relating  
19 to the Marina Project through at least October 26, 2007 and continued performing legal services for  
20 Claimants relating to the South Bay Project through at least April, 2008. Therefore, Respondents'  
21 claims, which were commenced in the related Superior Court action by the filing of the original  
22 complaint on October 31, 2008, are timely under California Code of Civil Procedure section 340.6.

#### 23 **FIRST CAUSE OF ACTION**

##### 24 **(Against Both Respondents for Professional Negligence ((Legal Malpractice))**

25 59. Claimants repeat and incorporate by reference each and every allegation contained in  
26 paragraphs 1 through 58, as if set forth here in full.

27 60. At all times relevant to this action, Allen Matkins and Jackson had an attorney-client  
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1 relationship with Claimants. Allen Matkins and Jackson owed both a legal and ethical duty to  
2 Claimants to adhere to the standards of care and loyalty required of attorneys toward their clients. In  
3 particular, as an Allen Matkins partner with purported specialized expertise in legal and corporate  
4 issues relating to the negotiation and drafting of commercial construction contracts, Jackson (and by  
5 extension, Allen Matkins) owed to Claimants a duty of care to act with the skill, prudence and  
6 diligence as other members of the profession commonly possess who are specialists in commercial  
7 construction contract negotiation and drafting, and related legal counseling, and to exercise such  
8 expertise in rendering legal advice and consultation to Claimants. Accordingly, lawyers like Jackson  
9 who hold themselves out as specialists must exercise the skill, prudence, and diligence exercised by  
10 other specialists of ordinary skill and capacity specializing in the same field. Respondents' duty  
11 owed to Claimants encompasses both knowledge of pertinent law and an obligation of diligent  
12 research and informed judgment.

13 61. Allen Matkins and Jackson breached their obligations to Claimants and were  
14 professionally negligent, as evidenced by the following acts and omissions, among other things:

15 A. Failing to analyze the facts and law relating to the PCL Construction Contract  
16 and the South Bay Construction Contract;

17 B. Failing to properly draft the PCL Construction Contract and the South Bay  
18 Construction Contract;

19 C. Failing to include provisions in the PCL Construction Contract and the South  
20 Bay Construction Contract which provided the best possible protection for Claimants as  
21 owners/developers, and thereby failing to follow the instructions of their clients;

22 D. Failing to advise Claimants as to the terms included and omitted from the PCL  
23 Construction Contract and the South Bay Construction Contract;

24 E. Failing to include a prevailing party attorney's fees and expert witness fees  
25 provision in the PCL Construction Contract regarding the Hotel project.  
26  
27  
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1 F. Failing to include a provision in the South Bay Construction Contract regarding  
2 the South Bay Storage facility giving the owner/developer the right to record and serve the  
3 “Notice of Completion”;

4 G. Failing to take all steps reasonably necessary to prevent the contractor in the  
5 South Bay Storage construction project from filing a “Notice of Completion” and triggering  
6 the filing of mechanic’s lien notices by the subcontractors;

7 H. Failing to use the care, skill and reasonable diligence necessary and appropriate  
8 in representing Claimants.

9 62. The negligent acts and omissions of Allen Matkins and Jackson were below the  
10 standard of care for attorneys who practice in this community, particularly those who, like Jackson,  
11 hold themselves out to the public and to their actual and prospective clients as construction contract  
12 specialists.

13 63. As a result of Respondents’ negligent acts and omissions, Claimants were damaged in  
14 a sum in excess of the jurisdictional minimum of this Court, including having paid \$1,300,000 in fees  
15 and having incurred nearly \$500,000 in costs in the PCL Construction Defect Action, and being  
16 charged by Claimants approximately \$170,000 in excessive fees relating to the South Bay Storage  
17 project.

## 18 **SECOND CAUSE OF ACTION**

### 19 **(Against Both Respondents for Breach of Fiduciary Duty)**

20 64. Claimants repeat and incorporate by reference each and every allegation contained in  
21 paragraphs 1 through 58, as if set forth here in full.

22 65. As an attorney who held himself out as having particular expertise and skill in  
23 complex commercial construction contracts and related advisory issues, and by virtue of the trust and  
24 confidence thereby placed in him by Claimants, who lacked such specialized expertise and legal  
25 skills, Respondents owed to Claimants fiduciary duties of care, loyalty and good faith, including a  
26 duty to place Respondents’ interests above their own interests and to act with unstinting fidelity and  
27 loyalty at all times. These fiduciary duties included the responsibility to comply with the Rules of  
28

1 Professional Conduct in all of their dealings with Claimants, including but not limited to Rule of  
2 Professional Conduct 4-200 and not to unreasonably or excessively bill Claimants.

3 66. Allen Matkins and Jackson breached their fiduciary duties to Claimants by  
4 unreasonably and excessively billing Claimants for the legal services performed.

5 67. Claimants have been damaged by Allen Matkins' and Jackson's breach of fiduciary  
6 duties in a sum in excess of the minimum jurisdiction of this Court, including being charged by  
7 Claimants approximately \$170,000 in excessive and unnecessary fees relating to the South Bay  
8 Storage project.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Claimants requests the following relief against all Respondents:

- 11 1. For judgment in favor of Claimants and against Respondents in the amount of  
12 \$1,800,000 (the amount of fees and costs paid and incurred by Claimants in the PCL  
13 Construction Defect Action);  
14 2. For an order denying Respondents' claims for relief in their Cross-Complaint, and  
15 adjudging and decreeing that Respondents take nothing by that action;  
16 3. For prejudgment interest;  
17 4. For such other and further relief as the Court finds just and proper

18 DATED: December 13, 2011

19 **LAW OFFICES OF  
20 MARK ANCHOR ALBERT & ASSOCIATES**

21  
22 By: 

23 Mark Anchor Albert  
24 Attorneys for Claimants



**EXHIBIT A TO CLAIMANTS' FIRST AMENDED STATEMENT  
OF CLAIMS**

*MARINA PACIFIC ET AL. V. ALLEN MATKINS ET AL.*

ADRS Case No. 09-0641-DIJ



ORIG. SIGNED



# Abbreviated Form of Agreement Between Owner and Contractor for Construction Projects of Limited Scope where the basis of payment is the Cost of the Work Plus a Fee with or without a Guaranteed Maximum Price

## AIA Document A117 - Electronic Format

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

This document includes abbreviated General Conditions and should not be used with other general conditions. It has been approved and endorsed by The Associated General Contractors of America.

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### AGREEMENT

made as of the 22<sup>nd</sup> day of December in the year of Two Thousand Five

#### BETWEEN the Owner:

(Name and address)  
Marina Pacific Hotel & Suites LLC  
1697 Pacific Avenue  
Venice, CA 90291  
Telephone: (310) 452-1111  
Facsimile: (310) 392-1554  
Attn: Erwin H. Sokol

PLEASE NOTE, ALL LIEN RELEASE FORMS ATTACHED AS EXHIBIT "G" SHALL INCLUDE L.L.C AFTER MARINA PACIFIC HOTEL & SUITES  
THANK YOU  
Erwin H. Sokol

#### and the Contractor:

(Name and address)  
PCL Construction Services, Inc.  
200 Burchett Street  
Glendale, CA 91203-1222  
Telephone: 818-246-3481  
Facsimile: 818-247-5775  
License No.: B474555  
Attn: Jack Sample

#### The Project is:

Best Western Marina Pacific Hotel & Suites at Venice Beach  
1697 Pacific Avenue

Venice, CA 90291

(Name and location)

**A. Project Details:** As further detailed in Exhibits "A" through "I", the Project includes, but is not limited to, all work, services (including certain design/build services, which currently include (1) Mechanical/HVAC, (2) Fire Protection, and (3) Fire-Life Safety and may include by Change Order as additional services such as (a) Electrical, (b) Plumbing or other portions or specific sub-portions of the work that the Contractor recommends proceed on a design/build basis), materials, equipment and tools necessary to construct and complete, to the Owner's satisfaction and in conformance with the Legal Requirements and the Contract Documents, for the Project located at 1697 Pacific Avenue, Venice, CA 90291 (collectively the "Work"). Further, if the electrical or plumbing Subcontractors elect to make field modifications to the Construction Documents, such field modifications shall be added as specific design/build sub-portions of the Work by Change Order so that the Contractor's Professional Liability insurance will apply to such field modifications. The Contractor acknowledges that it has been provided all City and Coastal Commission approval documents and Contractor hereby agrees to strictly comply with all terms and conditions of the approvals contained in the Contract Documents related thereto (collectively "Entitlements"). The Contractor shall comply with all Legal Requirements including, but not limited to, all Entitlements, laws, codes, statutes, rules, regulations, and the interpretation of same, by any applicable authorities having jurisdiction over the Project (collectively "Legal Requirements").

**B. Owner and Owner's Representative Not Acting As Contractors:** Although Mark Sokol, Erwin Sokol and Jeff Bay are licensed contractors, they are not, in any way, acting as contractors on this Project. All requirements under this Agreement and the Exhibits are to be performed exclusively by the Contractor and its subcontractors and not in any way by the Owner. If any claims are asserted against the Owner or the Owner's Representative alleging that they acted as licensed contractors for this Project, the Contractor shall provide them with defense and indemnity as set forth herein. Any decisions required of the Owner hereunder, such as approvals of Change Orders, shall be decisions made by the Owner strictly in its capacity as an owner and not as a contractor. Further, all such decisions must be made by the Owner in writing and not by the Owner's Representative as further detailed in Paragraph 2.5, herein.

**C. Safety and Occupied Project:** This Project is in the middle of a tourist area and the hotel will continue to be fully occupied as a hotel during the construction Work. The Contractor shall use the greatest care during the construction Work to avoid injuries to the public and occupants of the hotel. The Contractor shall provide a very detailed and complete schedule of the Project in sufficient detail such that the Owner knows which rooms cannot be occupied due to the construction Work during each day of the Project and so that the Owner knows exactly which rooms it can and cannot rent. The Contractor shall plan the construction Work in order to allow for maximum occupancy of the Project and in order to meet or surpass the Project schedule.

**D. Parking Garage Coordination:** During the Construction Work, the Parties will work together to structure the most economical and efficient parking plan for the Contractor, Subcontractors and suppliers, and guests.

**E. Construction Noises:** The parties shall work together to the extent possible to ensure that guests of the hotel are not adversely impacted by the construction Work including, but not limited to, drilling, hammering and other construction noises.

**F. Elevators:** The Contractor shall schedule the Work so that one elevator inside the Project is operational at all times.

**The Architect is:**

(Name and address)

Profeta-Royalty Architecture

127 Broadway, Suite 204

Santa Monica, CA 90401

Telephone: (310) 260-8808

Facsimile: (310) 260-8808

The Owner and Contractor agree as set forth below.

**ARTICLE 1  
THE WORK OF THIS CONTRACT**

**1.1** 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: The Contractor shall fully execute the Work described in the Contract Documents, and reasonably inferable as necessary to produce the results intended by the Contract Documents, in conformance to the Legal Requirements and to the reasonable satisfaction of the Owner, as detailed in the Scope of Work and Contract Documents, including the Plans and Specifications, as listed in Exhibit "A" (the "Work").

**1.2 DISCREPANCY AND PRIORITY OF DOCUMENTS.** If, and to the extent of, any inconsistency, ambiguity, discrepancy or error in the Contract Documents (referred to collectively in this Article 1 as "Discrepancy") the Contractor shall immediately notify the Owner and provide the Work that is reasonably inferable from the Contract Documents to the Project. The Contractor shall give precedence to the Contract Documents in the following order of priority:

**1.2.1** Modifications and Change Orders executed by the Owner and the Contractor and issued after execution of this Agreement;

**1.2.2** This Agreement, including all Exhibits attached hereto, except the "Scope of Work, Plans and Specifications" contained in Exhibit "A";

**1.2.3** The Design Drawings and the Specifications, both as listed in Exhibit "A" to this Agreement and collectively referred to as the "Construction Documents", subject to the following:

i. Drawings with latest date will supersede those with earlier dates (including, but not limited to, addendums/bulletins, field directives, and RFI's);

ii. Larger scale drawings will govern over smaller scale drawings;

**1.2.4** The Scope of Work listed in Exhibit "A" to this Agreement; and

**1.2.5** Specific reports for this Project, including, but not limited to, geotechnical reports.

**ARTICLE 2  
RELATIONSHIP OF THE PARTIES**

**2.1 RELATIONSHIP OF THE PARTIES.** The Contractor accepts the fiduciary relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Owner, Architect, and the consultants and separate Contractors retained by Owner and exercise the Contractor's best skill, efforts and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to make best efforts to furnish at all times an adequate supply of workers and materials; and to perform the Work in the best way and most expeditious and economical manner consistent with the Owner's interests, in accordance with the Contract Documents and consistent with the representations and warranties set forth herein. The Owner agrees to exercise best efforts to enable the Contractor to perform the Work in the best way and most expeditious manner by furnishing and approving in a timely way, information required by the Contractor and to make payments to the Contractor in accordance with the requirements of the Contract Documents. The Owner and Contractor shall not amend, modify, waive, or release any provision of this Agreement or the Contract Documents without the prior written approval of the Owner, and no Change Order is effective unless approved by the Contractor and the Owner in writing.

**2.2 STANDARD OF CARE.** The Contractor shall do all that is necessary to perform the Work in the most expeditious and economical manner so that the Work meets or exceeds the Owner's intended purposes and is consistent with the best workmanship and sound business practices that are consistent with the other reputable construction firms providing similarly complex and high quality services and work in similar projects within Southern California. Contractor shall supervise and be responsible to Owner for the performance of Work by Contractor and any and all Subcontractors and shall be present on the Project site at all times during the performance of such Work.

**2.3 ADMINISTRATIVE STAFF.** The Contractor's Fee shall (i) include all the Work performed by its executive and administrative staffs, estimating departments, engineering departments, purchasing departments, and auditing departments, and (ii) include their availability, as applicable, to assist in value engineering, the purchase of materials and equipment, including sales taxes, the preparation of estimates, the material detailing, the negotiation of Subcontracts and the expediting of the delivery of materials in connection with the Work. The Contractor's part-time Project Accountant shall be provided at a cost detailed in the General Conditions Breakdown or the Schedule of Values as contained in Exhibits "C" or "D."

**2.3.1 EVIDENCE OF FINANCING.** Prior to commencement of the Work, the Owner shall furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under this Agreement.

**2.4 OWNER IMPROVEMENTS.** The Contractor shall cooperate in good faith with all the Owner-retained contractors, if any, to facilitate the construction and installation of certain Owner improvements in the Project ("Owner Improvements") as the Owner may designate in writing and coordinate the Work with the work of all such contractors hired to construct and install the Owner Improvements ("Owner's Contractors"), including but not limited to:

**2.4.1** Shared use of site and completed portions of the Project, including storage;

**2.4.2** Shared use of parking for construction personnel as shall be reasonably approved by the Project Superintendent;

**2.4.3** Allow the Owner's Contractors to commence construction as reasonably approved in writing by the Owner and Contractor;

**2.4.4** Protection of each other's adjacent materials; and

**2.4.5** Shared use of loading, elevator or hoisting facilities.

The Owner retained contractors, the Contractors and Subcontractors are each responsible for their own staging, parking, hoisting, and installation of their work. Each of these entities will be required to adhere to the work and safety plan outlined by the Contractor for this Project, which has been generally approved by the Owner.

The costs of providing and performing the above items, including, but not limited to coordination, access, storage, and use of the Project, shall be included in the Contract Sum. Notwithstanding anything herein, if the Owner improvements are coordinated by the Contractor, but the Owner-retained contractors still create unavoidable situations where the Contractor must demobilize, remobilize or is otherwise disrupted (collectively "interferences"), the Contractor shall provide the Owner with a Change Order reflecting the Contractor's reasonable direct expenses for such interferences.

**2.5 OWNER'S REPRESENTATIVE:** The Owner's representative is ("Owner's Representative"):

Jeffery Bay  
Build-Tech Construction Consultants, Inc.  
2215 First St. #108  
Simi Valley, CA 93065  
Tel: 805-584-3060 ext. 3  
Fax: 805-584-0984  
Cell: 805-551-8900

**2.5.1** Owner's Representative will be authorized to act on behalf of and in the name of the Owner in connection with the Project regarding the items contained in this Agreement, the General Conditions and as otherwise authorized by the Owner in writing. Notwithstanding anything herein, or any other document, the Owner's Representative will only be authorized to execute Change Orders up to Five Thousand Dollars (\$5,000.00). All Change Orders in excess of this amount must be approved in writing by the Owner. The Owner may from time to time designate a different Owner's Representative or the Architect as the Owner's Representative. All matters requiring written approval under this Agreement, the Exhibits or any other Contract Documents must be approved in writing by the Owner, not the Owner's

Representative. The Contractor will copy the Owner on all notices, request for approval, Change Orders, Applications for Payment and claims delivered to the Architect or the Owner's Representative.

**2.6 CONTRACTOR'S REPRESENTATIVE:** The Contractor's representative is ("Contractor's Representative"):

Jack Sample  
PCL Construction Services, Inc.  
200 Burchett Street  
Glendale, CA 91203-1222  
Telephone: 818-246-3481  
Telefax: 818-247-5775

If approved by the Owner in writing, the Contractor's Representative is authorized to act on behalf of and in the name of the Contractor in connection with the Project.

**2.6.1** The Contractor's Representative shall be an individual approved by the Owner. The Contractor shall authorize said Contractor's Representative to receive and act upon instruction from the Owner pursuant to the Contract Documents. The Contractor's Project Superintendent referenced below in Paragraph 2.6.3 shall be on the Project Site at all times during the course of the Work.

**2.6.2** The parties agree that the Owner shall have the right to cause the Contractor to remove or replace the Contractor's Representative or other Contractor Project staff for due cause at the Owner's reasonable discretion. Replacement of the Contractor's Representative shall be subject to the Owner's prior-written approval.

**2.6.3 SKILLED PERSONNEL.** The Contractor shall furnish only skilled and properly trained staff for the performance of the Work. The persons in the Contractor's employ filling the following positions shall be persons approved by the Owner:

Project Superintendent: Sheldon Nelson;  
Project Manager: Manny Zabat

**2.6.4 OWNER APPROVAL OF CHANGE IN PERSONNEL.** Any such person shall not be changed without the written consent of the Owner, unless such person becomes unable to perform any required duties due to death, disability, transfer or termination of employment with the Contractor. If any such person is no longer capable of fulfilling the requirements of their position, the Owner and Contractor shall agree on mutually acceptable substitute.

### **ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION**

**3.1** - The date of commencement is the date from which the Contract Time of Paragraph 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 date of commencement shall be within five (5) days after a notice to proceed from the Owner.

**3.2** The Contractor shall achieve Substantial Completion of the "First Phase" of the Work not later than the date set forth in Exhibit "B," attached hereto ("Completion Date") which is June 6, 2006. Final Completion of the entire Work shall be achieved within thirty (30) days of Substantial Completion of all phases of the Work as detailed in Exhibit "B" which is November 16, 2006 (the "Final Completion Date"). "Final Completion" shall mean the date on which (i) the Owner and Architect accept the interior and the exterior of all the Work; (ii) the Owner and Architect are satisfied that all

Punchlist Work has been completed; and (iii) the Contractor has obtained a certificate of occupancy for the Work. Time is of the essence with respect to this Agreement.

*(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.)*

**3.2.1** If the Contractor shall fail to reach Substantial Completion of the First Phase of the Work, as detailed herein and in the Construction Documents, in any of the existing guest rooms to be included in Group #1 as defined in the Construction Documents (approximately 46 guest rooms) on or prior to the "Turn Over Date" indicated in Exhibit "B" for the First Phase, which is June 6, 2006, then the Contractor shall be charged Liquidated Damages in the amount of One Hundred and Fifty Dollars (\$150) per affected guest room per day after a seven (7) day grace period. Concerning this Paragraph 3.2.1, Substantial Completion of the First Phase shall require that each guest room can be "legally occupied" by hotel guests by the date indicated in Exhibit "B" for the First Phase which is June 6, 2006 and includes, but not be limited to, elevator access to the guest rooms (and all floors where the guest rooms are located), fire and life safety compliance for each room, completed and balanced HVAC service to each guest room, completion of each room for occupancy within reasonable hotel industry standards and scaffolding and related construction items removed from the Project so that the building appears to be open for business (collectively, "Fully Occupied"). These Liquidated Damages are based on the assumption that the Department of Building and Safety, Fire Department, or other applicable agencies will allow the guest rooms to be Fully Occupied while the Work is ongoing in other guest rooms and while only one elevator is operational.

**3.2.2** If the Contractor shall fail to complete the "Second Phase" of the Work for the balance of the rehabilitated guest rooms (other than the guest rooms included in Group #1) on or prior to the Turn Over Date indicated in Exhibit "B" for the Second Phase, which is November 16, 2006, then the Contractor shall be charged Liquidated Damages in the amount of seventy-five percent (75%) of One Hundred and Twenty Five Dollars (\$125) per affected guest room per day after a seven (7) day grace period. Concerning this Paragraph 3.2.2, Substantial Completion of the Second Phase shall require that each guest room can be "legally occupied" by hotel guests by the date indicated in Exhibit "B" which is November 16, 2006 and includes, but not be limited to, elevator access to the guest rooms (and all floors where the guest rooms are located), fire and life safety compliance for each room, completed and balanced HVAC service to each guest room, completion of each room for occupancy within reasonable hotel industry standards and scaffolding, man lifts and related construction items removed from the Project so that the building appears to be open for business (collectively, "Fully Occupied").

**3.2.3** If the Contractor shall fail to complete the entire Scope of Work on the "6<sup>th</sup> Floor", which consists of approximately thirty (30) new guest rooms, on or prior to the Turn Over Date indicated in Exhibit "B" for Final Completion, which is November 16, 2006, then the Contractor shall be charged Liquidated Damages in the amount of seventy-five percent (75%) of One Hundred and Twenty Five Dollars (\$125) times the total number of new guest rooms affected. For example, if thirty (30) new guest rooms were affected, then Liquidated Damages would total Two Thousand Eight Hundred Twelve Dollars and Fifty Cents (\$2,812.50) per day after a seven (7) day grace period. Concerning this Paragraph 3.2.3, Substantial Completion of the Second Phase shall require that each guest room can be "legally occupied" by hotel guests by the date indicated in Exhibit "B" which is November 16, 2006 and includes, but not be limited to, elevator access to the guest rooms (and all floors where the guest rooms are located), fire and life safety compliance for each room, completed and balanced HVAC service to each guest room, completion of each room for occupancy within reasonable hotel industry standards and scaffolding, man lifts and related construction items removed from the Project so that the building appears to be open for business (collectively, "Fully Occupied").

**3.2.4** The installation and commissioning of the 2<sup>nd</sup> elevator, which is commonly known as the lobby elevator, will not be tied to Liquidated Damages. If the completion of the 2<sup>nd</sup> elevator does not occur on or prior to Final Completion date for the 6<sup>th</sup> floor as indicated on Exhibit "B" which is November 16, 2006, the Contractor's general conditions, overhead, other Costs of the Work shall not be included in an Additive Change Order.

**3.2.5** The Parties agree that three (3) guest rooms will be closed for the duration of the Work at the temporary hoist location to serve as access for workers and materials into the Project building. Accordingly, these three (3) guest rooms shall not be subject to Liquidated Damages until after the passage of the Final Completion date for the 6<sup>th</sup> floor which is November 16, 2006.

**3.2.6** The Contractor shall schedule and coordinate the Work so that there is at least one operating guest elevator for the Project that reaches all existing floor and the rooms that can be Fully Occupied at all times. The guest elevators are identified in the Contract Documents as the 1<sup>st</sup> elevator, which is commonly known as the "middle" or "westerly" elevator, and the 2<sup>nd</sup> elevator, which is commonly known as the "lobby" elevator. The Contractor agrees to keep the 2<sup>nd</sup> elevator operational at all times and not take the 2<sup>nd</sup> elevator out of service until (a) after September 4, 2006 and (b) after the date when the 1<sup>st</sup> elevator is completely renovated, commissioned and fully operational to all the guest room that can be Fully



Occupied (and all the floors where such guest rooms are located), whichever date is later. As long as the services to be performed by the Owner's design professionals related to the elevators is completed and delivered to the Contractor by January 7, 2006, the Contractor shall make a good-faith effort to cause (x) the 1<sup>st</sup> elevator to be completely renovated, commissioned and fully operational to all the guest rooms that can be Fully Occupied (and all the floors where such guest rooms are located) before September 5, 2006 and (y) the 2<sup>nd</sup> elevator to be completely renovated, commissioned and fully operational to all the guest room that can be Fully Occupied (and all the floors where such guest rooms are located) by December 6, 2006. The terms, conditions and dates contained in this Subparagraph 3.2.6 shall supercede the terms, conditions and dates contained in the Schedule attached to Exhibit "B".

Notwithstanding any other provision herein, the Contractor shall not be liable for any delay caused by force majeure events, extreme weather conditions or acts of war.

**3.3** The Contractor shall take all action necessary to achieve Substantial Completion of the entire Work in the most timely fashion possible and in any case, no later than the date indicated in Exhibit "B". The Contractor shall be responsible for achieving Substantial Completion of the entire Work without delay, and shall diligently pursue the coordination, execution and completion of the Project. Substantial Completion shall be deemed by the parties to mean the date upon which final written acceptance is provided by the Owner and the governmental entity providing inspections, permit sign-offs and approvals for the Work), 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.)*

**3.4 PROJECT SCHEDULE.** In Exhibit "B", the Contractor shall provide a Project Schedule. Further, the Contractor shall provide an updated Project Schedule within seven (7) days after execution of this Agreement ("Project Schedule"). The updated Project Schedule shall provide the same Commencement Date and Substantial Completion Date as the Project Schedule in Exhibit "B". The Project Schedule shall be related to the entire Project to the full extent required by the Contract Documents, shall include a schedule for all required submittals, and shall provide for expeditious and practicable execution of the Work. The Project Schedule shall indicate the dates for starting and completing the various stages of construction and shall be revised as required by the conditions of the Work, subject to the Owner's written approval. The Project Schedule shall cover all activities, milestones and trades required for the execution of the Work with scheduling and delivery dates for long-lead-time materials and equipment. The adequacy of the information in the submitted Project Schedule is subject to the written approval of the Owner. With each Application for Payment submitted by the Contractor in accordance with the Contract, other than the final Application for Payment, the Contractor shall submit to the Owner and Architect a current Project Schedule revised to indicate the portion of the Work executed during the time period covered by the Application for Payment, all progress slippages occurring during previously covered time periods, and the corrective action taken for the slippage carried over into the time period covered by the Application for Payment, the anticipated delays or difficulties, and all other information required to adequately present the actual status of the progress of the Work as of the date of the Application for Payment as may be further required by the Owner.

**3.5 FAILURE TO MEET PROJECT SCHEDULE.** In the event the Contractor falls behind the Project Schedule to such an extent that the Owner in good faith determines that the Contractor will be unable to achieve Substantial Completion by the date set forth in the Project Schedule, as such date may be extended as provided in the Contract Documents, the Contractor shall, within two (2) working days following the Owner's demand therefor, provide to the Owner, in writing, a detailed explanation of the measures the Contractor will take in order to recover from the delay so that the progress of the Work complies with the Project Schedule. If, in the Owner's reasonable judgment, Owner believes the Contractor's intended recovery measures will not cause the Contractor to recover from the delay (provided such delay arises from a cause which is the Contractor's or its Subcontractor's responsibility) so as to achieve Substantial and Final Completion on schedule, the Owner may direct the Contractor to accelerate the progress of the Work, and the Contractor may utilize the Contingency for all or a portion of the acceleration costs. However, the acceleration costs shall not cause any adjustment to the GMP. Such methods of acceleration may, at the Owner's election, include, without limitation, employing such additional forces or paying such additional overtime wages and the actual, reasonably necessary compression and inefficiency costs attributable to such acceleration, as may be required in order to assure that the progress of the Work is in compliance with the Project Schedule and assure timely Substantial and Final Completion of the Work. The cost of such overtime work, together with the actual, reasonably necessary compression and inefficiency

costs attributable to such acceleration shall not increase the GMP unless the delays were caused by the Owner or an entity controlled by the Owner, or something not the fault of the Contractor and then such costs may be added to the Cost of the Work or GMP pursuant to the Change Order provisions of this Contract. If the Owner requires the Contractor to accelerate the Work hereunder and the Contractor disputes that the Owner was reasonable in requiring such acceleration in order to achieve essential milestones or Project Schedule, such as delivery of the guest rooms for use during June through August, 2006, or Substantial or Actual Completion pursuant to the Project Schedule, then the Contractor may pursue recovery of any acceleration costs actually incurred, but not in excess of the GMP, through the Alternative Dispute Resolution process contained in Exhibit "H."

**3.6 Early Completion Bonus For Second Phase.** For every day that the Second Phase guest rooms and the 6<sup>th</sup> Floor new guest rooms for the Project are deemed Finally Complete by the applicable jurisdiction, and ready for occupancy pursuant to Subparagraph 3.2.2 and 3.2.3 seven (7) calendar days prior to the Turn Over Date for Final Completion (as agreed upon in the attached Schedule contained in Exhibit "B") (collectively "Early Day(s)"), the Owner shall award to the Contractor a bonus in the sum of seventy five dollars (\$75.00) for each Second Phase guest room and 6<sup>th</sup> Floor new guest room times the applicable number of Early Day(s) that the applicable rooms are actually occupied by hotel customers. In other words, in order for the bonus to apply, such Second Phase and 6<sup>th</sup> Floor guest rooms must be able to be "legally occupied", ready for occupancy pursuant to Subparagraph 3.2.2 and 3.2.3 and must be, in fact, actually occupied by hotel customers during the Early Day(s) period. The Owner shall make a good-faith effort to cause such guest rooms to be occupied by hotel customers and shall have a good-faith duty to accurately report such occupancy to the Contractor. However, the Contractor shall not have any right to audit or access the Owner's occupancy or management records. Legal occupancy includes, but not be limited to, elevator access to the guest rooms, fire and life safety compliance for each guest room, completed and balanced HVAC service to each guest room, completion of each room for occupancy within reasonable hotel industry standards and scaffolding and related construction items removed from the Project so that the building appears to be open for business. However, this Early Completion Bonus can only be earned if the Department of Building and Safety, Fire Department, or other applicable agencies will allow the guest rooms to be occupied while the Work is ongoing in other guest rooms and while only one elevator is operational. This Early Completion Bonus does not apply to the early completion of First Phase of the Work as detailed in Paragraph 3.2.1, but instead applies to Final Completion of the Second Phase and the 6<sup>th</sup> Floor.

**3.7 Early Completion Bonus For First Phase.** For every day that the First Phase guest rooms for the Project are deemed Finally Complete by the applicable jurisdiction, and ready for occupancy pursuant to Subparagraph 3.2.1 seven (7) calendar days prior to the Turn Over Date for Final Completion (as agreed upon in the attached Schedule contained in Exhibit "B") (collectively "Early Day(s)"), the Owner shall award to the Contractor a bonus in the sum of seventy five dollars (\$75.00) for each First Phase guest room times the applicable number of Early Day(s) that the applicable rooms are actually occupied by hotel customers. In other words, in order for the bonus to apply, such First Phase rooms must be able to be "legally occupied", ready for occupancy pursuant to Subparagraph 3.2.1, and must be, in fact, actually occupied by hotel customers during the Early Day(s) period. The Owner shall make a good-faith effort to cause such guest rooms to be occupied by hotel customers and shall have a good-faith duty to accurately report such occupancy to the Contractor. However, the Contractor shall not have any right to audit or access the Owner's occupancy or management records. Legal occupancy includes, but not be limited to, elevator access to the guest rooms, fire and life safety compliance for each guest room, completed and balanced HVAC service to each guest room, completion of each room for occupancy within reasonable hotel industry standards and scaffolding and related construction items removed from the Project so that the building appears to be open for business. However, this Early Completion Bonus can only be earned if the Department of Building and Safety, Fire Department, or other applicable agencies will allow the guest rooms to be occupied while the Work is ongoing in other guest rooms and while only one elevator is operational. This Early Completion Bonus does not apply to the early completion of the Second Phase and the 6<sup>th</sup> Floor.

#### **ARTICLE 4 CONTRACT SUM**

**4.1** The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract Sum the Contract Sum consisting of the Cost of the Work as defined in Article 5 and the Contractor's Fee determined as follows

*(State a lump sum, percentage of Cost of the Work or other provision for determining the Contractor's Fee, and explain how the Contractor's Fee is to be adjusted for changes in the Work.)*

The Contractor's Fee, except as it may be limited by the Guaranteed Maximum Price, shall be five and one-half percent (5.5%) of the Cost of the Work which shall cover all Work as outlined in Exhibit "A" attached hereto. In the event any Change Orders are agreed to by the parties, the Owner shall pay the Contractor the amount of each such approved Change Order which shall be all inclusive, and include any additional Fee and General Conditions necessary for such Change Order upon the Contractor's incorporation into the Project of the Work required by the Change Order. For additive Change Orders, the Contractor's Fee shall be five and one-half percent (5.5%) of the Cost of such additional Work. For deductive Change Orders, the Contractor's Fee shall be two and three-fourths percent (2.75%) of the Cost of such deducted Work.

## 4.2 GUARANTEED MAXIMUM PRICE (IF APPLICABLE)

4.2.1 The sum of the Cost of the Work and the Contractor's Fee, along with the insurance costs, Subcontractor Default Insurance or bonding costs, bonuses, General Conditions costs, and any other costs to be incurred by the Contractor to perform the Work is guaranteed by the Contractor not to exceed the GMP as set forth in Exhibit "C" and Exhibit "D," attached hereto. The GMP for the Work shall be agreed to by the Contractor and Owner in Exhibit "C". The Contractor will provide at least two (2) subcontractor bids from each trade and for the General Conditions Cost line items for leased equipment. All subcontracts shall be lump sum subcontracts unless otherwise agreed to in advance in writing by the Owner. The Owner shall have audit rights to review any of the Contractor's or Subcontractor's records for the Project. Subcontracts will be awarded to the lowest responsible bid, unless Owner requests that the Contractor select a higher responsible bidder. Costs which would cause the GMP to be exceeded shall be paid by the Contractor without reimbursement by the Owner. A detailed breakdown of the elements constituting the GMP shall be attached hereto as Exhibit "C" ("Schedule of Values"). The attachment of the Schedule of Values to this Agreement shall not be deemed a guarantee by the Contractor of the costs of any individual line items constituting the Cost of the Work, rather it shall be used in approving Applications for Payments and shall constitute Contractor's guarantee that the Contract Sum shall not exceed the GMP. The GMP is subject to adjustment only by Change Orders authorized by the Owner in writing in accordance with the requirements of the Contract Documents.

For the purpose of this Contract, wherever the term Schedule of Values appears, it shall mean the Schedule of Values contained in Exhibit "C". Further, wherever the term Scope of Work appears in the Contract it shall refer to the Scope of Work detailed herein and in the Exhibits. The Exhibits to this Agreement are fully incorporated herein and include the following: Exhibit "A" List of Contract Documents (Including Scope of Work, Plans and Specifications); Exhibit "B" Project Schedule; Exhibit "C" Schedule of Values; Exhibit "D" General Condition Breakdown; Exhibit "E" Qualifications and Exclusions; Exhibit "F" Early Retention Schedule; Exhibit "G" Lien Waiver Forms; and Exhibit "H" Alternative Dispute Resolution; and Exhibit "I" Key Personnel.

*(Insert specific provisions if the Contractor is to participate in any savings.)*

4.2.1.1 **SAVINGS.** Savings, if any, within the GMP, shall be provided sixty percent (60%) to the Owner and forty percent (40%) to the Contractor if the Contractor substantially completes the Work, as scheduled and as described herein and in Exhibit "A". Savings will be calculated based on the GMP minus the final Cost of Work, Contractor's Fee, General Conditions, insurance costs and Subcontractor Default Insurance or bonding costs ("Final Cost of the Work"). If the Final Cost of the Work is below the GMP, and calculated at the Project completion after all subcontracts and purchase orders are closed, the resulting Savings shall be shared by the Owner and the Contractor as detailed herein. The Owner shall retain One Hundred Percent (100%) of any remaining allowance funds.

4.2.1.2 **Contingency.** The GMP shall include a contingency amount not to exceed three percent (3%) of the Cost of the Work for contingency items, as defined below ("Contingency"). It is understood that the Contingency is the maximum sum available to cover the costs (including impact and delay costs) resulting from: (i) Any shortfall in buy-outs in any line item of the Cost of Work; and (ii) Required Scope of Work that was not part of the original buy-out with the relevant subcontractor (if the amount exceeds the line item budget). The Contractor acknowledges that it has a clear understanding of the Project Scope of Work. The Contractor shall provide its best effort in managing the cost of corrections so as to avoid using the Contingency. Any cost savings resulting from the Contractor's buy-outs shall be moved to the Contingency fund. Offsets against the Contingency shall be documented and approved in writing by the Owner prior to proceeding with any of the Work associated with the use of such Contingency funds. Such prior approval by the Owner shall not be unreasonably withheld. Use of the Contingency shall require the prior-written approval of the Owner or the Owner's Representative, which approval shall not be unreasonably withheld.

**4.2.1.3 No GMP or Schedule Increases.** The GMP or Completion Date shall not be adjusted and no Change Order shall be issued, notwithstanding any provision in the Contract Documents to the contrary, for any of the following: (i) additional costs or delays occasioned by or related to the negligence, error, omission, inaction, mistake or failure of the Contractor, its employees, agents and Subcontractors; (ii) additional costs or delays related to equipment, materials or supplies, whether because such equipment, material or supplies are late in arriving or are determined to be inadequate or in disrepair upon arrival; (iii) delays or additional costs related to adverse weather up to a maximum of ten (10) adverse weather days that prevent any Work on the Project; or (iv) additional costs or delays related to any subcontractors or suppliers, including delays resulting from the financial condition of any such subcontractors or suppliers.

**4.2.2** The Guaranteed Maximum Price is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner: *See Exhibit "E" entitled Qualifications and Exclusions.*

*(State the numbers or other identification of any accepted alternates, but only if a Guaranteed Maximum Price is inserted in Subparagraph 4.2.1. 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.)*

**4.2.3** The amounts agreed to for unit prices, if any, are as follows:

*(State unit prices only if a Guaranteed Maximum Price is inserted in Subparagraph 4.2.1)*

**4.2.4** Notwithstanding anything else to the contrary, the Contractor shall only be paid (1) the Contractor's actual Cost of the Work as verified by the Owner, (2) the Contractor's Fee, (3) the General Conditions Costs, and (4) any prior authorized written Change Orders. Items 1, 2 and 3 shall not exceed the Guaranteed Maximum Price.

**4.2.5 SCHEDULE OF VALUES.** The Contractor shall furnish the Owner with (i) a Schedule of Values in Exhibit "C" and (ii) a Project Schedule that updates the Project Schedule contained in Exhibit "B", as required under Paragraph 3.4. Both such documents shall be in form and substance satisfactory to the Owner and include such supporting data and documents as the Owner or the Architect may reasonable require.

**4.2.6 REPRESENTATIONS AND WARRANTIES.** BY EXECUTING THIS AGREEMENT AND FURNISHING THE OWNER WITH THE GMP, SCHEDULE OF VALUES AND PROJECT SCHEDULE, THE CONTRACTOR REPRESENTS AND WARRANTS THAT (i) AS OF THE DATE HEREOF, TO THE BEST OF THE CONTRACTOR'S KNOWLEDGE AFTER DUE INQUIRY AND AFTER COMPLETING A THOROUGH AND COMPREHENSIVE INVESTIGATION OF THE CONTRACT DOCUMENTS, MATERIALS AND INFORMATION FURNISHED THE CONTRACTOR AS OF THE DATE OF THIS AGREEMENT AND THE ONGOING DISCUSSIONS AND MEETINGS BETWEEN THE CONTRACTOR AND BOTH THE OWNER AND ARCHITECT HAVE DESCRIBED THE SCOPE, CONSTRUCTION REQUIREMENTS AND DESIGN INTENT OF THE WORK IN DETAILS SUFFICIENT TO ENABLE THE CONTRACTOR TO ESTABLISH FIRMLY THE GMP AND PROJECT SCHEDULE.

## **ARTICLE 5 COSTS TO BE REIMBURSED**

**5.1** The term "**Cost of the Work**" shall mean costs necessarily incurred by the Contractor, or its parent companies, or companies owned or controlled by the Contractor, or the subsidiaries or other affiliates of any of the above companies, in good faith and in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. Such Costs of the Work shall be subject to the Owner's review and audit rights. Such review includes, but is not limited to, detailed transaction registers, requested back up, audit, and final accounting cost reconciliation (which will reconcile progress payments made on a percentage of completion basis with actual approved costs incurred for this Project). The Contractor must disclose any such companies prior to using them in any capacity of the Project and obtain the Owner's written approval prior to using such companies. The Cost of the Work shall include only the items set forth in this Article 5 and as detailed in the G702 attached as Exhibit "D" entitled the Schedule of Values. The G702 shall contain a good faith estimate and detailed cost breakdown of all costs for the complete Project including the Contractor's Fee, General Conditions, Insurance and bonds. Upon the mutual execution of this agreement, the Schedule of Values provided as Exhibit D shall constitute the Project budget. The G702 shall be updated and submitted with each Application for Payment pursuant to Articles 9 and 10. As used herein, the term "costs" shall mean actual costs paid or payable by the Contractor less all discounts, rebates and salvage

obtained pursuant to the terms contained in Article 7. The Contractor shall disclose to the Owner all discounts, rebates and salvage and all discounts, rebates and salvage shall be passed through to the Owner.

**5.1.1 Construction Wages.** Wages of construction workers directly employed by the Contractor to perform the construction of the Work at the Project site or, with the Owner's prior written approval, at off-site workshops. Wages shall also include wages or salaries of the Contractor's supervisory and administrative personnel when stationed at the Project site with the Owner's prior written approval. *(If it is intended that the wages or salaries of certain personnel stationed at the Contractor's principal, on site or other offices shall be included in the Cost of the Work, the Contractor shall identify in Exhibit "I" entitled Key Personnel the personnel to be included and whether for all or only part of their time, and the rates at which their time will be charged to the Work.)*

**5.1.2** Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

**5.1.3** Payments made by the Contractor to Subcontractors in accordance with the requirements of the subcontracts.

**5.1.4** Cost of all materials, temporary facilities, equipment and hand tools not customarily owned by the construction workers, which are provided by the Contractor at the site and fully consumed in the performance of the Work, including reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Contractor. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

**5.1.5** Reasonable rental costs for necessary temporary facilities, machinery, equipment, and hand tools used at the site of the Work, whether rented from the Contractor or others.

**5.1.6** That portion directly attributable to this Contract of premiums for insurance and bonds.

**5.1.7** Losses and expenses, not compensated by insurance or otherwise, sustained by the Contractor in connection with the Work, provided they have resulted from causes other than the fault or neglect of the Contractor.

**5.1.8** Costs of removal of debris from the site.

**5.1.9** Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property.

**5.1.10** Other costs incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

**5.1.11** Costs paid or incurred by the Contractor for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work and under subparagraph 5.1.1

*(Here insert modifications or limitations to any of the above subparagraphs.)*

**5.1.12** Costs of document reproductions, facsimile transmissions and long-distance telephone calls, postage and parcel delivery charges, telephone service at the site and reasonable petty cash expenses of the site office.

**5.1.13** That portion of the reasonable expenses of the Contractor's personnel incurred while traveling in discharge of duties connected with the Work.

**5.1.14** Costs of materials and equipment suitably stored off the site at a bonded or insured facility at a mutually acceptable location, if approved in advance by the Owner in writing.

**5.1.15 MISCELLANEOUS COSTS**

5.1.15.1 That portion of insurance and Subcontractor Default Insurance premiums, if applicable, that can be directly attributed to this Contract. Liability insurance is 1.1% of the GMP. In lieu of Subcontractor Bonds, Contractor will provide Subcontractor Default Insurance at a rate of 1.2% of all Subcontractual Work.

5.1.15.2 Sales, use or similar use taxes imposed by a governmental authority that are related to the Work.

5.1.15.3 Deductible amounts paid from out of the Contingency. However, if the Contingency is exhausted, the Contractor shall be responsible for any remaining deductibles and the payment of such deductibles cannot be used to increase the GMP.

5.1.15.4 [Intentionally deleted.]

5.1.15.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the reasonable cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Contractor resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Contractor's Fee or subject to the Guaranteed Maximum Price.

5.1.15.6 Data processing costs related to the Work.

5.1.15.7 Deposits lost for causes other than the Contractor's negligence or failure to fulfill a specific responsibility to the Owner as set forth in the Contract Documents.

#### 5.1.16 OTHER COSTS AND EMERGENCIES

5.1.16.1 Other costs incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

5.1.16.2 Costs due to emergencies incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property.

5.1.16.3 Costs of repairing or correcting damaged or nonconforming Work executed by the Contractor, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility of the Contractor, Subcontractor or supplier and only to the extent that the cost of repair or correction is not recoverable by the Contractor from insurance, sureties, Subcontractors or suppliers.

### ARTICLE 6 COSTS NOT TO BE REIMBURSED

6.1 The Cost of the Work shall not include:

6.1.1 Salaries and other compensation of the Contractor's personnel not listed in Exhibit "I."

6.1.2 Expenses of the Contractor's principal office and offices other than the site office.

6.1.3 Overhead and general expenses, except as may be expressly included in and as detailed in Exhibit "D" entitled General Conditions Breakdown.

6.1.4 The Contractor's capital expenses, including interest on the Contractor's capital employed for the Work.

6.1.5 Rental costs of machinery and equipment, except as specifically provided in Subparagraph 5.1.5.

6.1.6 Except as provided in Paragraph 10.2 of this Agreement, costs due to the fault or negligence of the Contractor, Subcontractors, anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable,

including, but not limited to, costs for the correction of damaged, defective or nonconforming Work, disposal and replacement of materials and equipment incorrectly ordered or supplied, and making good damage to property not forming part of the Work.

6.1.7 Any cost not specifically and expressly described in Article 5.

6.1.8 Costs which would cause the Guaranteed Maximum Price, if any, to be exceeded.

#### **ARTICLE 7 DISCOUNTS, REBATES AND REFUNDS**

7.1 Provided the Owner has tendered advanced payment, cash discounts obtained on payments made by the Contractor shall be credited as a deduction to the Cost of the Work.

7.2 Amounts which accrue to the Owner in accordance with the provisions of Paragraph 7.1 shall be credited to the Owner as a deduction from the Cost of the Work.

#### **ARTICLE 8 ACCOUNTING RECORDS**

8.1 The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Contract; the accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to the Contractor's records relating to this Contract. The Contractor shall preserve these records for a period of ten (10) years after final payment, or for such longer period as may be required by law, or the Contractor may send a complete set of such records to the Owner upon Substantial Completion of the Project.

8.2 **INSPECTION OF RECORDS.** If any inspection by the Owner of the Contractor's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda and any other data relating to the Contract Documents reveals any overcharges that cumulatively equal in excess of Ten Thousand Dollars (\$10,000.00), including, without limitation, any unjustified or unsubstantiated charges or untimely request for payment, the Contractor shall pay the Owner upon demand an amount equal to one hundred twenty-five percent (125%) of such overcharge, as reimbursement for said overcharge and the administrative expenses incurred in determining the overcharge. The requirements of this Paragraph 8.2 shall not apply to any portion of an overcharge which is the subject of a good faith dispute between the Owner and the Contractor or between the Contractor and a subcontractor.

#### **ARTICLE 9 PROGRESS PAYMENTS**

9.1 Subject to the Provisions contained in Article 9 and (1) based upon compliance with the other requirements detailed herein, (2) based upon Applications for Payment submitted to the Architect and the Owner by the Contractor, (3) based upon the Architect and Owner's review and approval of the Work performed and (4) based upon any other requirements of the Lender, the Owner shall make undisputed progress payments on account of the Contract Sum to the Contractor as provided in the Contract Documents. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

9.1.1 In addition to other provisions in Article 20 and other provisions in this Agreement for required items, each Application for Payment shall be accompanied by the following, all in form and substance satisfactory to the Owner, the Architect, the requirements of the Lender, the title company, and in compliance with applicable statutes:

(1) The Contractor shall provide a duly executed and acknowledged Contractor's Sworn Statement showing all Subcontractors with whom the Contractor has entered into subcontracts, the amount of such subcontracts, the amount requested for any Subcontractor, sub-subcontractor and supplier in the Application for Payment and the amount to be paid to the Contractor from such progress payment.

(2) Notwithstanding any other provision herein, thirty (30) days after payment, the Contractor shall provide the Owner with duly executed unconditional waivers of mechanics' and suppliers' liens and stop notice claims on construction funds from the Contractor and all Subcontractors, sub-subcontractors and suppliers establishing unconditional payment or satisfaction of payment (collectively, "Unconditional Lien Waiver"). Conditional waivers of mechanics' and suppliers' liens and stop notice claims ("Conditional Lien Waiver") shall be provided with each Application for Payment. The Owner shall have the reasonable option of providing payment to the Contractor and all Subcontractors, sub-subcontractors and suppliers by joint checks in the event that the Contractor encounters material economic difficulties. Copies of the Unconditional Lien Waivers and the Conditional Lien Waivers are attached as Exhibit "G". The Contractor shall provide an Unconditional Lien Waiver or a Conditional Lien Waiver for each entity or person that has been or will be paid through the current Application for Payment. The Contractor shall cooperate fully with either (i) providing Unconditional Lien Waivers or (ii) providing Conditional Lien Waivers and receiving payment by joint check for such amounts subject to the Conditional Lien Waivers. If Conditional Lien Waivers are provided with the current Application for Payment, then Unconditional Lien Waivers shall be provided to replace the Conditional Lien Waivers thirty (30) days after the Contractor receives payment. If Unconditional or Conditional Lien Waivers are not provided as required herein, then subsequent Applications for Payment shall be deemed "disputed" and the Owner may withhold payment on the entire Application for Payment until the missing Unconditional or Conditional Lien Waivers are provided. The Application for Payment form is attached as Exhibit "C"; and

(3) The Contractor shall provide such other information, documentation and materials as the Owner, the Architect, the Lender, or the title company may require.

9.1.2 The Contractor shall make every effort to provide the Owner with the documentation required in compliance with Paragraph 9.1 and 9.1.1 (the "Contractor's Documentation") by the fifth (5<sup>th</sup>) day of the month for all Work actually performed during the previous month. Upon receipt of the Contractor's Documentation and contingent upon the written approval of the Work by the Architect and Owner, the Owner shall request the Lender or the title company to make payment to the Contractor of all undisputed amounts. Every effort will be made to cause the Owner, Lender or the title company to pay the Contractor within fifteen (15) days of receipt of the Contractor's Documentation that is in compliance with Paragraphs 9.1 and 9.1.1.

9.1.3 Each Application for Payment shall be based on the most recent Schedule of Values submitted by the Contractor in accordance with the Contract Documents. The Schedule of Values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Contractor's Fee shall be shown as a single separate item. The Schedule of Values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect or Owner may require. This schedule, unless objected to by the Architect or Owner, shall be used as a basis for reviewing the Contractor's Applications for Payment. The Owner shall pay the Contractor the agreed-upon percentage of completion for items detailed in the Schedule of Values with the right to audit and receive back-up documentation on any items represented on the Schedule of Values. Unit prices, if any, shall be included in the Schedule of Values and detailed in Exhibit "C" and shall be tied to executed subcontract amounts agreed to by the Owner.

9.1.4 The amount paid pursuant to each Application for Payment shall be ninety percent (90%) of the Work completed and ninety percent (90%) of the value of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Project. Accordingly, the Owner shall be entitled to retain ten percent (10%) of the value of the entire completed Work, including the value of materials and equipment delivered to the site, to assure the faithful performance of the Work by the Contractor pursuant to the Contract Documents (hereinafter referred to as the "Retainage"). Notwithstanding any of the above, the Owner will release Retainage on a trade by trade basis once a trade has reached Substantial Completion of its Work, which, as to this Paragraph only, shall be deemed by the parties to mean passage of all inspections, delivery of all executed Conditional Lien Waivers (followed by Unconditional Lien Waivers within seven (7) days of payment by the Owner), delivery of all warranty, manufacturing and as-built documents, completion of all punch-list items and acceptance of the Work by the Owner at the Owner's sole discretion.

9.1.5 Upon Substantial Completion of the entire Work, and pursuant to an Application for Payment specified in Article 9.1 above, the Owner shall pay the Contractor all remaining outstanding undisputed amounts up to the GMP, less such amounts as the Owner shall determine for incomplete Work, remaining Punch List items, unsettled claims and necessary Retainage.



**9.2** 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 any rate of interest agreed upon, if any.)* The "legal" interest rate in California.

*(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.)*

**9.3 PROGRESS DURING DISPUTES.** In the event of any dispute between the Owner and the Contractor, the Contractor shall proceed with the performance of its obligations under the Contract Documents in accordance with the Project Schedule, with reservations of all rights and remedies the Contractor may have at law or in equity. The Owner will continue to make undisputed payments in accordance with those provisions herein.

**9.4 Early Released Retention.** The retention for the Work of certain Subcontractors may be released prior to final payment by agreement of the Owner and Lender, provided that the particular Subcontractor for whom retentions being released is not in default under its subcontract and has completed, to the Owner's satisfaction, all of its portion of the Work, including, without limitation, Punchlist Work attributable thereto ("Early Released Retention"). Such Early Released Retention shall not be released earlier than sixty (60) days after completion and acceptance of the Work of such Subcontractor's trades subject to Early Released Retention set forth in Exhibit "F", attached hereto. The Owner shall hold all retention other than the Early Released Retention until final payment is made in accordance with Paragraph 10.1 of this Agreement. Except with the Owner's prior approval, payments to Subcontractors shall be subject to retainage set forth in Subparagraph 9.1.4 herein, and in the Schedule of Values.

**9.5 Stored Materials.** Payments for stored materials may be made subject to the Owner's and Lender's approvals, such approvals shall not unreasonably be withheld, and the Contractor's compliance with the Owner's and Lender's requirements, including, without limitation, the perfection and protection of any Lender's security interest, and the receipt of certificates of insurance evidencing adequate insurance coverage.

**9.6 Compliance with Lender Requirements.** Notwithstanding and in addition to the foregoing, the Contractor shall comply with such requirements for the Applications for Payment as the Lenders may impose as condition to disbursement of funds. Further, the Contractor shall provide complete evidence of insurance with copies of all policies, amendatory riders and additional insured endorsements for the Contractor and certificates of insurance from all Subcontractors and suppliers. Until the Contractor complies with such requirements, payments may be declined by the Owner and the Contractor shall not have the right to stop or suspend the Work. Such payment will be made by the Owner when the Contractor has complied with such requirements subject, however, to any restrictions imposed by the Lenders with respect to the time or times when disbursement of funds will be made.

**9.7 Mechanic's Lien Releases.** The Contractor shall comply with the provisions contained in Paragraph 9.1.1(2).

## **ARTICLE 10 FINAL PAYMENT**

**10.1 FINAL PAYMENT.** Final payment constituting the unpaid balance of the Cost of the Work and the Contractor's Fee (subject to any retention with minor Work or defective Work) shall be due and payable no later than forty-five (45) days after the Architect or Owner's Representative issues a Certificate of Substantial Completion (as defined below) based on a complete and valid Final Application for Payment, as detailed below in Paragraph 10.3, a Certificate of Occupancy from the applicable governmental authorities, or whatever is required that will enable the Owner to legally offer its new hotel rooms to the public for occupancy (collectively, "Occupancy Requirements"). The "Certificate of Substantial Completion" means a written certificate that: (i) sets forth the date upon which Substantial Completion has been achieved; (ii) states the responsibilities of the Owner and the Contractor for maintenance, utilities and insurance; (iii) lists the items of Work to be completed or corrected ("Punchlist Work"); and (iv) fixes the time within which the Contractor shall complete such Punchlist Work which time shall not be later than forty-five (45) days, unless otherwise agreed to in writing by the Owner, after the Contractor's submittal of its Application for Payment upon Substantial Completion; and (v) fixes the time within which Contractor shall obtain all final approvals of the Project from Owner and all governmental Authorities, including, but not limited to, the final Certificate of Occupancy. Final payment shall be made,

provided that the Contractor has first delivered to the Owner (or Architect if the Owner so requests) such other evidences of the Contractor's full payment of Subcontractors (with exception of retentions and final payments which are to be paid out of the final payment of the Owner to the Contractor) and the absence of any liens generated by the Work as may be required by the Owner, and Lender or a title insurance carrier prior to insuring the absence of all liens generated by the Work; and provided further, that (a) the Owner has first received a Certificate of Payment, which Certificate of Payment states that the evidences delivered by the Contractor are sufficient to indicate said payment of Subcontractors and absence of liens and (b) Owner has received the Occupancy Requirements and (c) the Contractor has delivered to the Owner (i) maintenance and operating manuals for all equipment (ii) all warranties and guaranties in connection with the Work, (iii) attic stock and maintenance materials and (iv) As-Built Drawings for the Project. Final payment, at the Owner's option, may be made in the form of checks made jointly payable to the Contractor and any Subcontractor entitled to payment out of the funds provided by the final payment, provided, however, that no such check shall be payable to more than two payees or in an amount greater than the amount of payment claimed by the Subcontractor payee and approved by the Contractor. The Contractor shall provide evidence satisfactory to the Owner and, if requested by the Owner, to the Architect establishing the identities of such persons and the amounts of the payments to which they are entitled. The Owner may retain an amount equal to one hundred fifty percent (150%) of the cost to complete the Punchlist Work, as determined by the Owner, until such time as the Punchlist Work is complete. Within seven (7) days following the Contractor's written notification to the Architect that the Punchlist Work has been completed, the Owner or Owner's Representative shall conclusively determine whether such Punchlist Work has in fact been completed. The Owner or Owner's Representative shall document in writing the date on which it is determined that the Punchlist Work was completed to the Owner's satisfaction. The Owner shall make payment for this Punchlist Work within ten (10) working days after the date on which the Owner or Owner's Representative determines such Punchlist Work has been completed to the Owner's satisfaction. Within ten (10) days of actual completion of the Work, the Owner, at its sole option, may record and serve a Notice of Completion ("NOC") on all entities that served twenty-day preliminary notices. The Contractor shall cooperate with the NOC process by immediately providing an accurate log with full names and addresses of all entities who have provided twenty-day preliminary notices regarding the Project.

**10.2** If, subsequent to final payment and at the Owner's request, the Contractor incurs costs described in **Article 5** and not excluded by **Article 6** to correct defective or nonconforming Work, the Owner shall reimburse the Contractor such costs and applicable General Conditions Costs, without any increase in the Contractor's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Contractor has participated in savings as provided in Subparagraph 4.2.1, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Contractor.

**10.3** Regarding the Final Application for Payment, the Contractor shall provide for each entity or person that has been or will be paid through the Final Application for Payment (i) duly executed Unconditional Lien Waivers for all amounts paid thirty (30) days prior to the Final Application date and Conditional Lien Waivers for all amounts applied for in the Final Application for Payment, (ii) joint checks for all Subcontractors, sub-subcontractors and suppliers if the Contractor has encountered material financial difficulties or (iii) a bond satisfactory to the Owner and any Lender to indemnify the Owner against any pending or potential liens. If any liens are recorded and remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees. Copies of the Unconditional Lien Waivers and the Conditional Lien Waivers are attached as **Exhibit "G"**. The Contractor shall cooperate fully with the above-referenced procedures. If Conditional Lien Waivers are provided with the Final Application for Payment, then Unconditional Lien Waivers shall be provided to replace the Conditional Lien Waivers within seven (7) days of payment by the Owner to the Contractor. If Unconditional Lien Waivers for payments made over thirty (30) days prior to the Final Payment date or Conditional Lien Waivers for currently applied for amounts are not provided as required herein with the Final Application for Payment, then the Final Application for Payment shall be deemed "disputed" and the Owner may withhold payment on the entire Final Application for Payment until the missing Unconditional or Conditional lien Waivers are provided. The Final Application for Payment form shall be substantially similar to the form attached as **Exhibit "C"**.

## **ARTICLE 11 ENUMERATION OF CONTRACT DOCUMENTS**

**11.1** The Contract Documents are listed in **Article 12** and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

11.1.1 The Agreement is this executed Abbreviated Form of Agreement Between Owner and Contractor, AIA Document A117, 1987 Edition, as modified.

11.1.2 The Supplementary and other Conditions of the Contract are those contained in the Project Manual as follows:

Document	Title	Pages
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See 11.1.6 for list of Exhibits attached hereto and incorporated herein.

11.1.3 The Specifications are those contained in the Project Manual dated as in Subparagraph 11.1.2, and are as follows:

*(Either list the Specifications here or refer to an exhibit attached to this Agreement.)*

Section	Title	Pages
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See 11.1.6 for list of Exhibits attached hereto and incorporated herein.

11.1.4 The Drawings are as follows, and are dated unless a different date is stated below:

*(Either list the Drawings here or refer to an exhibit attached to this Agreement.)*

Number	Title	Date
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See 11.1.6 for list of Exhibits attached hereto and incorporated herein.

11.1.5 The Addenda, if any, are as follows:

Number	Date	Pages
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None.

There are no bidding requirements included as part of the Contract Documents. Further, portions of Addenda relating to bidding requirements for any Subcontractors are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 11.

11.1.6 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.)*

Exhibit "A" – List of Contract Documents (Including Scope of Work, Plans and Specifications)

Exhibit "B" – Project Schedule

Exhibit "C" – Schedule of Values

Exhibit "D" – General Condition Breakdown

Exhibit "E" – Qualifications and Exclusions

Exhibit "F" – Early Retention Schedule

Exhibit "G" – Lien Waiver Forms

Exhibit "H" – Alternative Dispute Resolution

Exhibit "I" -- Key Personnel

## GENERAL CONDITIONS

### ARTICLE 12 CONTRACT DOCUMENTS

**12.1** The Contract Documents consist of this Agreement with 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. 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.

**12.2** The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor.

**12.3** Execution of the Contract by the Contractor is a representation that the Contractor has visited the site and become familiar with the local conditions under which the Work is to be performed.

**12.3.1** The Contractor represents and warrants that its investigation of the site was performed in detail and was sufficient to disclose the observable conditions of the building site, surrounding areas, and all improvements thereon (the "Project"), and the observable conditions under which the Work is to be performed, including, without limitation (1) the location, condition, layout, and nature of the Project and surrounding areas, (2) coordination with all entities involved with the Project (3) anticipated labor and supply costs, and (4) availability and cost of materials, tools, and equipment.

**12.3.2** The Owner shall not be required to make any adjustment in either the Contract Sum or the Contract Time in connection with any failure by the Contractor to comply with the requirements of this Subparagraph 12.3.1.

**12.4** 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.

### ARTICLE 13 OWNER

**13.1** The Owner shall furnish surveys and a legal description of the site.

**13.2** The Owner shall secure all necessary easements and entitlements for the Project. The Contractor shall secure all permits, fees, approvals and charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities and the cost of such shall not be included in the GMP.

**13.3** If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents or fails to carry out the Work in accordance with the Contract Documents and such failure continues beyond seven (7) days after written notice from the Owner, the Owner, by a written order, 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.

**13.4** Nothing herein shall prevent the Owner from withholding payment for incomplete or incorrect Work until it is corrected. In other words, all undisputed payments shall be disbursed while disputed amounts as to particular trades or portions of the Work may be withheld until such disputed items are corrected. The parties shall make a good-faith effort to mediate and settle the dispute within thirty (30) days.

### ARTICLE 14 CONTRACTOR

**14.1** 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 the Contract, unless Contract Documents give other specific instructions concerning

these matters. The Contractor warrants and confirms that it is properly licensed for the Work by all applicable agencies and entities having jurisdiction in the location of the Project.

**14.2** 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 the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work. The items listed in this Paragraph shall be part of the Cost of the Work to be reimbursed as detailed in Article 5, herein.

**14.3** 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. The Owner assumes no responsibility or liability for the physical condition or safety at the Project. The Contractor shall be solely responsible for providing a safe place for the performance of the Work.

**14.4** In addition to the requirements in this Agreement and Exhibits, the Contractor warrants to the Owner 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 Owner or the Architect the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

**14.5** Except as provided in Paragraph 13.2, unless otherwise provided in the Contract Documents, the Contractor shall pay sales, consumer, use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure the building permit and other permits and governmental fees and licenses necessary for proper execution and completion of the Work. The Owner shall

reimburse the Contractor for these amounts as Costs of the Work.

**14.6** The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. The Contractor shall promptly notify the Architect and Owner if the Drawings and Specifications are observed by the Contractor to be at variance therewith.

**14.7** The Contractor shall be responsible to the Owner for the 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.

**14.8** The Contractor shall review, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals as specified pursuant to Paragraph 15.7. When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such certifications. Documents that are designated as "Contract Documents" by the Architect or this Agreement shall be considered as Contract Documents.

**14.9** 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. Any damage of the Project or surrounding areas caused by the performance of the Work shall be removed, repaired and otherwise remedied by the Contractor as a Cost of the Work to be paid for out of the Contingency until the Contingency is exhausted and then at the Contractor's sole expense so that the GMP is not increased in any way.

**14.10** The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

**14.11** The Contractor shall pay all royalties and license fees; shall defend suits or claims for infringement of patent rights and shall hold the Owner 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 unless the

Contractor has reason to believe that there is an infringement of patent.

**14.12** To the fullest extent permitted by law, the Contractor shall appear, defend, indemnify and hold harmless the Owner, Architect, Architect's consultants, agents, representatives, affiliates, parents, subsidiaries and employees of any of them (the "Indemnities") from and against any liabilities, claims, damages, losses and expenses, including but not limited to demands, lawsuits, warranty claims, alternative dispute resolution procedures, and all cost and fees related thereto such as attorneys' fees, and costs (collectively, "Claims") caused by, occurring in connection with, arising out of or resulting from performance of the Work, including Claims attributable to bodily injury, sickness, disease or death, injury to or destruction of tangible property, construction defects, penalties or fines, infringements of any patent or intellectual property rights, lien or stop notice claims, labor disputes, failure to provide or maintain all insurance, violations of the Legal Requirements, errors, omissions, breach of contract and breach of warranty, including loss of use resulting from such Claims, passive or active negligent acts or omissions of the Contractor, a Subcontractor, sub-subcontractor, supplier, 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 the passive or active negligence or acts of the party indemnified hereunder except for the sole negligence or sole willful misconduct of the Indemnitees. 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 14.12. The provisions contained in this Paragraph 14.12 shall survive the expiration or earlier termination of this Contract, the final completion of the Work and any other services to be provided pursuant to this Contract.

**14.12.1** In claims against any person or entity indemnified under this Paragraph 14.12 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 14.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

**14.13 REPRESENTATIONS/WARRANTIES.** The Contractor represents and warrants the following (in addition to any other representations and warranties contained in the Contract Documents) as a material

inducement to the Owner to execute this Agreement, which representations and warranties shall survive the execution and delivery of this Agreement, any termination of this Agreement and the final completion of the Work.

(1) the Contractor and its subcontractors are financially solvent, able to pay all debts as they mature and possessed of sufficient working capital to complete the Work and perform all of its obligations hereunder;

(2) the Contractor is able to furnish the plant, tools, material, supplies, equipment and labor required to complete the Work and perform its obligations hereunder and has sufficient experience and competence to do so;

(3) the Contractor is authorized to do business in the State of California, in the City of Los Angeles, and is properly licensed by all necessary governmental and public and quasi-public authorities having jurisdiction over the Contractor, the Work and the Project;

(4) the Contractor's execution of this Agreement and performance thereof is within the Contractor's duly authorized powers;

(5) the Contractor's duly authorized representative has visited the site of this Project and is familiar with the Project Site conditions under which the Work is to be performed; and has correlated observations with the requirements of the Contract Documents, and

(6) the Contractor is a large, sophisticated contractor who possesses a high level of experience and expertise in the business, administration, construction, construction management and superintendence of projects of the size, complexity and nature of this particular Project, and will perform the Work with care, skill and diligence of such a contractor.

The obligations of the Contractor under this Paragraph 14.12 shall not extend to the liability of the Architect, the Architect's 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, Construction Change Directives, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's 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 15  
ADMINISTRATION OF THE CONTRACT**

**15.1** The Contractor, through its own forces and in coordination with the Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) from time to time during the correction period described in Paragraph 23.1.

**15.2** 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. The Owner shall retain any required third-party testing agency and inspection services.

**15.3** The 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 Paragraphs 14.1 and 21.1. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

**15.4** Based on the Architect's observations and the Owner's, the Construction Lender's and the title company's evaluations of the Contractor's Applications for Payment, they will review and determine the amounts due the Contractor, less any disputed amounts.

**15.5** The Architect will initially interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. If the Architect's interpretation does not cause the parties to settle, the parties agree to retain a mutually agreeable mediator to resolve any disputes. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for results of any interpretations or decisions rendered in good faith. All decisions of the Architect, except those which have been resolved by the parties in writing or waived by the Contractor for acceptance of final payment, shall be subject to dispute resolution as outlined in Paragraph 15.8.

**15.6** The Architect or the Owner will have authority to reject Work which does not conform to the Contract Documents.

**15.7** 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.

**15.8** Except for mechanic's lien type claims, which after filing shall be stayed pending resolution by mediation or arbitration, all claims or disputes between the Contractor and the Owner arising out of or relating to the Contract Documents, or the breach thereof, shall be decided pursuant to the provisions contained in Exhibit "H".

**ARTICLE 16  
SUBCONTRACTS**

**16.1** 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 Contractor warrants and confirms that it will only engage Subcontractors who are properly licensed and qualified for the subcontracted portion of the Work by all applicable agencies and entities having jurisdiction in the location of the Project.

**16.2** 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 Owner the names of the Subcontractors for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor to whom the Owner 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. Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner.

**16.3 "FLOW-DOWN" AND SUBCONTRACTS.** All subcontracts, sub-subcontracts, supplier agreements, consultant agreement and other agreements entered into by the Contractor and Subcontractors with respect to the Work shall conform to the requirements of the Contract Documents and all Subcontractors shall be bound by the obligations of the Contractor under this Agreement and the Contract Documents to the extent of

the services and Work provided by such Subcontractors pursuant to their subcontractual obligations. The form of subcontract to be used by the Contractor in connection with the Work shall be submitted to the Owners and must be satisfactory to the Owner and the Owner's lenders, if any, in form and substance (as evidenced by the Owner's written approval thereof) and shall not be modified in any material respect, nor shall any such modified subcontract be submitted to a Subcontractor for execution, without the prior written consent of the Owner.

#### **ARTICLE 17 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS**

17.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate 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.

17.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for the 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.

17.3 Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefore. If a delay is caused by the Owner or the Owner's separate contractors, the Contractor's General Conditions expenses actually incurred for the Project plus the Contractor's Cost of the Work shall be compensated by the Owner as the Contractor's complete remedy for such delays.

#### **ARTICLE 18 CHANGES IN THE WORK**

18.1 The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or modifications, the GMP and the Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by prior written Change Order signed by the Owner and Contractor or by written Construction Change Directive signed by the Owner.

18.2 The Cost of the Work and Contract Time shall be changed only by written Change Order.

18.3 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement between the Owner and the Contractor.

18.3.1 The parties understand that each Change Order shall be "all inclusive" and be deemed to include all direct and indirect Costs of the Work related to such Change Order including, but not limited to, all insurance, Subcontractor Default Insurance, re-stocking, transportation, finance charges, taxes, labor burdens, etc., which are either enumerated on the face of the Change Order, deemed to be included in the Cost of the Work, the Contractor's Fees or General Conditions. Subcontractor mark-ups for overhead and profit on Change Orders shall not exceed fifteen percent (15%). All Change Orders once executed shall constitute an all inclusive Change Order as to the amounts agreed upon by the parties and any increases in the Schedule related thereto. If the Contractor later presents Change Orders or claims for additional amounts, increases in the Schedule or any "cumulative effects" or "impacts" associated with prior-approval Change Orders, such Change Order or claims shall be denied.

#### **ARTICLE 19 TIME**

19.1 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 and the schedule time period for Substantial Completion are reasonable periods for performing the Work.

19.2 Substantial Completion shall be as defined in Paragraph 3.3 and as established in Exhibit "B" on the Project Schedule.

19.3 If the Contractor is delayed at any time in progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Contractor's control, or by other causes which the Architect and Owner determine may justify delay, then the Contractor shall notify the Owner of such delay within seven (7) days from when such delay occurred and, in such notification the Contractor shall provide a draft of its proposed Change Order for the extension of time for such delay.



**ARTICLE 20  
PAYMENTS AND COMPLETION**

**20.1** Payments shall be made as provided in Articles 9 and 10 of this Agreement.

**20.1.1** The Contractor's Applications for Payment shall comply with Paragraphs 9.1.1 (2) and 10.3.

**20.1.2** The form of Application for Payment shall be AIA Document G702, Application and Certification for Payment, as detailed in Exhibit "C" or in a format acceptable to the Owner, Lender and title company.

**20.1.3** Until actual and final completion, the Owner will retain the amount detailed in the Agreement under Article 9.

**20.2** Reasonably disputed portions of payments may be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, (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 GMP, (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 of the Project budget would not be adequate to cover actual or liquidated damages for the anticipated delay, or (7) failure to carry out the Work in accordance with the Contract Documents.

**20.3** The Contractor shall not present a Punch List, as defined below, until the Work is Substantially Complete and the only types of Punch List Work to be listed by the Contractor will be back-ordered items, replacement items, corrections and repairs. In other words, the Punch List shall not be prepared when material Scopes of Work have not yet been performed and the Project is not yet Substantially Complete. When the Architect, Contractor and Owner agree that the Work is Substantially Complete, the Architect will issue a Certificate of Substantial Completion. Upon Substantial Completion and prior to final payment, the Contractor shall submit to the Owner, and Architect the list of items to be repaired, back-ordered, replaced or corrected (the "Punch List"). The Contractor shall prepare and submit for the Owner's approval follow-up Punch Lists to include those Punch Lists items that are resolved and add Punch List items provided by the Owner, Architect, and the Contractor. The failure to include any item on the Punch List shall not alter the responsibility of the Contractor to complete all Work in accordance with the requirements of the Contract Documents. The Punch

List items must be corrected by the Contractor before final payment is made.

**20.4** Final payment shall not become due until the Contractor has complied with the provisions of Paragraph 10.3. If any liens are recorded or any lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees. Further, final payment shall not be due and payable until the Contractor has delivered to the Owner, in a format approved by the Owner, the following: (1) as-built plans and specifications indicating any changes to the Plans and Specification and the actual location of all aspects of the Work as performed; (2) manuals (if any); warranties, including all manufacturer's warranties; (3) written certifications that all work was performed in accordance with the Contract Documents and the Legal Requirements; and (4) any other item reasonably required by the Owner or Lender.

**20.5** The making of final payment shall not constitute a waiver of claims by the Owner including 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 any special warranties required by the Contract Documents.

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.

**20.6** To the fullest extent permitted by law, provided the Contractor is paid on a timely basis for Work actually completed, the Contractor covenants and agrees that no liens or claims on loan proceeds shall be filed or maintained by the Contractor against the Work or the Project site or premises or the Owner's or Lender's funds or otherwise, for or on account of any such Work done or labor, equipment, materials or services furnished by it in connection with the Work. The Contractor shall obtain from its Subcontractors, Sub-subcontractors and suppliers in their respective contracts substantially the same covenant contained in this Subparagraph 20.6.

**20.7 LIEN SUBORDINATION.** The Contractor hereby subordinates all the Contractor's, laborer's, mechanics', materialmen's and other similar liens that it may have or acquire under the Contract Documents or otherwise as to the Project, the Work and the property upon which the Work is being constructed to the lien and security interest securing payment of sums now or hereafter borrowed by the Owner from the Owner's lender, if any. At the request of the Owner, the Contractor shall execute such additional documents as may be requested from time to time by the Owner or any such lender to evidence the provisions hereof, and shall cause the Subcontractors and any other parties furnishing labor or materials for the Work to subordinate their liens to such aforesaid sums.

**20.8 Owner's Site Conveyance.** The Owner may elect to sell, lease, mortgage or otherwise transfer any of the Owner's interest in any portion of the Project Site ("Site Conveyance"). In connection with any Site Conveyance, the Contractor shall execute and deliver to the Owner, and shall cause any Subcontractors to execute and deliver to the Owner, such documents for the benefit of the Owner, any purchaser and any title insurance company issuing title insurance, a full and complete release of all mechanics and suppliers liens and rights, with respect to the property which is the subject of such Site Conveyance, together with such other documents as a title company may require to induce it to issue its policy of title insurance with respect to the Site Conveyance without requiring the Owner's indemnity against mechanics and suppliers liens. Notwithstanding any of the other provisions of the Contract, the Contractor agrees that, prior to the Owner selling the Project to a bona-fide purchaser ("New Owner") the Owner shall seek the Contractor's approval of the New Owner, which approval shall not be unreasonably withheld, and, upon approval, the Contractor shall accept the New Owner as owner under the Contract and shall release the Owner from any and all liability to the Contractor under the Contract, after the Owner has satisfied all of its obligations hereunder which accrued prior to the date of such sale.

**20.9 Cash Flow Estimate.** In order to assist the Owner in its management of the cash needs of the Project, prior to the first payment hereunder, Contractor shall submit to the Owner a schedule of anticipated payment requests ("Cash Flow Estimate"), setting forth Contractor's best estimate of the amounts for which it will be requesting payment with each Application for Payment to be submitted by it during the next two (2) months. Thereafter, as part of each Application for Payment, Contractor will present Owner with a revised Project Cash Flow Estimate to update previously furnished information and maintain a two (2) month

forecast. The parties acknowledge and agree, however, that although a projected Cash Flow Estimate is to serve as a cash management aid to the Owner, the amounts shown in any such schedule shall not be determinative of the actual amounts to be paid to the Contractor during the two (2) months covered thereby.

**20.10 Confidentiality.** The Contractor shall treat all information relating to the Project and all information supplied to the Contractor as confidential and proprietary information and shall not permit the release of such information to others or make any public announcement or publicity releases without the Owner's prior written authorization. Also, the Contractor shall require all Subcontractors to comply with the requirements of this paragraph.

## **ARTICLE 21 PROTECTION OF PERSONS AND PROPERTY**

**21.1** 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 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; and
- .3 other property at the site or adjacent thereto.

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss. The Contractor shall promptly remedy damage and loss to property at the site or adjacent to the site 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 Subparagraphs 21.1.2 and 21.1.3, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either 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 14.12.

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

21.3 Customary precaution shall be taken against fire throughout all the Contractor's operations. The amount of flammable materials shall be reduced to a minimum consistent with the proper handling and storing of materials. Except as otherwise provided herein the Contractor shall not permit fires to be built, or open salamanders to be used in any part of the Work.

## ARTICLE 22 INSURANCE

22.1 The Contractor shall purchase from and maintain, and shall cause all Subcontractors to purchase from and maintain, in a company or companies lawfully licensed and authorized to do business in the jurisdiction in which the Project is located and maintaining during the policy term a "General Policyholders" Rating of at least A-VI or better, as set forth in the then most current issue of "Best's Insurance Guide", such insurance as will protect the Contractor and Subcontractors, as applicable, 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, Sub-subcontractor, supplier or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. All policies of such insurance shall include, in addition to the Contractor's interest, the respective interests of the Owner, Architect and any other persons and entities in the Project designated, in writing, by the Owner by naming them as additional insured under all coverages described below except workers' compensation. The Owner and following entities shall be named as a primary additional insureds by endorsement to the policy: the Additional Insured set forth in Section 22.9 above. Such additional insureds shall not, in any way, be obligated to pay any amounts including, but not limited to, deductibles, self-insured retentions, co-pays and the like. The certificate and endorsement evidencing the appropriate coverage and additional insureds shall be sent to the Owner. The Contractor required policies and provisions are as follows:

22.2 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.

22.3 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 upon the entire Work at the site to the full insurable value thereof. This insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief.

22.4 A loss insured under Owner's property insurance shall be adjusted with the Owner and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgagee clause.

22.5 The Owner shall file a copy of each policy with the Contractor before an exposure to loss may occur. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor and Owner.

### 22.5.1 [Intentionally Deleted]

22.5.2 **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, Contractor Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

22.6 The Owner and Contractor waive all rights against each other and the Architect, Architect's consultants, separate contractors described in Article 17, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Article 22 or other property insurance applicable to the Work, except such rights as they may have to the proceeds of such insurance held by the Owner as fiduciary. The Contractor shall require similar waivers in favor of the Owner and the Contractor by Subcontractors and Sub-subcontractors. The Owner shall require similar waivers in favor of the Owner and Contractor by the Architect, Architect's consultants, separate contractors described in Article 17, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them. In waiving rights of recovery under terms of this

Subparagraph, the terms Owner shall be deemed to include their employees and representatives.

22.7 As part of the Contractor's obligations and responsibilities under Paragraph 22.1, and for the Contractor's protection and benefit, and for the protection and benefit of the Owner and any and all of its partners, officers, directors, shareholders, beneficiaries, agents and employees including, but not limited to, the entities listed in Subparagraph 22.9 (collectively the "Indemnitees"), which Indemnitees shall be named as an additional insured, the Contractor shall procure, pay for and maintain, in full force and effect until the Work is completed (unless otherwise designated), at no expense to the Owner, the following policies of insurance to be written by an insurer with a Best's rating of no less than AV with respect to general liability, who is authorized to do business in the State in which the Project is located and which shall, as a minimum, afford the following types and limits of

(1) Broad Form Comprehensive or Commercial General Liability Insurance ("CGL") written on an occurrence basis (including Premises/Operations Liability, Products and Completed Operations Liability, Independent Contractors Liability, Contractual Liability, Broad Form Property Damage Liability, Explosion, Collapse and Underground Hazard Liability and Personal Injury Liability) (CGL) in the minimum amount of Two Million Dollars (\$2,000,000) per occurrence combined single limit for bodily injury and property damage and in the minimum amount of Five Million Dollars (\$5,000,000) total aggregate liability;

(2) Worker's Compensation Insurance in the amount not less than the limits required by law with Employer's Liability Insurance in a minimum amount of One Million Dollars (\$1,000,000);

(3) Comprehensive Automobile Liability Insurance to cover owned, long-term leased, hired, and non-owned automobiles (including medical payments and uninsured motorists coverages) in the minimum amount of Five Hundred Thousand Dollars (\$500,000), per occurrence combined single limit for bodily injury and for property damage;

(4) Umbrella Liability Insurance providing coverage in excess of the limits specified above (except Worker's Compensation Insurance) in a minimum amount of Eight Million Dollars (\$8,000,000) per occurrence and Six Million Dollars (\$6,000,000) in the aggregate for a period of ten (10) years after actual completion of the Work;

(5) If design/build Work is agreed to herein or by Change Order, the Contractor's design/build subcontractors shall provide Professional Liability Insurance - providing coverage for errors and omissions for construction management, process management, program management, safety services and any other services related to or arising out of the Work. Limits shall not be less than \$1,000,000 per occurrence and \$1,000,000 annual aggregate, all on an "occurrence" basis, or if cost prohibitive, on "claims made" basis. Professional Liability Insurance - Contractor's design/build subcontractors shall provide coverage for errors and omissions. Limits shall not be less than \$1,000,000 per occurrence and \$1,000,000 annual aggregate, all on an "occurrence" basis. If such coverage is provided on a claim-made form, prior to the effective date of termination of the Contractor's current insurance coverage, the Contractor shall purchase unlimited tail coverage in the amounts stated above for all claims arising out of incidents occurring prior to termination of the Contractor's current coverage or prior to termination of this agreement and provide the Owner a certificate of insurance evidencing such coverage. In no event shall the deductible on any such policy of insurance exceed twenty-five thousand dollars (\$25,000) without the prior written approval of Owner. Contractor agrees to maintain all insurance at the same levels of coverage for a period of two (2) years beyond the completion of Services and provide thirty (30) days written notice of any cancellation.

(6) Such other insurance as the Owner may reasonably require, as long as Owner agrees in writing prior to obtaining such other insurance to the terms and costs of such other insurance and to reimburse the Contractor for the added cost of such other insurance.

If the Contractor fails to purchase and maintain any insurance required under this Article 22, the Owner may, but shall not be obligated to, upon five (5) days' written notice to the Contractor, purchase such insurance on behalf of the Contractor and shall be entitled to be reimbursed by the Contractor promptly upon demand or deduct the amount of such premiums from the Contract Sum.

22.8 The CGL Policy and Umbrella Liability Policy shall name all of the Indemnitees set forth in Paragraphs 14.12, 22.7 and 22.9 as additional insured and shall expressly provide that the interest of each Indemnitee shall not be affected by any breach by the Contractor or any other Indemnitee of any policy provision. The coverage afforded under any insurance policy obtained under or pursuant to this Article 22 shall be primary to any valid and collectible insurance carried separately by any of the Indemnitees. Furthermore, all policies and

certificates of insurance shall expressly provide that no less than thirty (30) days' prior written notice shall be given the Owner in the event of material alteration, cancellation of the coverage contained in such policy or as evidenced by such certificate of insurance.

**22.9** The following shall be named on the certificates of insurance as Additional Insureds with respect to General Liability and Umbrella Liability coverages along with the following language:

"1. Erwin H. Sokol, Trustee for the Frances Sokol Trust and all of the respective partners, venturers, representatives, servants, officers, directors, shareholders, employees, successors and assigns of same;

"2. Erwin H. Sokol and Caren J. Sokol Trust and all of the respective partners, venturers, representatives, servants, officers, directors, shareholders, employees, successors and assigns of same;"

"3. Erwin H. Sokol and Mark Sokol, dba: S&S Associates and all of the respective partners, venturers, representatives, servants, officers, directors, shareholders, employees, successors and assigns of same;"

"4. Tri Mark Properties Inc. and all of the respective partners, venturers, representatives, servants, officers, directors, shareholders, employees, successors and assigns of same;"

"5. Marina Pacific Hotel & Suites LLC and all of the respective partners, venturers, representatives, servants, officers, directors, shareholders, employees, successors and assigns of same;"

"are ADDITIONAL INSUREDS pertaining to general liability (including all such coverage afforded by excess or umbrella liability coverage indicated on this Certificate) with respect to any liability arising out of operations related to the aforementioned project. The coverage afforded the Additional Insured is primary insurance over any other coverage which any of the Additional Insured may have with respect to any losses under such policy(s)."

**22.10 SURETY INSURANCE.** The Contractor shall provide surety insurance, also known as Subcontractor Default Insurance, for all subcontracts at a rate of one point two percent (1.2%) of such subcontracts without markup or fee to secure complete payment and performance of all the requirements of this Contract and all subcontracts, professional contracts, sub-subcontracts and supply contracts.

**22.11 IMPROVEMENT BONDS.** The Contractor hereby agrees to cooperate with and assist the Owner in taking such action as is necessary to exonerate and release the Owner from its obligations under any and all street, gutter, sidewalk and similar improvement bonds related to the Project, if any, as quickly as possible.

**22.12 CONTRACTOR'S REQUIREMENTS.** Upon the Owner's demand, the Contractor shall promptly pay, which payment shall not increase the Contract Sum, the premiums for all lien or stop notice release bonds which the Owner or Lender requires be obtained and recorded pursuant to applicable law. Further, the Owner shall also have the right to require the Contractor to furnish to the Owner, concurrently with the execution of the Agreement, to secure the Contractor's faithful performance of all of the Contract Documents and the payment of all obligations arising hereunder, an irrevocable, unconditional letter of credit (the "Letter of Credit") issued by a lender reasonably acceptable to the Owner (and in form and substance satisfactory to the Owner) which shall remain in full force and effect until Final Completion of the Project (as defined in the Owner-Contractor Agreement in the amount agreed upon in writing by the parties and naming the Owner (and, if requested, the Owner's lender) as the beneficiary thereunder. The Letter of Credit may be drawn upon from time to time by presentation of a clean sight draft from the designees of the Owner (or its Lender). The Cost of obtaining the Letter of Credit shall be certified by the lender (and replacements thereof) but not in excess of one and one half percent (1-1/2%) thereof per annum on the outstanding balance of the Letter of Credit shall be paid directly and promptly by the Owner and shall not be the subject of a Change Order. In the event that the Letter of Credit or any replacement therefor has not been extended on or before thirty (30) days prior to any expiration date set forth therein, the Owner shall have the right to draw the full amount outstanding thereunder upon five (5) days' written notice to the Contractor unless prior to the expiration of such five (5) day period, the Contractor shall have provided a replacement letter of credit with an expiration date no earlier than the date of Final Completion.

**22.13 ADDITIONAL INSUREDS.** Consistent with the other provisions contained herein, the insurance policies maintained by the Contractor pursuant to the Contract Documents, shall name the entities listed in Paragraph 22.9, above, as additional insureds. The Contractor's insurance policies shall be primary and any insurance maintained by Owner shall be excess insurance only. The Owner shall not be required to contribute to the payment of premiums or other costs with respect to the Contractor's policy. The interests of the additional insureds, the Contractor and Subcontractors in any

insurance proceeds shall be subject to the interest of any such lender, and the right of such lender to apply the proceeds pursuant to the terms of its deed of trust.

**22.14 WAIVER OF SUBROGATION.** The Contractor shall make a good-faith effort to obtain waivers of subrogation from the Subcontractors as follows: the Contractor and all Subcontractors of the first-tier shall waive all subrogation rights concerning all insurance policies against the Owner and each other and any of their subcontractors, suppliers and consultants and the Owner shall waive its subrogation rights regarding its property insurance only (collectively "Subrogation Entities"). The parties shall require all Subrogation Entities to enter into similar waivers of subrogation in favor of all other Subrogation Entities. Such waivers of subrogation shall be effective as to all Subrogation Entities even though such Subrogation Entities would otherwise have a duty to indemnify, contractually or otherwise, did not pay the insurance premiums directly or indirectly, and whether or not the Subrogation Entities had an insurable interest in the applicable liability. All policies of Subrogation Entities shall provide this waiver of subrogation by endorsement or policy language. Such waiver is not intended to waive any rights the Owner or the Contractor may have against the Architect or Architect's consultants in a professional capacity associated with any claim alleging Errors and Omissions. The Contractor shall require similar waivers in favor of the Owner and Contractor by the Architect, Architect's consultants, separate contractors as described in the Agreement, if any, and any of their subcontractors, sub-subcontractors, agents and employees of any of them.

#### **ARTICLE 23 CORRECTION OF WORK**

**23.1** The Contractor shall promptly correct Work rejected by the 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, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of one year from the date of Substantial Completion of the Contract or by terms of an applicable special warranty required by the Contract Documents. The provisions of this Article 23 apply to Work done by Subcontractors as well as to, Work done by direct employees of the Contractor.

**23.2** Nothing contained in this Article 23 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 Paragraph 23.1 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.

#### **ARTICLE 24 MISCELLANEOUS PROVISIONS**

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

**24.2** As between the Owner and the Contractor, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued:

- .1 not later than the date of actual and final completion for acts or failures to act occurring prior to the relevant date of actual and final completion.

**24.3 PUBLICITY.** The Contractor agrees that it will not, without the prior written approval of the Owner, (i) publicize the fact that the Owner has entered into the Contract Documents, or (ii) disclose, confirm or deny any details of the Contract Documents, except to the extent reasonably necessary for the Contractor to perform the Work or otherwise required by law. The Contractor agrees that it will not use the Owner's name in connection with the Contractor's publicity with respect to the Project without the prior review and written approval in each instance by the Owner. The Contractor shall also insert the terms of this provision in all contracts and/or agreements executed in connection with the services to be performed under the Contract Documents and require that its Subcontractors do the same.

**24.4 NOTICES.** All notices or demands of any kind which either party hereto may be required or desire to serve upon the other under the terms of the Contract shall be served upon such other party by personal service (which may be by private messenger or air freight courier), or mailing a copy thereof by certified or registered mail postage prepaid, with return requested to the addresses set forth on the first page of this Agreement. In case of delivery of notice by mail, such delivery shall be deemed complete on the actual date of delivery as shown by the addressee's certified or registered mail receipt or at the expiration of the third (3<sup>rd</sup>) business day following the date of mailing, whichever occurs first. In case of delivery by personal

service, such delivery shall be effective on the date of such delivery. The persons and addresses to which notices and demands shall be delivered may be changed from time to time by notice served as provided herein by either party upon the other. Failure to accept a notice shall not affect the validity thereof.

**24.5 LENDERS OR OTHER AGENCIES.** The Contractor acknowledges that the Owner is financing the Work through a construction Lender or through other funding sources or Agencies, and the Owner must comply with certain Lender or Agency terms and conditions in order to obtain payments from the Lender or Agency. The Contractor agrees to use its best efforts to comply with the reasonable requirements of Lender or Agency which bear upon the performance of the Work and the Disbursement of funds. The Owner shall have the right to assign the Contract Documents, including this Agreement, to entities including the Lender or Agencies for security purposes or for any other purpose. Such assignment by the Owner shall require the consent of the Contractor, which consent shall not be unreasonably withheld. The Contractor shall:

**24.5.1** make the site of the Work available at all times for inspection by the Owner, Lender and other Agencies and their agents;

**24.5.2** consent to and execute all documents requested by the Owner, Lender and other Agencies in connection with the collateral assignment of the Contract Documents to them;

**24.5.3** promptly furnish the Owner, Lender and other Agencies with information, documentation and materials that the Owner, Lender and other Agencies may reasonably request from time to time with respect to the Project; and

**24.5.4** upon request by title insurer designated by the Owner, promptly furnish to title insurer such affidavits, indemnities and guarantees as are reasonable and customary in commercial construction for such title insurer to issue "date down" endorsements to the title insurance policies of the Owner, Lender and other Agencies insuring such against mechanics liens from the Contractor and its Subcontractors for Work furnished in connection with the prior Applications for Payment for which the Contractor has received payment.

**24.6 Contractor Assignment.** The Contractor shall not assign the whole or any portion of its interest under the Contract Documents or any payments due or to become due the Contractor hereunder not, except as specifically permitted in the Contract Documents, subcontract any of its obligations hereunder without first

obtaining in each instance the prior-written consent of the Owner which consent may be withheld in the Owner's sole discretion. No assignment, whether voluntary or involuntary by operation of law, under legal process of proceedings, by receivership, in bankruptcy or otherwise, shall be valid or effective without such prior-written consent of the Owner. Should the Contractor attempt to make or suffer to be made any such assignment, except as aforesaid, the Owner may, at its option, terminate the agreements contained within the Contract Documents upon written notice to the Contractor. Should the Owner consent to any such assignment, such consent shall not constitute a waiver of any of the restrictions of this Section and the same shall apply to each successive assignment hereunder, if any. Any assignment in contravention of the provisions of this Section shall be void. All Subcontracts and Subcontractors' bonds, if any, shall expressly permit assignment to the Owner, Lender, and any other Agency in the event of the termination of this Agreement.

**24.7 Construction Documents.** The Construction Documents, including any drawings, specifications and modifications developed by the design professionals, specialty consultants, the Contractor, its Subcontractors and its design/build Subcontractors shall be included in the Scope of Work under Subparagraph 1.2 et. seq and shall remain the property of the Owner for its unrestricted use without further permission or involvement of the Contractor, Subcontractors or design/build Subcontractors, whether the Work for which the Construction Documents were prepared is constructed or not. Any misuse or reuse of the Construction Documents for another project without written verification or adaptation by the Owner shall be at the Contractor's or Subcontractor's sole risk and shall not relieve the Contractor or Subcontractor from liability regarding such misuse or reuse.

## ARTICLE 25 TERMINATION OF THE CONTRACT

**25.1** If the Owner fails to make an undisputed payment for a period of forty-five (45) days through no fault of the Contractor, the Contractor may, upon seven (7) additional days' written notice to the Owner, terminate the Contract and recover from the Owner up to the time of termination payment for undisputed Work executed, including the Contractor's Fees, General Conditions and overhead costs attributable to the undisputed executed Work, and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery.

**25.2** If the Contractor fails to carry out the Work in accordance with the Contract Documents or fails to

perform a provision of the Contract (collectively, "Deficiencies"), the Owner, after seven (7) days' written notice to the Contractor, without commencement by the Contractor of diligent efforts to correct such Deficiencies within such seven (7) days, and without prejudice to any other remedy the Owner may have, the Owner may make good such Deficiencies and may deduct the cost thereof, including compensation for the Architect's services and expenses made necessary thereby, from the payment then or thereafter due the Contractor. Alternatively, at the Owner's option, the Owner may terminate the Contract and take possession of the site and of all materials, equipment to be installed in the Work, and tools thereon owned by the Contractor or Owner and may finish the Work by whatever method the Owner may deem expedient including the use of a new contractor. If the unpaid balance of the Project budget including the Contractor's Fee exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, such excess Contractor's Fee shall be paid to the Contractor, but if such costs exceed such unpaid balance, the Contractor shall pay the difference to the Owner.

### **25.3 TERMINATION BY THE OWNER FOR CONVENIENCE**

**25.3.1 NOTICE OF TERMINATION.** The Owner may, at any time, terminate the Contract in whole or in part for the Owner's convenience and without cause. Termination by the Owner under this Paragraph shall be by a notice of termination delivered to the Contractor specifying the extent of termination and the effective date.

**25.3.2 CONTRACTOR'S RESPONSIBILITY UPON TERMINATION.** Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall immediately, in accordance with

instructions from the Owner, proceed with performance of the following duties regardless of delay in determining or adjusting amounts due under this Paragraph:

- .1 cease operations as directed by the Owner in the notice, vacate the Project Site, and remove all equipment and materials therefrom; and
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .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; and
- .4 place no further orders and enter into no further subcontracts for materials, labor, services or facilities except as necessary to complete continued portions of the Contract; and
- .5 terminate all subcontracts and orders to the extent they relate to the Work terminated; and
- .6 proceed to complete the performance of Work not terminated.

**25.3.3 PAYMENT UPON TERMINATION FOR CONVENIENCE.** In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for undisputed Work satisfactorily completed, the portion of Contractor's Fee equal to the percentage of the Work satisfactorily completed, including actual, direct and reasonable demobilization costs, General Conditions and overhead costs attributable to the undisputed Work satisfactorily completed. No unearned or anticipated profits shall be paid by the Owner.

## **ARTICLE 26 OTHER CONDITIONS OR PROVISIONS**

**26.1** The Owner shall not be required to make any adjustments in either the Project budget or the Contract Time in connection with any failure by the Contractor to comply with the requirements of this Contract.

**26.2 CONTRACTOR DISCLOSURE.** CONTRACTORS ARE REQUIRED BY LAW TO BE LICENSED AND REGULATED BY THE CONTRACTORS' STATE LICENSE BOARD WHICH HAS JURISDICTION TO INVESTIGATE COMPLAINTS AGAINST CONTRACTORS IF A COMPLAINT REGARDING A PATENT ACT OR OMISSION IS FILED WITHIN FOUR YEARS OF THE DATE OF THE ALLEGED VIOLATION. A COMPLAINT REGARDING A LATENT ACT OR OMISSION PERTAINING TO STRUCTURAL DEFECTS MUST BE FILED WITHIN TEN YEARS OF THE DATE OF THE ALLEGED VIOLATION. ANY QUESTIONS CONCERNING A CONTRACTOR MAY BE REFERRED TO THE REGISTRAR. CONTRACTORS' STATE LICENSE BOARD, P.O. BOX 26000, SACRAMENTO, CALIFORNIA 95826.



The Contractor hereby warrants and represents that it is duly licensed contractor under the laws of the State of California and that its Contractor's License Number is B474555.

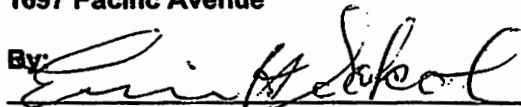
26.3 Notwithstanding any other provision of this Agreement, the Owner agrees that the Contractor shall be liable for any failure of the Project to comply with governmental requirements, laws, regulations, codes, and interpretations of such by any regulatory entity except for the Architect's errors or omissions in the Construction Documents unless the relevant elements in the Construction Documents become part of the design/build elements of the Work to be provided by the Contractor or its design/build subcontractors or consultants.

26.4 **Claims for Concealed or Unknown Conditions:** If conditions are encountered at the Project site which are subsurface, unusual or otherwise concealed physical conditions which differ materially from those indicated in the Construction 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 seven (7) days after first observance of the Conditions. The Architect, Owner or such other appropriate consultant as may be selected by the Owner 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, Owner or consultant selected by the Owner 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, Owner or consultant selected by the Owner 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 twenty-one (21) days after the Architect or consultant has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but 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, Owner or consultant selected by the Owner for initial determination, subject to further proceedings pursuant to Exhibit "H".

This Agreement entered into as of the day and year first written above.

**OWNER**  
**Marina Pacific Hotel & Suites LLC,**  
**1697 Pacific Avenue**

By:



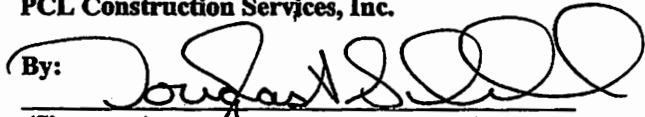
(Signature)

Erwin H. Sokol, OWNER

(Printed name and title)

**CONTRACTOR**  
**PCL Construction Services, Inc.**

By:



(Signature)

Douglas Schell, Assistant Secretary

(Printed name and title)

**EXHIBIT "A"**  
to  
**AIA Document A117 Agreement**  
**Between Marina Pacific Hotel & Suites LLC ("Owner")**  
**and PCL Construction Services, Inc. ("Contractor")**

**List of Contract Documents**  
**(Including Scope of Work, Plans and Specifications)**

**(The Scope of Work, Plans and Specifications are Attached)**

**EXHIBIT "A"**  
to  
**AIA Document A117 Agreement**  
**Between Marina Pacific Hotel & Suites LLC ("Owner")**  
**and PCL Construction Services, Inc. ("Contractor")**  
**List of Contract Documents**

<u>Document No.</u>	<u>Description</u>	<u>Issue Date</u>	<u>Remarks</u>
A0.0	Project Information	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A0.1	General Notes	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A0.2a	Accessibility Details	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A0.2b	Accessibility Details	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A0.2c	Accessibility Details	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A0.2d	Title 24 Notes	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A0.2e	General Notes	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A0.3	Exiting Diagrams	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A0.4	Door and Window Schedule	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A0.5	Partition Types	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A1.0	Site Plan	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A2.0	Demolition Plans	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A3.0	Existing Floor Plans – Parking	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A3.1	Existing Floor Plans – Levels 3, 4, 5	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A3.1a	Interstitial Floor Plan	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A3.2	6 <sup>th</sup> Floor Plan	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A3.3	Roof Plans	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A4.0	Reflective Ceiling Plans	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A5.0	Enlarged Plan – 6 <sup>th</sup> Floor	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A5.1	Enlarged Plan – 6 <sup>th</sup> Floor	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A5.2	Enlarged Plan – 6 <sup>th</sup> Floor	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A6.0	Building Sections	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A6.1	Building Sections	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A7.0	Exterior Elevations	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A7.1	Exterior Elevations	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A9.0	Wall Section	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A9.1	Wall Section	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A9.2	Details	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A9.3	Details	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
A9.4	Details	5/3/05	Bulletin 2 Pre-Permit Set - 4/29/05
ID- 1	No Sheet Title	2/11/05	Bulletin 2 Pre-Permit Set - 4/29/05
ID- 2	No Sheet Title	2/11/05	Bulletin 2 Pre-Permit Set - 4/29/05

<u>Document No.</u>	<u>Description</u>	<u>Issue Date</u>	<u>Remarks</u>
N/A	City of L.A. / CA Coastal Commission Docs		
N/A	City of L.A. / CA Coastal Commission Docs		
S0.1	General Structural Notes and Drawing Index	6/11/04	Resubmit For Plan Check- 7/20/05
S0.2	General Notes	6/11/04	Resubmit For Plan Check- 7/20/05
S0.3	General Structural Notes, Symbols, and Abbreviations	6/11/04	Resubmit For Plan Check- 7/20/05
S0.4	Typical Concrete Details	6/11/04	Resubmit For Plan Check- 7/20/05
S0.5	Metal Decking Typical Details	6/11/04	Resubmit For Plan Check- 7/20/05
S0.6	Typical Wood Details	6/11/04	Resubmit For Plan Check- 7/20/05
S0.7	Wood Typical Details	6/11/04	Resubmit For Plan Check- 7/20/05
S2.1	Foundation / Parking Plan – Level	6/11/04	Resubmit For Plan Check- 7/20/05
S2.2	Parking Plan – Level 2	6/11/04	Resubmit For Plan Check- 7/20/05
S2.3	Typical Floor Plan – Levels 3, 4, and 5	6/11/04	Resubmit For Plan Check- 7/20/05
S2.4A	Framing Plan Level 6	6/11/04	Resubmit For Plan Check- 7/20/05
S2.4B	Wall Layout Plan Level 6	6/11/04	Resubmit For Plan Check- 7/20/05
S2.5	Roof Framing Plan / High Roof Framing Plan	6/11/04	Resubmit For Plan Check- 7/20/05
S2.6	High Roof Framing and Mechanical Screen Enclosure Framing	6/11/04	Resubmit For Plan Check- 7/20/05
S3.1	Building Elevations	6/11/04	Resubmit For Plan Check- 7/20/05
S5.1	Concrete Details	6/11/04	Resubmit For Plan Check- 7/20/05
S7.1	Wood Details	6/11/04	Resubmit For Plan Check- 7/20/05
S7.2	Wood Details	6/11/04	Resubmit For Plan Check- 7/20/05
S7.3	Wood Details	6/11/04	Resubmit For Plan Check- 7/20/05
S7.4	Details	6/11/04	Resubmit For Plan Check- 7/20/05
E0.1	Electrical Legends and Symbols	4/08/05	Bulletin 1 – 02/08/05
E0.2	Lighting Schedules	4/08/05	Bulletin 1 – 02/08/05
E2.1	Lighting Plan Sixth Floor	4/08/05	Bulletin 1 – 02/08/05
E2.2	Power Plan Sixth Floor	4/08/05	Bulletin 1 – 02/08/05
E2.3	Power Plan Roof Level	4/08/05	Bulletin 1 – 02/08/05
E3.1	Electrical Plan Third Floor	4/08/05	Bulletin 1 – 02/08/05
E3.11	Electrical Plan Fourth Floor	4/08/05	Bulletin 1 – 02/08/05
E3.12	Electrical Plan Fifth Floor	4/08/05	Bulletin 1 – 02/08/05
E3.1a	Electrical Plan Interstitial Floor	4/08/05	Bulletin 1 – 02/08/05
E3.2	Mechanical Equipment Plan Sixth Floor	4/08/05	Bulletin 1 – 02/08/05
E3.3	Electrical Plan Roof	4/08/05	Bulletin 1 – 02/08/05
E4.0	Single Line Diagram – Existing Lighting Services #1 & #2	4/08/05	Bulletin 1 – 02/08/05
E4.1	Service Load Calculations Existing Lighting Service #1	4/08/05	Bulletin 1 – 02/08/05

<u>Document No.</u>	<u>Description</u>	<u>Issue Date</u>	<u>Remarks</u>
E4.2	Service Load Calculations Existing Lighting Service #2	4/08/05	Bulletin 1 – 02/08/05
E4.3	Single Line Diagram – Existing & 3-Phase Power Service “PSB”	4/08/05	Bulletin 1 – 02/08/05
E5.0	Panel Schedules	4/08/05	Bulletin 1 – 02/08/05
E5.1	Panel Schedules	4/08/05	Bulletin 1 – 02/08/05
E5.2	Panel Schedules	4/08/05	Bulletin 1 – 02/08/05
E5.3	Panel Schedules	4/08/05	Bulletin 1 – 02/08/05
M0.1	Mechanical Legend and Symbols	4/08/05	Bulletin 1 – 02/08/05
M0.1A	Title 24 Documents	4/08/05	Bulletin 1 – 02/08/05
M0.2	Mechanical Schedules	4/08/05	Bulletin 1 – 02/08/05
M3.1	Mechanical Plan Third Floor	4/08/05	Bulletin 1 – 02/08/05
M3.1.1	Mechanical Plan Fourth Floor	4/08/05	Bulletin 1 – 02/08/05
M3.1.2	Mechanical Plan Fifth Floor	4/08/05	Bulletin 1 – 02/08/05
M3.1a	Mechanical Plan Interstitial Floor	4/08/05	Bulletin 1 – 02/08/05
M3.2	Mechanical Plan Sixth Floor	4/08/05	Bulletin 1 – 02/08/05
M3.3	Mechanical Plan Roof	4/08/05	Bulletin 1 – 02/08/05
M4.1	Mechanical Plan Enlarged Roof Plan	4/08/05	Bulletin 1 – 02/08/05
M4.2	Conferance / Penthouse Detail Plans	4/08/05	Bulletin 1 – 02/08/05
M4.3	Mechanical Plan Enlarged New Room	4/08/05	Bulletin 1 – 02/08/05
M5.1	Mechanical Chilled and Hot Water Single Line Diagram	4/08/05	Bulletin 1 – 02/08/05
M5.2	Mechanical Chilled and Hot Water Single Line Diagram North	4/08/05	Bulletin 1 – 02/08/05
M5.3	Mechanical Chilled Water Single Line Diagram South	4/08/05	Bulletin 1 – 02/08/05
M5.4	Mechanical Heating Hot Water Single Line Diagram	4/08/05	Bulletin 1 – 02/08/05
M6.1	Mechanical Details	4/08/05	Bulletin 1 – 02/08/05
P0.01	Plumbing Legend, Notes, Symbols, & Details	4/08/05	Bulletin 1 – 02/08/05
P3.0	Existing Parking Level Two	4/08/05	Bulletin 1 – 02/08/05
P3.01	Existing Parking Level One	4/08/05	Bulletin 1 – 02/08/05
P3.1	Plumbing Plan Third & Fourth Floor	4/08/05	Bulletin 1 – 02/08/05
P3.1.2	Plumbing Plan Fifth Floor	4/08/05	Bulletin 1 – 02/08/05
P3.1a	Plumbing Plan Interstitial Floor	4/08/05	Bulletin 1 – 02/08/05
P3.2	Plumbing Plan Sixth Floor	4/08/05	Bulletin 1 – 02/08/05
P3.3	Plumbing Plan Roof	4/08/05	Bulletin 1 – 02/08/05
P4.0	Plumbing Riser Diagrams	4/08/05	Bulletin 1 – 02/08/05
P4.1	Plumbing Riser Diagrams	4/08/05	Bulletin 1 – 02/08/05
P5.0	Plumbing Details	4/08/05	Bulletin 1 – 02/08/05

**EXHIBIT "B"**  
to  
**AIA Document A117 Agreement**  
**Between Marina Pacific Hotel & Suites LLC ("Owner")**  
**and PCL Construction Services, Inc. ("Contractor")**  
**Project Schedule**

The Contractor shall attach the Project Schedule and comply with it in all material respects unless agreed otherwise by Change Order.

(The Schedule shall be attached by the Contractor)

Activity ID	Description	Orig Dur	Early Start	Early Finish
-------------	-------------	----------	-------------	--------------

2006												2007				
DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR

### Best Western Marina Pacific Hotel

#### Construction Support

##### Contract Awards

15/16-A	Award MEP Contracts	5	19DEC05*	23DEC05
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△ Award MEP Contracts

##### Submittals / Procurement

###### Steel Roof Trusses

00-0500P	Prepare Submittal: Roof Trusses	15	19DEC05*	10JAN06
00-0500R	Rev/App Submittal: Roof Trusses	10	11JAN06	24JAN06
00-0500F	Fab/Del: Roof Trusses	30	25JAN06	08MAR06

△ Prepare Submittal: Roof Trusses  
 △ Rev/App Submittal: Roof Trusses  
 △ Fab/Del: Roof Trusses

###### Windows, Sliders

00-0800P	Prepare Submittal: Windows, Sliders	10	19DEC05	03JAN06
00-0800R	Rev/App Submittal: Windows, Sliders	10	04JAN06	17JAN06
00-0800F	Fab/Del: Windows, Sliders	20	18JAN06	14FEB06

△ Prepare Submittal: Windows, Sliders  
 △ Rev/App Submittal: Windows, Sliders  
 △ Fab/Del: Windows, Sliders

###### Door Frames & Doors

00-0900P	Prepare Submittal: Frames & Doors	10	19DEC05	03JAN06
00-0900R	Rev/App Submittal: Frames & Doors	10	04JAN06	17JAN06
00-0900C	Incorp Comments Submittal: Frames & Doors	5	18JAN06	24JAN06
00-0900F	Fab/Del: Frames & Doors	40	25JAN06	22MAR06

△ Prepare Submittal: Frames & Doors  
 △ Rev/App Submittal: Frames & Doors  
 △ Incorp Comments Submittal: Frames & Doors  
 △ Fab/Del: Frames & Doors

###### Elevators

00-1400P	Prepare Submittal: Elevator	25	19DEC05	24JAN06
00-1400R	Rev/App Submittal: Elevator	10	25JAN06	07FEB06
00-1400C	Incorp Comments Submittal: Elevator	5	08FEB06	14FEB06
00-1400F	Fab/Del: Elevator	55	15FEB06	03MAY06

△ Prepare Submittal: Elevator  
 △ Rev/App Submittal: Elevator  
 △ Incorp Comments Submittal: Elevator  
 △ Fab/Del: Elevator

###### chiller Unit

00-1500P	Prepare Submittal: Chiller	15	27DEC05	17JAN06
00-1500R	Rev/App Submittal: Chiller	10	18JAN06	31JAN06
00-1500C	Incorp Comments Submittal: Chiller	5	01FEB06	07FEB06
00-1500F	Fab/Del: Chiller	50	08FEB06	19APR06

△ Prepare Submittal: Chiller  
 △ Rev/App Submittal: Chiller  
 △ Incorp Comments Submittal: Chiller  
 △ Fab/Del: Chiller

###### Unit Fan Coils

00-1505P	Prepare Submittal: Fan Coils	10	27DEC05	10JAN06
00-1505R	Rev/App Submittal: Fan Coils	10	11JAN06	24JAN06
00-1505C	Incorp Comments Submittal: Fan Coils	5	25JAN06	31JAN06
00-1505F	Fab/Del: Fan Coils	40	01FEB06	29MAR06

△ Prepare Submittal: Fan Coils  
 △ Rev/App Submittal: Fan Coils  
 △ Incorp Comments Submittal: Fan Coils  
 △ Fab/Del: Fan Coils

#### Construction Activities

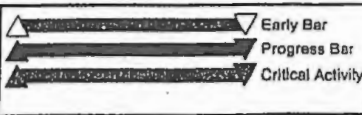
##### Mobilization

###### Not Level Specific

GEN000	NTP	1	19DEC05*	19DEC05
GEN007	Install Scaffolding	5	27DEC05	03JAN06
GEN010	Fence Off Scaffolding	1	27DEC05	27DEC05

△ NTP  
 △ Install Scaffolding  
 △ Fence Off Scaffolding

Start Date 19DEC05  
 Finish Date 16NOV06  
 Data Date 19DEC05  
 Run Date 15DEC05 17:55  
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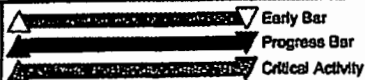
BWOD Best Western Marina Pacific Hotel Baseline Schedule Sheet 1 of 6

Exhibit "B"

PCL Construction Services, Inc.

Activity ID	Description	Orig Dur	Early Start	E-F F	2006												2007		
					DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB
GEN013	Remove Landscaping	1	28DEC05	28DEC05															
GEN016	Site Survey	2	28DEC05	28DEC05															
<b>CIP Work</b>																			
<b>Not Level Specific</b>																			
CIP078	CIP: Add / Move MEP For Shotcrete & Fiber Wrap	10	27DEC05	10JAN06															
CIP064	CIP: Temp Shoring @ Garage Interior	5	28DEC05	04JAN06															
CIP012	CIP: Excavate Footings	2	30DEC05	03JAN06															
CIP000	CIP: Drill & Epoxy Dowels	10	04JAN06	17JAN06															
CIP003	CIP: Install #18 Bars / Collector Beams	10	04JAN06	17JAN06															
CIP006	CIP: Demo Ledge, Parapet, Roof Wall	5	04JAN06	10JAN06															
CIP009	CIP: Demo Mansard Roof	5	04JAN06	10JAN06															
CIP015	CIP: Reinforce Footings	1	04JAN06	04JAN06															
CIP024	CIP: Shotcrete Formwork	10	04JAN06	17JAN06															
CIP060X	CIP: Demo Slab per SK***	5	04JAN06	10JAN06															
CIP061	CIP: Demo/Cut Railing	5	04JAN06	10JAN06															
CIP021	CIP: Pour Footings	1	05JAN06	05JAN06															
CIP036	CIP: Demo @ Interior Walls	4	05JAN06	10JAN06															
CIP030	CIP: Pressure Wash Walls	2	06JAN06	09JAN06															
CIP039	CIP: Plywood Sheeting @ Interior Walls	2	11JAN06	12JAN06															
CIP081	CIP: Fiber Wrap Columns	7	11JAN06	19JAN06															
CIP054	CIP: Rebar Interior Walls	3	13JAN06	17JAN06															
CIP048	CIP: Set Embeds	3	18JAN06	20JAN06															
CIP057	CIP: Shotcrete Wire @ Interior Walls	3	18JAN06	20JAN06															
CIP060	CIP: Coring for Rebar	3	18JAN06	20JAN06															
CIP018	CIP: Reinforce Shotcrete Walls	10	19JAN06	01FEB06															
CIP027	CIP: Shotcrete Wire	10	23JAN06	03FEB06															
CIP051	CIP: Install Scaffold Screening	2	06FEB06	07FEB06															
CIP042	CIP: Shoot Shotcrete Walls & Clean Rebound	12	08FEB06	24FEB06															
CIP045	CIP: Install Manlift	3	27FEB06	01MAR06															
CIP069	CIP: Re-Install Railings	5	27FEB06	03MAR06															
CIP072	CIP: Dry-Sack Shotcrete Walls	10	27FEB06	10MAR06															
CIP075	CIP: Masonry Holes Filled	5	27FEB06	03MAR06															
CIP084	CIP: Install Ledger	5	27FEB06	03MAR06															
CIP096	CIP: Remove Scaffolding	3	27FEB06	01MAR06															
CIP063	CIP: Backfill / Pour-back Walking Areas	2	01MAR06	02MAR06															
CIP066	CIP: Install Tile @ Entryway	3	03MAR06	07MAR06															
CIP087	CIP: Balconies / Install Waterproofing	10	06MAR06	17MAR06															
CIP080	CIP: Balconies / Install Plaster	10	06MAR06	17MAR06															
CIP093	CIP: Balconies / Install Tile	10	08MAR06	17MAR06															
CIP033	CIP: Paint Shotcrete Walls	10	20MAR06	31MAR06															
CIP099	CIP: Remove Manlift	3	12SEP06	14SEP06															

Start Date 18DEC05  
 Finish Date 16NOV06  
 Data Date 19DEC05  
 Run Date 16DEC05 17:55  
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Best Western Marina Pacific Hotel  
 Baseline Schedule

Sheet 2 of 6

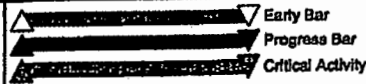
Exhibit "B"

PCL Construction  
 Services, Inc.



Activity ID	Activity Description	Orig Dur	Early Start	Early Finish	2006												2007		
					DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB
CIP102	WIP: Cmpit Infill @ Manlift (ralls, paint, etc)	3	15SEP06	19SEP06	△/CIP: Cmpit Infill @ Manlift (ralls, paint, etc)														
Structural Roof: Steel, SOMD, Wood-Frame/Sheath																			
Structure, Rough-ins, Exterior																			
SR-006	Lvl 6: Demo Stair Towers	5	08FEB06	14FEB06	△/Lvl 6: Demo Stair Towers														
SR-009	Lvl 6: Build Temp Stair Tower Covers	3	15FEB06	17FEB06	△/Lvl 6: Build Temp Stair Tower Covers														
SR-015	Lvl 6: Inst Chiller Lines (Interstitial Space)	5	27FEB06	03MAR06	△/Lvl 6: Inst Chiller Lines (Interstitial Space)														
SR-018	Lvl 6: Inst Boiler Lines (Interstitial Space)	5	27FEB06	03MAR06	△/Lvl 6: Inst Boiler Lines (Interstitial Space)														
SR-021	Lvl 6: Inst Elect R/I (Interstitial Space)	5	27FEB06	03MAR06	△/Lvl 6: Inst Elect R/I (Interstitial Space)														
SR-000	Lvl 6: Set SS Trusses	5	09MAR06	15MAR06	△/Lvl 6: Set SS Trusses														
SR-012	Lvl 6: Install Sprinklers (Interstitial Space)	5	13MAR06	17MAR06	△/Lvl 6: Install Sprinklers (Interstitial Space)														
SR-003	Lvl 6: Install Metal Decking	5	15MAR06	21MAR06	△/Lvl 6: Install Metal Decking														
SR-024	Lvl 6: SOMD Edge Form	5	22MAR06	29MAR06	△/Lvl 6: SOMD Edge Form														
SR-027	Lvl 6: SOMD MEP Sleeving	2	22MAR06	23MAR06	△/Lvl 6: SOMD MEP Sleeving														
SR-111	Lvl 6: Install Draft Stop	3	22MAR06	24MAR06	△/Lvl 6: Install Draft Stop														
SR-129	Lvl 6: Install Access Panels	3	22MAR06	24MAR06	△/Lvl 6: Install Access Panels														
SR-030	Lvl 6: SOMD Column/Rail Embeds	3	29MAR06	31MAR06	△/Lvl 6: SOMD Column/Rail Embeds														
SR-033	Lvl 8: SOMD Rebar	5	29MAR06	04APR06	△/Lvl 6: SOMD Rebar														
SR-036	Lvl 6: SOMD Pour	1	06APR06	06APR06	△/Lvl 6: SOMD Pour														
SR-039	Lvl 6: Install Tube Steel Columns	2	07APR06	10APR06	△/Lvl 6: Install Tube Steel Columns														
SR-042	Lvl 6: Inst Wood Framing Plates	5	07APR06	13APR06	△/Lvl 6: Inst Wood Framing Plates														
SR-045	Lvl 6: Detail & Trim Wood Framing	5	07APR06	13APR06	△/Lvl 6: Detail & Trim Wood Framing														
SR-114	Lvl 6: F/R/P Equipment Pad	2	07APR06	10APR06	△/Lvl 6: F/R/P Equipment Pad														
SR-117	Lvl 6: WP Equipment Pad	2	11APR06	12APR06	△/Lvl 6: WP Equipment Pad														
SR-048	Lvl 6: Frame / Stand Wood Walls	5	12APR06	18APR06	△/Lvl 6: Frame / Stand Wood Walls														
SR-063	Lvl 6: Joist Units	5	17APR06	21APR06	△/Lvl 6: Joist Units														
SR-051	Lvl 6: Pimbing R/I	5	19APR06	25APR06	△/Lvl 6: Pimbing R/I														
SR-054	Lvl 6: Electrical R/I	10	19APR06	02MAY06	△/Lvl 6: Electrical R/I														
SR-057	Lvl 6: HVAC R/I	5	19APR06	25APR06	△/Lvl 6: HVAC R/I														
SR-132	Lvl 6: Install (#1,2,3) Stair(s) Extension	6	19APR06	26APR06	△/Lvl 6: Install (#1,2,3) Stair(s) Extension														
SR-066	Lvl 6: Sheet Units	5	20APR06	26APR06	△/Lvl 6: Sheet Units														
SR-120	Lvl 6: Set Boiler / Chiller equip	1	20APR06	20APR06	△/Lvl 6: Set Boiler / Chiller equip														
SR-123	Lvl 6: Connect Roof top Equipment	5	21APR06	27APR06	△/Lvl 6: Connect Roof top Equipment														
SR-069	Lvl 6: Frame Clerestory Doghouse	7	25APR06	03MAY06	△/Lvl 6: Frame Clerestory Doghouse														
SR-126	Lvl 6: Start-up Roof Top Equipment	15	01MAY06	19MAY06	△/Lvl 6: Start-up Roof Top Equipment														
SR-072	Lvl 6: Joist Clerestory Doghouse	7	03MAY06	11MAY06	△/Lvl 6: Joist Clerestory Doghouse														
SR-05006	Lvl 6: Install Stair Closer Plates	10	04MAY06	17MAY06	△/Lvl 6: Install Stair Closer Plates														
SR-075	Lvl 6: Sheet Clerestory Doghouse	7	10MAY06	18MAY06	△/Lvl 6: Sheet Clerestory Doghouse														
SR-060	Lvl 6: Sprinkler R/I	7	12MAY06	22MAY06	△/Lvl 6: Sprinkler R/I														
SR-078	Lvl 6: Install Flashing	6	19MAY06	26MAY06	△/Lvl 6: Install Flashing														
SR-093	Lvl 6: Inst Windows @ Doghouse	3	19MAY06	23MAY06	△/Lvl 6: Inst Windows @ Doghouse														
SR-141	Lvl 6: Copper Roof Underlayment	3	24MAY06	26MAY06	△/Lvl 6: Copper Roof Underlayment														

Start Date 19DEC05  
 Finish Date 18NOV06  
 Data Date 19DEC05  
 Run Date 15DEC05 17:55



BW0D

Best Western Marina Pacific Hotel  
 Baseline Schedule

Sheet 3 of 6

Exhibit "B"

PCL Construction  
 Services, Inc.

Activity ID	Description	Dur	Start	F'
SR-081	Lvl 6: Waterproof Patio's	10	30MAY06	12JUN06
SR-087	Lvl 6: Metal Roof @ Doghouse	5	30MAY06	05JUN06
SR-102	Lvl 6: Composite Roofing under deck	15	30MAY06	19JUN06
SR-108	Lvl 6: Unit Roofing (Copper)	10	30MAY06	12JUN06
SR-135	Lvl 6: Demo Roofing @ Scaffold / Set Up Scaff	3	06JUN06	08JUN06
SR-084	Lvl 6: Inst Balcony Rail	5	13JUN06	19JUN06
SR-096	Lvl 6: Inst Windows / Sliders	5	13JUN06	19JUN06
SR-099	Lvl 6: Wrap Paper/ Moisture Barrier @ Ext Walls	5	20JUN06	26JUN06
SR-105	Lvl 6: Install Sub-Deck	12	20JUN06	07JUL06
SR-136	Lvl 6: Wood Siding @ Ext Walls	15	27JUN06	19JUL06
SR-090	Lvl 6: Inst Glass @ Balcony Rail	3	03OCT06	05OCT06

Level 6 Build Out

Lvl 6: Guest Rooms

L6-09054	Lvl 6: Inst Sun Deck	10	20JUN06*	05JUL06
L6-09003	Lvl 6: Inst Insulation	6	10JUL06	17JUL06
L6-09006	Lvl 6: Hang Drywall	12	18JUL06	02AUG06
L6-09009	Lvl 6: Tape/Finish All Drywall	15	03AUG06	23AUG06
L6-09012	Lvl 6: Inst Doors, Jamb	5	03AUG06	09AUG06
L6-09015	Lvl 6: Hang Corridor Drywall	3	03AUG06	07AUG06
L6-09033	Lvl 6: Install Shower Pan, Tile	15	03AUG06	23AUG06
L6-09018	Lvl 6: Paint Units	10	17AUG06	30AUG06
L6-09021	Lvl 6: Install door Hardware	7	24AUG06	01SEP06
L6-09048	Lvl 6: Paint Corridors	7	24AUG06	01SEP06
L6-09024	Lvl 6: Install Cabinets	5	31AUG06	07SEP06
L6-09045	Lvl 6: Install MEP Finishes	5	05SEP06	11SEP06
L6-09051	Lvl 6: Carpet Corridors	3	05SEP06	07SEP06
L6-09029	Lvl 6: Field Measure Stone Counters	5	08SEP06	14SEP06
L6-09036	Lvl 6: Install Floor Tile	25	12SEP06	16OCT06
L6-09030	Lvl 6: Stone Counters	5	15SEP06	21SEP06
L6-09027	Lvl 6: Install Interior Tile Base	15	03OCT06	23OCT06
L6-09039	Lvl 6: Install Mirrors, Restrm Accessories	2	17OCT06	18OCT06
L6-09042	Lvl 6: Install Plumbing fixtures	7	17OCT06	25OCT06
L6-09057	Lvl 6: Install Signage	3	17OCT06	19OCT06
L6-PUNCH	Lvl 6: Guest Rms Punch	15	26OCT06	15NOV06

Unit Remodeling

Remodel: Group #1

RENO-1000	Renov Grp #1: Protection	7	27MAR06*	04APR06
RENO-1006	Renov Grp #1: Install of new HVAC complete	5	27MAR06	31MAR06
RENO-1009	Renov Grp #1: Demo Old HVAC	3	03APR06	05APR06
RENO-1024	Renov Grp #1: Extend Walls	3	03APR06	05APR06
RENO-1003	Renov Grp #1: Elect R/I	5	05APR06	11APR06

2005 DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	FEB	MAR	APR	
						▲ Lvl 6: Waterproof Patio's										
						▲ Lvl 6: Metal Roof @ Doghouse										
						▲ Lvl 6: Composite Roofing under deck										
						▲ Lvl 6: Unit Roofing (Copper)										
						▲ Lvl 6: Demo Roofing @ Scaffold / Set Up Scaff										
						▲ Lvl 6: Inst Balcony Rail										
						▲ Lvl 6: Inst Windows / Sliders										
						▲ Lvl 6: Wrap Paper/ Moisture Barrier @ Ext Walls										
						▲ Lvl 6: Install Sub-Deck										
						▲ Lvl 6: Wood Siding @ Ext Walls										
						▲ Lvl 6: Inst Glass @ Balcony Rail										
						▲ Lvl 6: Inst Sun Deck										
						▲ Lvl 6: Inst Insulation										
						▲ Lvl 6: Hang Drywall										
						▲ Lvl 6: Tape/Finish All Drywall										
						▲ Lvl 6: Inst Doors, Jamb										
						▲ Lvl 6: Hang Corridor Drywall										
						▲ Lvl 6: Install Shower Pan, Tile										
						▲ Lvl 6: Paint Units										
						▲ Lvl 6: Install door Hardware										
						▲ Lvl 6: Paint Corridors										
						▲ Lvl 6: Install Cabinets										
						▲ Lvl 6: Install MEP Finishes										
						▲ Lvl 6: Carpet Corridors										
						▲ Lvl 6: Field Measure Stone Counters										
						▲ Lvl 6: Install Floor Tile										
						▲ Lvl 6: Stone Counters										
						▲ Lvl 6: Install Interior Tile Base										
						Lvl 6: Install Mirrors, Restrm Accessories										
						▲ Lvl 6: Install Plumbing fixtures										
						▲ Lvl 6: Install Signage										
						▲ Lvl 6: Guest Rms Punch										
						▲ Renov Grp #1: Protection										
						▲ Renov Grp #1: Install of new HVAC complete										
						▲ Renov Grp #1: Demo Old HVAC										
						▲ Renov Grp #1: Extend Walls										
						▲ Renov Grp #1: Elect R/I										

Start Date 19DEC05  
 Finish Date 16NOV06  
 Date Date 18DEC06  
 Run Date 15DEC05 17:55

▲ Early Bar  
 ▲ Progress Bar  
 ▲ Critical Activity

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West Marina Pacific Hotel  
 Baseline Schedule

Sheet 4 of 6

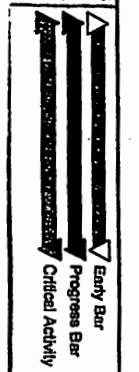
Exhibit "B"

PCL Construction  
 Services, Inc.



Activity ID	Activity Description	Orig Dur	Early Start	Early Finish	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
PH2-003	Phase 2 Turnover	1	16NOV06	16NOV06																

Start Date 19DEC06  
 Finish Date 16NOV08  
 Data Date 19DEC06  
 Run Date 19DEC06 17:55



BW000  
 Best Western Marina Pacific Hotel  
 Baseline Schedule

Sheet 6 of 6

Exhibit "B"  
 PCL Construction Services, Inc.

**EXHIBIT "C" - SCL - JULE OF VALUES**

**TO:** Marina Pacific Hotel & Suites, LLC  
 1697 Pacific Ave.  
 Venice, CA 90291

**FROM:** PCL CONSTRUCTION SERVICES, INC  
 200 Burchett Street  
 Glendale, CA 91203

**Project:** Best Western Marina Pacific Hotel & Suites  
**Application Number:** \_\_\_\_\_  
**Invoice No:** \_\_\_\_\_  
**Period To:** \_\_\_\_\_  
**Application Date:** \_\_\_\_\_

**ATTN:** Mark Sokol

**CONTRACTOR'S APPLICATION FOR PAYMENT**

Application is made for Payment, as shown below, in connection with the Contract.  
 Continuation Sheet, AIA Document G703, is attached.

CHANGE ORDER SUMMARY		
Change Orders approved in Previous Months	ADDITIONS	DEDUCTIONS
TOTAL		
Approved this Month		
<b>This Month TOTALS</b>	0	0
<b>Net change by Change Orders</b>	0	0

The undersigned Contractor certifies that to the best of the Contractor's Knowledge, Information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

I hereby certify that all obligations for which previous Certificates of Payment were issued and paid have been paid or otherwise satisfied in a manner mutually acceptable to the Owner and the Contractor.

**CONTRACTOR:**

**By:** Manny Jurcos, Project Accountant  
 Name and Title \_\_\_\_\_ Date: \_\_\_\_\_

**ARCHITECT'S CERTIFICATE FOR PAYMENT**

In accordance with the Contract Documents, based on on-site observations and the data comprising the above application, the Architect certifies to the Owner that to the best of the Architect's 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**.....\$ \_\_\_\_\_

(Attach explanation if amount certified differs from the amount applied for.)  
**ARCHITECT:** \_\_\_\_\_

**By:** \_\_\_\_\_ Date: \_\_\_\_\_  
 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.

1. ORIGINAL CONTRACT SUM \$ 10,175,747
2. Net Change by Change Orders \$ 0
3. CONTRACT SUM TO DATE (LINE 1+2) \$ 10,175,747
4. TOTAL COMPLETED & STORED TO DATE (Column H on G703) \$ 0
5. RETAINAGE:
  - a. Completed Work (10% of Column E+F on G703) \$ 0
  - b. Stored Material (10% of Column G on G703) \$ 0
  - Total retainage (Line 5a + 5b or Total in Column K of G703) \$ 0
6. TOTAL EARNED LESS RETAINAGE (Line 4 less Line 5 Total) \$ 0
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 from prior Certificate) \$ 0
8. CURRENT PAYMENT DUE \$ 10,175,747
9. BALANCE TO FINISH, PLUS RETAINAGE (Line 3 less Line 6) \$ 10,175,747



**CONSTRUCTION LEADERS**

**EXHIBIT "E"**  
**QUALIFICATIONS & EXCLUSIONS**

**Revised 12/21/05**  
**Marina Pacific Hotel & Suites**  
**Venice, CA**

**GENERAL ITEMS**

1. Price is based on seismic upgrades, additions, and renovations of the existing Marina Pacific Hotel & Suites property located at 1697 Pacific Avenue in Venice, CA per the Profeta Royalty drawings (dated 5/3/05), the Structural Focus drawings (dated 7/20/05) the IBE Mechanical, Electrical, & Plumbing drawings (dated 9/23/05) and the following inclusions, exclusions, assumptions, and qualifications.

2. PCL includes the following staff and labor rate:

<i>ITEM</i>	<i>RATE</i>	<i>COMMENTS</i>
Project Manager	\$87 / hr	75%-time
Superintendent	\$83 / hr	Full-time
Project Engineer	\$68 / hr	Full-time
Project Accountant	\$49 / hr	4 days per month
Carpenter	\$56.50 / hr	As Required
Cement Mason	\$56.50 / hr	As Required
Laborer	\$49.65 / hr	As Required

3. Total construction schedule is estimated to be approximately eleven (11) months. (Pending design / fabrication / construction of elevators, shafts, machine rooms, etc.)

4. Our pricing is based on the assumption that a Guaranteed Maximum Price, AIA standard contract will be executed by December 21, 2005.

5. Price excludes the following:

- Permit or plan check fees.
- Design services / costs (with the exception of Mechanical, Fire Protection, Fire-Life-Safety, and any other Design-Build work added by Change Order).
- Hazardous materials survey / abatement. (Assumes there are no such building materials on the property.)
- Any work related to questions or RFI's by previous General Contractors (unless now incorporated into bid drawings).
- Traffic lane closure permit. (Assumes Owner will secure closure of north traffic lane of 17<sup>th</sup> Street for duration of construction.)

6. Any work or rework at the Penthouse located at the west end of the property with the exception of adding the new stair and the associated structural modifications. (No other scope provided.)
7. Removal, protection, or replacing of any existing furnishings, furniture, equipment, or materials as needed for new work is assumed to be provided by Owner.
8. The construction schedule / work plan will require that many guestrooms be vacant at various times of construction. PCL and the Ownership will need to coordinate on a continual basis in regards to scheduling and gaining access to rooms. The renovations to the rooms on 3<sup>rd</sup> through 5<sup>th</sup> floors will essentially be performed in three (3) phases; assumes new HVAC units will be allowed to be installed prior to start of renovations in rooms.
9. Prior to proceeding with the work, PCL requires reasonably satisfactory evidence that financial arrangements have been made by the Ownership to cover the agreed upon scope of work.
10. The information contained within this Exhibit supersedes any conflicting or ambiguous information contained within any other contract documents except as indicated in the AIA Document A117.

## **DIVISION 1**

1. Price includes the following:
  - General Liability insurance
  - Errors & Omissions insurance
  - Subguard costs for all PCL subcontractors
  - Contract drawing reproduction costs
  - City of LA business tax
  - Temporary toilets / wash stations for own employees
  - An Allowance of \$25,600 for temporary protection as needed (e.g. furnishing, installing, maintaining, removal of protective materials, such as carpet mask, masonite boards, etc.)
  - Scaffolding as required for the performance of work. (This will close down the sidewalk on the south side of the project and will encroach into the alley on the north side.)
  - Pedestrian canopy on east side of the property only.
  - Normal working hours are assumed to be between 7am and 4pm. (Assumes work is allowed to continue to 6pm, if desired by PCL or subcontractors.)
  - Installing and later removing temporary tamper-proof screws to close off existing sliding glass doors during scaffolding / shotcrete operations. Workers will be requiring access (from the scaffolding) to the room balconies in order to perform their work.

**2. Price excludes the following:**

- Final clean-up of new or rehabilitated floors. (To be provided by Owner.)
- Testing & inspection
- Temporary electrical or water consumption costs during construction.
- Payment & Performance bond
- All-Risk insurance
- Third Party Inspection. (Assumes this will be provided by the Ownership.)
- Parking fees. Assumes an average of approx. 40 ea. standard-size parking stalls will be provided by Owner on site on a daily basis. (PCL will handle parking costs for additional spaces or over-sized vehicles as required.)
- Jobsite trailer office. (Assumes use of existing space on property for construction office.)
- Dust barriers.
- Noise mitigation.
- Adherence to any previous Construction Staging Plans.
- Security service.
- Any costs / impacts due to issues related to building height approvals.

**3. Price includes a Contractor's Controlled Contingency of \$305,272.**

**DIVISION 2**

**1. Price includes the following:**

- Demolition / removal of items as called for on Demolition Plan (A2.0).
- An Allowance of \$32,000 is provided for select demo not clearly defined on A2.0.
- An Allowance of \$20,000 for X-ray, radar, or other type of testing as needed for locating reinforcing steel in existing structure.
- Removal / replacing of gate conflicting with column requiring fiber wrap.

**2. Price excludes the following:**

- Demolition, removal, disposal of items not clearly called out for removal on drawings. (See Allowance above.)
- Sub-drainage systems.
- Dewatering.
- Site utilities.
- Demolition methods called for on detail 7/S0.4.
- Demolition of existing elevators, shaft / concrete walls, etc. (Pending design.)
- Salvaging of any equipment, materials, etc.
- Verification of existing foundation per 11/S7.1.
- Any fencing or gate work except as noted above.
- Replacing / relocating of wood fence (consisting of wood poles) at northeast corner of property after foundation upgrade.
- Temporary shoring of metal decking.



- Asphalt paving, site concrete, or parking striping.
- Off-site, A-permit, or B-permit work.
- Landscape / irrigation. (Relocating or replacing of trees, plants, ivy, irrigation, etc. is also excluded. Rootball of trees may be damaged by foundation upgrades.)

### **DIVISION 3**

#### **1. Price includes the following:**

- Structural excavation, backfill, spoils disposal as needed for concrete foundation upgrades.
- Smooth hard trowel finish on slab-on-metal deck.
- 2 ½" concrete thickness on top of slab-on-metal deck.
- All "concrete" items depicted (e.g. walls, piers, beams, collectors) will be provided as shotcrete, except for foundations and slab-on-metal deck.
- 4-hr separation wall (per B1/A9.2 & 12/S7.2) will be shotcrete.
- Shotcrete Pre-Construction test panel will be performed as part of the new shotcrete wall required inside the parking garage.
- Shotcrete lifts figured as 5 ft (in lieu of 3 ft per drawings).
- Drill & epoxy dowels and reinforcing steel as depicted. Collector beam rebar is figured as #9 bar (in lieu of originally specified #18).
- Fiber wrap system to be weather-resistant acrylic coating (in lieu of specified Class 1 rating).
- Shotcrete piers at east and west ends (ref: B1, B3/A7.1) will extend approx. 6" beyond 2" thick existing rafters, creating a "shelf".

#### **2. Price excludes the following:**

- Topping slabs.
- Sandblasting. (Surface preparation prior to shotcrete application will be high-pressure wash.)
- Removal of existing slab-on-grade or filling of possible void between slab-on-grade and foundation (ref: 11/S7.1). Initial test holes revealed a void between top of foundation and underside of slab-on-grade.
- Additional reinforcing for areas where void space after removal of existing air conditioning units is filled with shotcrete. (Pending design.)
- Removal, reworking, or doweling into existing wing wall near F/11 for new shotcrete work. (Assumes shotcrete ends flush against wing wall.)
- Strengthening of existing balcony slabs at 3<sup>rd</sup> floor. (Existing slabs are approx. 6" thick, while 3, 4/S3.1 calls for 6" embedment of dowels for new shotcrete.)

#### **DIVISION 4**

1. Price includes the following:
  - New slump stone to fill holes left after removal of existing air conditioning units in 99 ea. rooms. (Includes drilling & epoxying of 1 ea. dowel on each of the 4 ea. sides.)
  - Stone tops as required.
2. Price excludes the following:
  - Any other masonry work, except as listed above

#### **DIVISION 5**

1. Price includes the following:
  - Extension of stair assemblies, including railings, as depicted.
  - An Allowance of \$48,000 is included for the addition of perforated closure plates to existing stair risers as depicted.
  - Design-Build joist assembly system.
  - Complete tube steel / railing assemblies as depicted.
  - Cutting / patching of existing railings at balconies after new shotcrete piers are constructed.
  - An Allowance of \$25,000 is included for misc. metals and/or elevator support steel not clearly defined on drawings.
2. Price excludes the following:
  - Nelson studs.
  - Additional structural steel (not depicted) that may be required in order to support joist assembly system.
  - Expediting costs (\$25,000) for detailing / fabrication of joists. (This is carried in PreConstruction Agreement.)
  - Welding of nuts as depicted on 9/S0.6. (A second nut will be added above the metal deck in order to plumb the sill bolts prior to concrete placing.)

#### **DIVISION 6**

1. Price includes the following:
  - New wood framing, sheathing, nailers, etc. as called out on drawings.
  - All lumber figured as S-GRN to attain 19% moisture content in place before covering with finishes.
  - Lumber grades as figured as follows (in lieu of that shown on XII Rough Carpentry schedule on S0.2):
    - Sills—Construction standard / #2
    - Studs—Construction standard / #2
    - Joists, planks, plates—#2
    - Beams, 5" & wider—#1

- Beams, 2x10 at roof deck—#2
- Posts, 6x6& larger—#1
- Plywood blocking—Structural I
- Backing, stripping, & furring—Construction standard
- Millwork as depicted.
- Removing, relocating, modifying existing shelves and poles as needed for new fan coil units.
- Cement fiberboard siding figured as having 8" exposure (not 5 ¼" width per specifications).
- Generic composite decking material (in lieu of specified material) will be used. Attachment method will be stainless steel screws to allow for easy removal.
- Glu-lam beams will be untreated architectural grade material.
- Spacer blocks at all HD5's at joists. (Assumes all existing joists lap.)
- Hilti pins only to anchor wood sill plates at all non-shear walls.

2. Price excludes the following:

- Any work related to millwork, trim, molding, etc. not depicted.
- Build-out / reframing for new elevator shafts, machine rooms, etc. (Pending design finalization.)
- Costs related to reworking / relocating existing joists or trellis that may be required due to potential conflict with new shotcrete at overhang (e.g. north elevation between grids 11 & 12).
- Cants at sleepers (ref: A1/A9.3).

**DIVISION 7**

1. Price includes the following:

- Horizontal waterproofing at balconies and toilets only.
- Henry Blueskin membrane on exterior walls (in lieu of building paper depicted on A9.2).
- Roofing system to be Torch-Applied in lieu of specified built-up system in order to eliminate fumes / odor issues associated with kettle.
- Patching of existing roofing at new penetrations for conduits, piping, ductwork. (A warranty for this work cannot be provided.)
- Removing existing roof tile and re-laying (approx. 900 sf) at East side of building.
- Removing existing roof tile and re-laying (approx. 1,400 sf) around metal roofs at West side of building.
- All architectural metals and flashing as depicted.
- Enkasonic soundproofing pad below tile only.
- Acoustic caulking / insulation as depicted.
- Temporary weather protection.

2. Price excludes the following:

- Methane mitigation measures.
- Fireproofing / intumescent paint.
- Testing for double-lock standing seam roofing system.
- New drains at exterior fins (ref: D1/A7.0).
- Replacing existing gutters.
- Acoustic mitigation measures, materials, assemblies except as depicted.
- Moisture protection at interior shotcrete applications.
- Waterproofing at existing balconies. (Pending consultant recommendations regarding patching around new shotcrete piers.)
- Unnamed expansion material between finish flooring and drywall depicted on A0.5.
- Removal, relocating, or modifying existing roof framing or roofing assemblies.

## **DIVISION 8**

1. Price includes the following:

- Furnish and install all doors / frames / hardware per Schedules on A0.4.
- Furnish and install all glazed assemblies per Schedules on A0.4 and per ID-1 & ID-2.
- Disposal of existing glazed assemblies to be replaced by new Milgard systems.
- An Allowance of \$19,500 is carried for furnishing & installing the Guestroom Entry lock system on the 6<sup>th</sup> floor. (No information provided in bid documents.)
- Relocating / reframing for three (3) ea. openings at units 312, 412, & 512 to accommodate new shear wall thickness.

2. Price excludes the following:

- New frames, doors, or hardware at linen / entry closets. (Pending design of furr-out of closets for new fan coil units.)

## **DIVISION 9**

1. Price includes the following:

- An Allowance of \$75,000 for additional walls, soffits, ceilings not clearly depicted. This also includes for repairs, rework, new finishes in existing rooms as needed for new shear walls, MEP systems, etc.
- Wall and floor tile as depicted.
- Replace / patch tile pavers at Entryway after foundation upgrade at F/12 (ref: S2.2).
- Patching a 1 ft section of tile around new shotcrete piers at existing balconies. (Waterproofing excluded.)
- A carpet Allowance of \$37,800 for furnishing and installing carpet in new corridors and for replacing carpet in existing rooms as needed due to required removal, damage, etc.

- An Allowance of \$12,000 for any work associated with plaster assemblies. This includes removing, replacing, patching as needed (e.g. where existing plaster conflicts with structural elements needing upgrades in garage, at balconies, etc.).
- Painting as specified, including throughout new 6<sup>th</sup> floor, stair tread safety striping, new exterior shotcrete finishes.

2. Price excludes the following:

- Draft stops except where depicted (ref: A3.1a).
- Build-out / reframing for new elevator shafts, machine rooms, “doghouses”, vestibules, etc. (Pending design finalization.)
- Drywall or furr-outs below new or existing stairs.
- Anti-graffiti coating or paint at areas currently covered with ivy that will not be receiving new shotcrete.
- Repainting of exterior surface more than once. (Assumes this will be painted relatively soon after shotcrete is complete. Does not include for repainting at end of project.)
- Additional drywall not depicted but as may be needed for Type III building.

**DIVISION 10**

1. Price includes the following:

- Furnish and install access panels as required.
- Code required signage.
- Guest identification signage at 6<sup>th</sup> floor only.
- An Allowance of \$9,000 for unspecified basic washroom accessories (on 6<sup>th</sup> floor only).
- An Allowance of \$3,500 for removing, replacing, relocating existing signage and associated electrical as required for new work (e.g. shotcrete applications).

2. Price excludes the following:

- Signage except as noted above.

**DIVISION 11**

1. Price includes the following:

- Extension of trash chute per B1/A5.0.

2. Price excludes the following:

- Furnishing / installation of any appliances.

### **DIVISION 12**

1. No Furnishings (artwork, window treatments, drapes, furniture, rugs, etc.) are included.

### **DIVISION 13**

1. No division 13 work (Special Construction) is included.

### **DIVISION 14**

1. Price includes the following:

- 2 ea. 7-stop traction elevators by Schindler designed as 350 fpm, 2,500 lb capacity. (See Exclusions below.)
- An Allowance of \$10,000 for cab finish upgrades.
- Entrances to be #4 stainless steel.
- Cab wall panels to be plastic laminate. Cab walls to be baked enamel.
- Temporary man / materials hoist and operator as needed for duration of construction. Location of hoist is planned outside of Unit nos. 322, 422, 522.
- Construction sequencing such that one (1) elevator stay operational and available to guests at all times during construction. Assumes that Department of Building & Safety, Fire Department, or other agencies with jurisdiction allow Owner to occupy guestrooms with one (1) elevator being non-operational throughout construction.

2. Price excludes the following:

- Removal of existing elevators, removal / reconstruction of elevator shafts, enclosures, or new machine room. (Pending finalization of design.) The cost related to this work is not included in the Allowance listed above.
- Costs / impacts if applicable agencies do not allow occupation of guestrooms without two (2) operational / commissioned elevators in the building.

### **DIVISION 15**

1. Price includes the following:

- An Allowance of \$25,000 for removal, relocation, or replacing of existing mechanical, electrical, plumbing, drainage work (e.g. for fiber wrapping of columns, new shotcrete walls / piers, extension of stairs, damaged or deteriorated materials, etc.)
- Design-Build HVAC system proposed by Thermalair, including engineering. Chiller priced as Carrier-type. DDC controls system figured (in lieu of specified Trane system.)
- Condensate lines to be run parallel with chiller lines in lieu of running to individual sinks on 3<sup>rd</sup> through 5<sup>th</sup> floors.

- Cold water supply lines from water meter in garage will run up to the roof directly above the water meter.
- Design-Build fire protection system, including new flow and tampers at 6<sup>th</sup> floor & Interstitial floor. Concealed heads wherever piping is concealed.

2. Price excludes the following:

- UV light for fan coil units.
- Duct smoke detectors.
- Fire / fire smoke dampers.
- Specified HVAC system. (Price is based on Thermalair's proposed system.)
- Thermostats located away from fan coil units as depicted on Mechanical drawings for 3<sup>rd</sup> through 5<sup>th</sup> floors. (Thermostats will be located at the units themselves.)
- Air conditioning of corridors.
- New piping, equipment, etc. unless denoted as "(N)" on the drawings.
- New sump pumps in elevator pits. (Pending design.)
- Replacing existing flow and tampers. (Assumes operation / capacity of existing equipment is sufficient.)
- Design / engineering for plumbing scope.

## **DIVISION 16**

1. Price includes the following:

- Design-build fire alarm system for 6<sup>th</sup> floor only.
- Electrical work as depicted.
- Emergency lighting on 6<sup>th</sup> floor.
- See Allowance listed in Division 15 related to removals / relocation of electrical.
- Temporary lighting / temporary power distribution as needed.
- Allowance for 6<sup>th</sup> floor Lighting (nothing specified)
  - Common Area (\$29,000)
  - Units (\$55,000)
  - Balcony Sconces (\$5,500)

2. Price excludes the following:

- Telecom / security / CATV systems or wiring.
- New switchgear. (Assumes existing switchgear is in proper working condition and can be re-used.)
- Temporary power consumption costs.
- Work related to street lighting or power poles.
- Costs related to potential conflict with power lines and new shotcrete applications (e.g. at grids A/6.4).
- Design / engineering for electrical scope.

**EXHIBIT "D"**  
**to**  
**AIA Document A117 Agreement**  
**Between Marina Pacific Hotel & Suites LLC ("Owner")**  
**and PCL Construction Services, Inc. ("Contractor")**  
**General Conditions Breakdown**



BE Number BE050528A REV051216  
 District File No 52-050006  
 Owner File No

PCL Construction Services, Inc.  
 Los Angeles Special Projects Office

23  
 Dec 16, 2005  
 07:30:00 AM

**EXHIBIT "D"**  
**GENERAL CONDITIONS BREAKDOWN**

Owner Marina Pacific Hotel & Suites, LLC  
 Project Marina Pacific Hotel - Renovations  
 Location Venice, CA  
 Designer Profeta Royalty Architecture, LLP  
 Func. Unit 63,286 sf  
 Area 63,286 SF

Proprietary and Confidential

Summary Item Description	Quantity	UoM	Percent Tot. Cost	Unit Cost /Bldg. Area	Item Unit Cost	Total Cost
<b>PROJECT STAFF</b>		<b>1 LS</b>				
<b>PROJECT MANAGER</b>	<b>12 MO</b>					
<b>PROJECT MANAGER</b>	<b>12 MO</b>		<b>1.4071%</b>	<b>2.14</b>	<b>11,310.00</b>	<b>135,720</b>
- 75% time - Includes 1 month of PreConstruction						
<b>PROJECT MANAGER</b>	<b>12 MO</b>		<b>1.41%</b>	<b>2.14</b>	<b>11,310.00</b>	<b>135,720</b>
<b>SUPERINTENDENT</b>	<b>12 MO</b>					
<b>SUPERINTENDENT</b>	<b>12 MO</b>		<b>1.7899%</b>	<b>2.73</b>	<b>14,386.67</b>	<b>172,640</b>
- Full-time - Includes 1 month of PreConstruction						
<b>SUPERINTENDENT</b>	<b>12 MO</b>		<b>1.79%</b>	<b>2.73</b>	<b>14,386.67</b>	<b>172,640</b>

BE Number BE050528A REV051216  
 District File No 52-050006  
 Owner File No

PCL Construction Services, Inc.  
 Los Angeles Special Projects Office  
**CONCEPTUAL ESTIMATE DETAIL**  
**EXHIBIT "D"**

24  
 Dec 16, 2005  
 07:30:00 AM

Owner **Marina Pacific Hotel & Suites, LLC**  
 Project **Marina Pacific Hotel - Renovations**  
 Location **Venice, CA**  
 Designer **Profeta Royalty Architecture, LLP**  
 Func. Unit **63,286 sf**  
 Area **63,286 SF**

Proprietary and Confidential

Summary Item Description	Quantity	UoM	Percent Tot. Cost	Unit Cost /Bldg. Area	Item Unit Cost	Total Cost
<b>PROJECT ENGINEER</b>	<b>11</b>	<b>MO</b>				
<b>PROJECT ENGINEER</b>	<b>11</b>	<b>MO</b>	<b>1.3442%</b>	<b>2.05</b>	<b>11,786.67</b>	<b>129,653</b>
- Full-time						
<b>PROJECT ENGINEER</b>	<b>11</b>	<b>MO</b>	<b>1.34%</b>	<b>2.05</b>	<b>11,786.67</b>	<b>129,653</b>
<b>ACCOUNTANT</b>	<b>11</b>	<b>MO</b>				
<b>ACCOUNTANT</b>	<b>11</b>	<b>MO</b>	<b>0.1802%</b>	<b>0.27</b>	<b>1,579.76</b>	<b>17,377</b>
- 4 days per month						
<b>ACCOUNTANT</b>	<b>11</b>	<b>MO</b>	<b>0.18%</b>	<b>0.27</b>	<b>1,579.76</b>	<b>17,377</b>
<b>PROJECT STAFF</b>	<b>1</b>	<b>LS</b>	<b>4.72%</b>	<b>7.20</b>		<b>455,391</b>
<b>CONSTRUCTION EQUIPMENT</b>	<b>1</b>	<b>LS</b>				
<b>MISC. EQUIPMENT</b>	<b>1</b>	<b>LS</b>				
<b>PICKUP TRUCK</b>	<b>10</b>	<b>MO</b>	<b>0.1140%</b>	<b>0.17</b>	<b>1,100.00</b>	<b>11,000</b>
<b>FORKLIFT</b>	<b>10</b>	<b>MO</b>	<b>0.2281%</b>	<b>0.35</b>	<b>2,200.00</b>	<b>22,000</b>
<b>MISC. EQUIPMENT</b>	<b>1</b>	<b>LS</b>	<b>0.34%</b>	<b>0.52</b>		<b>33,000</b>
<b>CONSTRUCTION EQUIPMENT</b>	<b>1</b>	<b>LS</b>	<b>0.34%</b>	<b>0.52</b>		<b>33,000</b>

BE Number BE050528A REV051216  
 District File No 52-050006  
 Owner File No

PCL Construction Services, Inc.  
 Los Angeles Special Projects Office  
**CONCEPTUAL ESTIMATE DETAIL**  
**EXHIBIT "D"**

25  
 Dec 16, 2005  
 07:30:00 AM

Owner **Marina Pacific Hotel & Suites, LLC**  
 Project **Marina Pacific Hotel - Renovations**  
 Location **Venice, CA**  
 Designer **Profeta Royalty Architecture, LLP**  
 Func. Unit **63,286 sf**  
 Area **63,286 SF**

Proprietary and Confidential

Summary Item Description	Quantity	UoM	Percent Tot. Cost	Unit Cost /Bldg. Area	Item Unit Cost	Total Cost
<b>PROJECT OVERHEAD</b>	<b>1</b>	<b>LS</b>				
<b>TEMP FACILITIES</b>	<b>11</b>	<b>MO</b>				
JOBSITE TRAILER						
- EXCLUDED. Assumes use of space in bldg to serve as jobsite office.						
<b>TOOL CRIBS</b>	<b>11</b>	<b>MO</b>	<b>0.0125%</b>	<b>0.02</b>	<b>110.00</b>	<b>1,210</b>
<b>TEMP TOILETS / HANDWASH STATION</b>	<b>44</b>	<b>MO</b>	<b>0.0593%</b>	<b>0.09</b>	<b>130.00</b>	<b>5,720</b>
<b>MOVE IN &amp; OUT</b>	<b>1</b>	<b>EA</b>	<b>0.0721%</b>	<b>0.11</b>	<b>6,958.00</b>	<b>6,958</b>
<b>TEMP WATER - OFFICE CONSUMPTION</b>	<b>11</b>	<b>MO</b>	<b>0.0057%</b>	<b>0.01</b>	<b>50.00</b>	<b>550</b>
<b>COURIER SERVICE</b>	<b>11</b>	<b>MO</b>	<b>0.0656%</b>	<b>0.10</b>	<b>575.00</b>	<b>6,325</b>
<b>SITE COMMUNICATIONS</b>	<b>11</b>	<b>MO</b>	<b>0.0713%</b>	<b>0.11</b>	<b>625.00</b>	<b>6,875</b>
<b>COMPUTER STATIONS</b>	<b>22</b>	<b>MO</b>	<b>0.0684%</b>	<b>0.10</b>	<b>300.00</b>	<b>6,600</b>
<b>OFFICE-SUPPLIES</b>	<b>11</b>	<b>MO</b>	<b>0.0171%</b>	<b>0.03</b>	<b>150.00</b>	<b>1,650</b>
<b>OFFICE-FURN/EQUIPMENT</b>	<b>1</b>	<b>LS</b>	<b>0.0052%</b>	<b>0.01</b>	<b>500.00</b>	<b>500</b>
<b>TEMP FACILITIES</b>	<b>11</b>	<b>MO</b>	<b>0.38%</b>	<b>0.57</b>	<b>3,308.00</b>	<b>36,388</b>
<b>STORAGE / PARKING FEES</b>	<b>1</b>	<b>LS</b>				
<b>STORAGE / PARKING FEES</b>		<b>LS</b>				
- EXCLUDED						
<b>STORAGE / PARKING FEES</b>	<b>1</b>	<b>LS</b>	<b>0.00%</b>	<b>0.00</b>		<b>0</b>
<b>PROJECT SIGNS</b>	<b>1</b>	<b>EA</b>				
<b>PROJECT SIGNS</b>	<b>1</b>	<b>EA</b>	<b>0.0244%</b>	<b>0.04</b>	<b>2,356.00</b>	<b>2,356</b>
- Temporary routing of vehicles, pedestrians, etc.						
<b>PROJECT SIGNS</b>	<b>1</b>	<b>EA</b>	<b>0.02%</b>	<b>0.04</b>	<b>2,356.00</b>	<b>2,356</b>

BE Number BE050528A REV051216  
 District File No 52-050006  
 Owner File No

PCL Construction Services, Inc.  
 Los Angeles Special Projects Office

26  
 Dec 16, 2005  
 07:30:00 AM

CONCEPTUAL ESTIMATE DETAIL

EXHIBIT "D"

Owner Marina Pacific Hotel & Suites, LLC  
 Project Marina Pacific Hotel - Renovations  
 Location Venice, CA  
 Designer Profeta Royalty Architecture, LLP  
 Func. Unit 63,286 sf  
 Area 63,286 SF

Proprietary and Confidential

Summary Item Description	Quantity	UoM	Percent Tot. Cost	Unit Cost /Bldg. Area	Item Unit Cost	Total Cost
<b>VIDEO / PHOTO DOCUMENTATION</b>	1	LS				
VIDEO / PHOTO DOCUMENTATION	1	EA	0.0259%	0.04	2,500.00	2,500
- Documentation of existing site & adjacent properties						
<b>VIDEO / PHOTO DOCUMENTATION</b>	1	LS	0.03%	0.04		2,500
<b>MEDICAL &amp; SAFETY</b>	11	MO				
SAFETY SUPPLIES	11	MO	0.0428%	0.07	375.00	4,125
TEMP FIRE PROTECTION	11	MO	0.0257%	0.04	225.00	2,475
SAFETY ORIENTATION	4	EA	0.0156%	0.02	376.00	1,504
<b>MEDICAL &amp; SAFETY</b>	11	MO	0.08%	0.13	736.73	8,104
<b>SECURITY</b>	1	LS				
SECURITY - SERVICES						
- EXCLUDED						
<b>SECURITY</b>	1	LS	0.00%	0.00		0
<b>PROTECTION</b>	1	LS				
STAIRS & LADDERS	11	MO	0.0155%	0.02	136.06	1,497
TEMP FENCES	400	LF	0.0413%	0.06	9.97	3,986
- For back area around Laydown Yard						
<b>PROTECTION</b>	1	LS	0.06%	0.09		5,483
<b>TESTING &amp; INSPECTION</b>	1	LS				
TESTING & INSPECTION						
- EXCLUDED						

BE Number BE050528A REV051216  
 District File No 52-050006  
 Owner File No

PCL Construction Services, Inc.  
 Los Angeles Special Projects Office  
**CONCEPTUAL ESTIMATE DETAIL**

27  
 Dec 16, 2005  
 07:30:00 AM

**EXHIBIT "D"**

Owner **Marina Pacific Hotel & Suites, LLC**  
 Project **Marina Pacific Hotel - Renovations**  
 Location **Venice, CA**  
 Designer **Profeta Royalty Architecture, LLP**  
 Func. Unit **63,286 sf**  
 Area **63,286 SF**

Proprietary and Confidential

Summary Item Description	Quantity	UoM	Percent Tot. Cost	Unit Cost /Bldg. Area	Item Unit Cost	Total Cost
<b>TESTING &amp; INSPECTION</b>	1	LS	0.00%	0.00	---	0
<b>CLEANING</b>	1	LS				
HOUSEKEEPING	47	WK	0.4839%	0.74	993.00	46,671
TRASH REMOVAL	47	EA	0.1462%	0.22	300.00	14,100
FINAL CLEANUP - EXCLUDED. To be provided by Owner.						
<b>CLEANING</b>	1	LS	0.63%	0.96	---	60,771
<b>COMMISSIONING &amp; CLOSEOUT</b>	1	LS				
AS-BUILT DRAWINGS	1	LS	0.0083%	0.01	800.00	800
<b>COMMISSIONING &amp; CLOSEOUT</b>	1	LS	0.01%	0.01	---	800
<b>DRAWING REPRODUCTION</b>	1	LS				
DRAWING REPRODUCTION	75	EA	0.0505%	0.08	65.00	4,875
<b>DRAWING REPRODUCTION</b>	1	LS	0.05%	0.08	---	4,875
<b>PROJECT OVERHEAD</b>	1	LS	1.26%	1.92	---	121,277
<b>SPEC. GENERAL CONDITIONS</b>	1	LS				
IS ASSESSMENT	10,175,747	TB	0.2110%	0.32	0.002000	20,351
EXPENDABLE TOOLS	827,771	LC	0.1287%	0.20	0.015000	12,417

BE Number BE050528A REV051216  
 District File No 52-050006  
 Owner File No

PCL Construction Services, Inc.  
 Los Angeles Special Projects Office  
**CONCEPTUAL ESTIMATE DETAIL**

28  
 Dec 16, 2005  
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**EXHIBIT "D"**

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 Func. Unit **63,286 sf**  
 Area **63,286 SF**

Proprietary and Confidential

Summary Item Description	Quantity	UoM	Percent Tot. Cost	Unit Cost /Bldg. Area	Item Unit Cost	Total Cost
<b>CONSUMABLE SUPPLIES</b>	<b>827,771</b>	<b>LC</b>	<b>0.1287%</b>	<b>0.20</b>	<b>0.015000</b>	<b>12,417</b>
PERMITS-BUILDING - EXCLUDED			TB			0.00
<b>SPEC. GENERAL CONDITIONS</b>	<b>1</b>	<b>ES</b>	<b>0.47%</b>	<b>0.71</b>	<b>-</b>	<b>45,185</b>

**EXHIBIT "F"**  
to  
**AIA Document A117 Agreement**  
**Between Marina Pacific Hotel & Suites LLC ("Owner")**  
**and PCL Construction Services, Inc. ("Contractor")**  
**Early Retention Schedule**

NOT APPLICABLE

**EXHIBIT "G"**  
to  
**AIA Document A117 Agreement**  
**Between Marina Pacific Hotel & Suites LLC ("Owner")**  
**and PCL Construction Services, Inc. ("Contractor")**

**Lien Release Forms**

**(California Projects)**

**(Attached)**



# CONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

[California Civil Code S3262 (d)(1)]

Upon receipt by the undersigned of a check from \_\_\_\_\_

in the sum of \$ \_\_\_\_\_

payable to **PCL CONSTRUCTION SERVICES, INC.**

and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanic's lien, stop notice, or bond right

the undersigned has on the job of **Best Western Marina Pacific Hotel & Suites**

located at **1697 Pacific Ave., Venice, CA 90291**

to the following extent. This release covers a progress payment for labor, services, equipment or material furnished to

through \_\_\_\_\_ only & does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based upon work performed or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release. This release of any mechanic's lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon a rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.

Dated: \_\_\_\_\_

**PCL CONSTRUCTION SERVICES, INC.**

By \_\_\_\_\_

**Manny Juncos - Project Accountant**

**NOTE: CIVIL CODE SECTION 3262 (d)(1) PROVIDES:** Where the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a progress payment and the claimant is not, in fact paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall follow substantially the form set forth above

# UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

[California Civil Code S3262 (d)(2)]

The undersigned has been paid and has received a progress payment in the sum of \$ \_\_\_\_\_

for labor, services, equipment, or material furnished to \_\_\_\_\_

on the job of Best Western Marina Pacific Hotel & Suites

located at 1697 Pacific Ave., Venice, CA 90291

and does here by release any mechanic's lien, stop notice, or bond right that the undersigned has on the above referenced job to the following extent. This release covers a progress payment for labor, services, equipment, or materials furnished to \_\_\_\_\_

through \_\_\_\_\_ only & does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based upon work performed or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release. This release of any mechanic's lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon a rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.

Dated: \_\_\_\_\_

\_\_\_\_\_ PCL Construction Services, Inc.

By \_\_\_\_\_

\_\_\_\_\_ Manny Juncos - Project Accountant

**"NOTICE TO PERSONS SIGNING THIS WAIVER: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM. "**

**NOTE: CIVIL CODE SECTION 3262 (d)(2) PROVIDES:** Where the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver it has, in fact, been paid the progress payment, the waiver and release shall follow substantially the form set forth above.

# CONDITIONAL WAIVER AND RELEASE UPON FINAL PAYMENT

[California Civil Code S3262-(d)(1)]

Upon receipt by the undersigned of a check from \_\_\_\_\_

in the sum of \$ \_\_\_\_\_

payable to \_\_\_\_\_

and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanic's lien, stop notice, or bond right the undersigned has on the job of Best Western Marina Pacific Hotel & Suites

located at 1697 Pacific Ave., Venice, CA 90291

to the following extent. This release covers the final payment for labor, services, equipment or material furnished on the job, except for disputed claims for additional work in the amount of \$ \_\_\_\_\_, with such additional described as follows: \_\_\_\_\_

Before any recipient of this document relies on it, the party should verify evidence of payment to the undersigned.

Dated: \_\_\_\_\_

**PCL CONSTRUCTION SERVICES, INC.**

By \_\_\_\_\_

**Manny Juncos - Project Accountant**

**NOTE: CIVIL CODE SECTION 3262 (d)(1) PROVIDES:** Where the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a progress payment and the claimant is not, in fact paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall follow substantially the form set forth above

# UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

[California Civil Code S3262 (d)(2)]

The undersigned has been paid in full for all labor, services, equipment, or material furnished to:

Best Western Marina Pacific Hotel & Suites

located at 1697 Pacific Ave., Venice, CA 90291

and does hereby waive and release any right to a mechanic's lien, stop notice, or or any right against a labor and material bond on the job, except for disputed claims for extra work in the amount of \$ \_\_\_\_\_ with such extra work described as follows: \_\_\_\_\_

Dated: \_\_\_\_\_ PCL Construction Services, Inc.

By \_\_\_\_\_  
Manny Juncos - Project Accountant

**NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.**  
**NOTICE: THIS DOCUMENT WAIVES RIGHTS**

**NOTE: CIVIL CODE SECTION 3262 (d)(2) PROVIDES:** Where the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver it has, in fact, been paid the progress payment, the waiver and release shall follow substantially the form set forth above.

**Exhibit "H"**  
**to**  
**AIA Document A117 Agreement**  
**Between Marina Pacific Hotel & Suites LLC ("Owner")**  
**and PCL Construction Services, Inc. ("Contractor")**

**Alternative Dispute Resolution**

**1. Project Neutral**

The Owner, Architect and Contractor may agree to select a Project Neutral for the Project. The Project Neutral shall be experienced both in the design and construction of major real estate developments as well as the mediation of design and construction disputes. The parties shall select the Project Neutral from among the members of the construction panel of the American Arbitration Association or from other panels as mutually agreed to by the parties.

The Project Neutral, in close consultation with all involved parties, shall assist in resolving any disputes, claims, or other controversies that might arise from the commencement of design through issuance of the final certificate of occupancy and acceptance of the Project by the Owner. The Project Neutral shall have no adjudicatory authority and, therefore, shall act solely as a mediator in working with the parties.

If requested in writing by the parties, the Project Neutral shall attend the regular job meetings at the site of the Project. Also, the Project Neutral shall attempt to be available to attend any specific job-related meeting if so requested by the Owner, Architect and Contractor in writing. The Project Neutral also shall be available to confer or meet with any party or parties if so requested by the Owner, Architect and Contractor.

If the services of the Project Neutral are retained, they shall be provided on an hourly basis and the cost will be borne in equal parts by the Owner, Architect, Contractor, and any other necessary parties, including, but not limited to, consultants, subcontractors, sub-subcontractors, and suppliers (collectively, "Subcontractors") except as agreed to in writing between any Subcontractor and the parties.

The confidentiality of any discussion involving the Project Neutral shall be protected by all applicable statutes and case law with respect to mediation.

The term of service by the Project Neutral shall end on the same date as the Architect's services for the Construction Phase as detailed in Subparagraph 2.6.1 of the Agreement. The Project Neutral may be involved in subsequent dispute resolution negotiations or proceedings under the terms and conditions set forth herein.

**2. Executive Negotiations**

If there is any unresolved dispute(s), such dispute(s) may be resolved at any time by designated executives of the involved parties through direct negotiations before, in lieu of, or after engaging the Project Neutral. These direct negotiations shall be between or among executives with authority to resolve the dispute(s). To this effect, the executives shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable resolution satisfactory to the involved parties. These discussions are intended to be informal and must be conducted face-to-face.

The executives taking the lead in such negotiations may involve any other individuals or entities in the discussions that the lead executives deem appropriate.

Unless required by statute, no arbitration, court or other legal proceeding (except mechanic's lien rights) shall be initiated prior to sixty (60) days after issuance of the temporary certificate of occupancy and acceptance of the Project by the Owner.

The confidentiality of the executive negotiations shall be protected by all applicable statutes and case law with respect to settlement negotiations.

If, at the end of the sixty (60) day period following issuance of the temporary certificate of occupancy and acceptance of the Project by the Owner there are any dispute(s) remaining unresolved, such dispute(s) shall then be the subject of facilitated negotiation (i.e., with a professional construction mediator) (herein "mediation") between or among the involved parties.

### **3. Mediation**

If, at the end of the sixty (60) day period following issuance of the temporary certificate of occupancy and acceptance of the Project by the Owner there are any disputes remaining unresolved, such remaining dispute(s) may next be attempted to be resolved by mediation. Such mediation shall be conducted under the Construction Industry Mediation Rules of the American Arbitration Association. The cost of the mediation proceeding and the mediator shall be allocated under the rules and policies of the American Arbitration Association.

During mediation, the involved parties shall endeavor in good faith to resolve any and all remaining disputes which they have on the Project. Unless required by statute, no arbitration or other proceeding shall be initiated prior to thirty days after any party serves a written demand for mediation with the American Arbitration Association.

The confidentiality of the mediation shall be protected by all applicable statutes and case law with respect to mediated settlement negotiations.

If, after the passage of thirty (30) days from service of any written demand for mediation on the American Arbitration Association the mediation does not result in settlement of all disputes, then any unresolved claim or controversy arising from or relating to this contract shall be settled by arbitration or judicial reference to an arbitrator

as described in the following Subsections. The parties may agree to extend this thirty (30) day period.

**4. Post-Completion Dispute Resolution**

**a. Disputes with Less than \$10,000.00 in Controversy – Arbitration**

Within thirty (30) days from when a mediator declares the parties are at an impasse on one or more of their claims and/or controversies, or if no mediation occurs within the sixty (60) day period for Executive negotiations, the parties shall exchange letters which shall state in summary form those claims and/or controversies which each party contends are unresolved and the party's asserted value of those claims and/or controversies.

If after exchange the parties agree the total amount in controversy (i.e., taking into account both claims and counter-claims) is less than \$10,000.00, then such remaining disputes shall be settled by arbitration administered by American Arbitration Association in accordance with its Construction Industry Arbitration Rules, using a single arbitrator, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

**b. Disputes with \$10,000.00 or More in Dispute – Judicial Reference**

If after exchange of the letters the parties (1) cannot agree whether or not there is more or less than \$10,000.00 in dispute regarding Architect's claims or the threshold amount asserted by the Contractor, as specified in the Contractor's Agreement ("Contractor's Threshold"), or (2) agree that more than \$10,000.00 (or the Contractor's Threshold amount) is in dispute, the parties stipulate that trial by jury and judge is waived as to all unresolved claims or controversies. The party or parties seeking affirmative relief will then file a court action (or cross-complaint in an existing court action). The parties, however, expressly stipulate that all such court-filed claims or controversies shall be referred by the court to a referee who is agreed to by all parties pursuant to the LCCP Rules, as defined below, who will hear and determine all issues with respect to such claims and controversies, both as to the facts and the law, in accordance with its Construction Industry Arbitration Rules, the Rules of its Large, Complex Case Dispute Resolution Program of the American Arbitration Association (i.e., the "LCCP Rules"), and its Judicial Reference Procedures, as applicable.

The arbitrator selected shall be named in an order of the court as the referee, in accordance with the applicable law as to judicial references.

Within thirty (30) days of when the hearings in the case are closed under the LCCP Rules, the referee shall report its statement of decision to the court. Such statement of decision by the referee shall include a detailed, written opinion explaining the decision, including the referee's findings of fact and conclusions of laws.

Judgment on the referee's decision may be entered by the court as if the action had been tried in court.

The cost of the referee and/or the American Arbitration Association proceedings shall be borne by the participating parties as determined by the arbitrator or the court after the referee's decision is provided to the court. An order so providing can be entered by the court without further notice.

The intent of this Section is that the parties settle remaining claims valued together at \$10,000.00 (or the Contractor's Threshold amount) by way of judicial reference. The parties agree to take such actions as to enable a judicial reference whereby (1) the dispute is heard and determined under the LCCP Rules, (2) the statement of decision by the referee is provided to the court which then may enter the statement of decision as a judgment as if the case had been tried by the court, and (3) the normal rules with respect to appeals would apply as to the judgment thereby entered by the court. Notwithstanding any of the above, in the event that all or any portion of the statement of decision is reversed by the trial court or any appellate courts, any retrial of issues of fact shall be remanded to the original appointed referee(s). However, if the original referee(s) is unavailable due to death or retirement, the parties shall agree to substitute referee(s) by mutual agreement consistent with Paragraph 4.4.2.1, above. Notwithstanding any of the above, if the court wherein the judicial reference is filed finds that the judicial reference to the referee(s) is unenforceable as provided for herein, or otherwise declines to proceed in accordance with the judicial reference procedures herein, the parties agree to submit their claims to binding arbitration pursuant to the Construction Industry Rules of the American Arbitration Association unless otherwise mutually agreed to by the parties.

## **5. Incorporation by Reference**

The Architect agrees to incorporate these dispute resolution provision into any contracts, subcontracts and any other agreements with Subcontractors which it may enter into with respect to the Project. The expectation of the parties is that any entity or individual working on the Project for the Architect will be bound to resolve their disputes which involve the Owner, Architect, Contractor and/or any of their Subcontractors in one proceeding in which all parties will participate and be bound.

**5.1 Claims and Timely Assertion of Claims.** The party filing 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, except those Claims reserved by mutual agreement of the parties.

**5.2 Prehearings.** If there is an arbitration proceeding, there shall be a prehearing meeting between the parties at which each party shall present a memorandum disclosing the factual basis of its claim and defenses and disclosing legal issues raised. The memorandum shall also disclose the names of any expert a party intends to present as a witness during the proceedings. At the prehearing meeting, the arbitrator shall make rulings and set schedules for hearings consistent with their powers



as set forth in this paragraph. All hearings shall be held on consecutive weekdays until five (5) hearings have been held and shall be recommenced within seven (7) days of the last prior day of hearings.

**5.3 Joinder.** Notwithstanding any other provision of the Agreement, the American Arbitration Association may join to any arbitration under this Agreement an entity not a party to this Agreement or other arbitrations involving this Project if such joinder is necessary to a complete resolution of any common issues of law or fact.

**5.4 Discovery.** Notwithstanding any other provision herein, the parties shall be entitled to discover all documents and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration, subject to the Arbitrator's approval. The parties may use all methods of discovery available under the State of California discovery statutes and shall be governed thereby. Prior to the deposition of any expert witness, the party proposing to call such a witness shall provide a full and complete report by the expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The report shall be provided no less than ten (10) days prior to the date set for the expert witness' deposition. Any Rules of Evidence shall be applied by the arbitrators liberally.

**[END OF EXHIBIT "H"]**

**EXHIBIT "I"**  
to  
**AIA Document A117 Agreement**  
**Between Marina Pacific Hotel & Suites LLC ("Owner")**  
**and PCL Construction Services, Inc. ("Contractor")**  
**Key Personnel**

<i>POSITION</i>	<i>RATE</i>	<i>COMMENTS</i>
Project Manager	\$87 / hr	75%-time
Superintendent	\$83 / hr	Full-time
Project Engineer	\$68 / hr	Full-time
Project Accountant	\$49 / hr	4 days per month
Carpenter	\$56.50 / hr	As Required
Cement Mason	\$56.50 / hr	As Required
Laborer	\$49.65 / hr	As Required

**EXHIBIT B TO CLAIMANTS' FIRST AMENDED STATEMENT  
OF CLAIMS**

*MARINA PACIFIC ET AL. V. ALLEN MATKINS ET AL.*

ADRS Case No. 09-0641-DIJ



**MUTUAL SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS –**  
**MARINA PACIFIC**

This Mutual Settlement Agreement and Release of All Claims (hereinafter "Agreement") is made and entered into as of July 14, 2011, by, between and among (1) Plaintiff and Cross-Defendant MARINA PACIFIC HOTEL AND SUITES, LLC (hereinafter "MARINA PACIFIC"); (2) Defendant, Cross-Complainant and Cross-Defendant PCL CONSTRUCTION SERVICES, INC. (hereinafter "PCL"); (3) Defendant and Cross-Defendant ACTION GLASS & MIRROR (hereinafter "ACTION"); (4) Defendant and Cross-Defendant JUAN ANTONIO OCHOA (hereinafter "OCHOA"); (5) Defendant and Cross-Defendant MICHAEL LYNN MCDANIELS (hereinafter "MCDANIELS"); (6) Defendant and Cross-Defendant RONIT YEMINI CORPORATION, dba COASTAL TILE (hereinafter "COASTAL"); (7) Defendant and Cross-Defendant RAMIDESIGNS, INC. (hereinafter "RAMI"); (8) Intervenor LEXINGTON INSURANCE COMPANY, as intervenor on behalf of its insured, Defendant and Cross-Defendant ASMACS, a suspended corporation (hereinafter "ASMACS"); (9) Defendant and Cross-Defendant PETROLEUM BUSINESS SYSTEMS, INC., dba JT ELECTRIC (hereinafter "JT"); (10) Defendant and Cross-Defendant H&R CONSTRUCTION AND SURFACING, INC. (hereinafter "H&R"); (11) Cross-Defendant PELLA ARCHITECTURAL PRODUCTS, INC. dba PACIFIC ARCHITECTURAL MILLWORK nka PAM PRODUCTS, INC. (hereinafter "PELLA"); (12) Cross-Defendant W&W STEEL COMPANY (hereinafter "W&W"); and (13) Defendant and Cross-Defendant CMF, INC. (hereinafter "CMF") (collectively, "the PARTIES"). This Agreement is entered into with reference to the following facts:

**Mutual Settlement Agreement and Release of All Claims**

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**RECITALS**

A. On or about December 22, 2005, MARINA PACIFIC entered into a written contract with PCL (the "Prime Contract") for a remodel and an addition of a sixth floor and 30 associated ocean-view luxury guest suites at the Best Western Marina Pacific Hotel, currently known as "Hotel Erwin", located at 1697 Pacific Avenue in Venice (the "PROJECT"). On or about January 4, 2006, PCL entered into Subcontracts with ACTION, COASTAL, RAMI, ASMACS, JT, W&W and CMF. On or about March 26, 2006, PCL executed a Purchase Order with numerous revisions with PELLA. On or about May 10, 2006, PCL executed a Purchase Order with numerous revisions with H&R. The work was completed in phases with 46 rooms placed in use on or about June 16, 2006, 43 rooms placed into use on or about February 17, 2007, and 30 rooms placed into use on or about October 22, 2007.

B. MARINA PACIFIC is the owner of the PROJECT.

C. On July 2, 2009, MARINA PACIFIC filed its First Amended Complaint (hereinafter "FAC") in the litigation entitled *Marina Pacific Hotel and Suites v. PCL Construction Services, Inc., et al.*, Los Angeles County Superior Court Case BC408324 (hereinafter "CLAIM") alleging various construction defects at the PROJECT and naming as defendants, among others, PCL. MARINA PACIFIC asserted that damage was discovered in December 2007, but that the damage began prior to the date it was discovered. On May 19, 2010, COASTAL was named as Doe 17, JT was named as Doe 18, RAMI was named as Doe 19, CMF was named as Doe 21, and ASMACS was named as Doe 23 to MARINA PACIFIC's FAC. On September 28, 2010, ACTION was named as Doe 27 and

**Mutual Settlement Agreement and Release of All Claims**

Page 3

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H&R was named as Doe 28 to MARINA PACIFIC's FAC. Neither PELLA nor W&W were named to MARINA PACIFIC's FAC.

D. On June 10, 2011, PCL filed its Third Amended Cross-Complaint (hereinafter "TACC") in the CLAIM as against, among others, MARINA PACIFIC, ACTION, COASTAL, RAMI, ASMACS, JT, H&R, PELLA, W&W and CMF.

E. The CLAIM, FAC, TACC, and related cross-complaints, filed under Case Number BC408324, will be collectively referred to herein as "the LITIGATION."

F. Now, after engaging in, but not completing the discovery process, site inspections, and extended settlement negotiations, the PARTIES propose to resolve the LITIGATION and to release all claims, now pending or contemplated against all PARTIES to this Agreement related to performance of work at the PROJECT, except for those Claims related to or stemming from additional insured obligations of ACTION's, COASTAL's, JT's, PELLA's and W&W's insurers, and except for the exclusion stated in Section 8(a), *infra*.

G. Notwithstanding the terms of paragraph 8, which remain operative and binding between PCL and MARINA PACIFIC (as well as between and among all the PARTIES), it is understood and agreed between PCL and MARINA PACIFIC, *inter sese*, that MARINA PACIFIC is the party prevailing on the Prime Contract in the LITIGATION.

NOW, THEREFORE, in consideration of the mutual terms, promises, covenants and conditions contained herein and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the PARTIES do hereby agree as follows:

**Mutual Settlement Agreement and Release of All Claims**

**Page 4**

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1. **Incorporation of Recitals:** The Recitals are incorporated into this Agreement as though fully set forth herein.

2. **No Admission of Liability by Any Party:** This Agreement is entered into for the purpose of settlement and resolution of disputes and controversies only, and nothing herein shall be deemed to imply, constitute or be construed as an admission of liability or wrongdoing on the part of any PARTIES.

3. **Determination that Settlement Entered in "Good Faith":** This Agreement is expressly contingent upon judicial determination of the "good faith" of the settlement within the meaning and pursuant to the provisions of CAL. CIV. PROC. CODE Section 877.6. The PARTIES shall move the Court for such determination on their own behalf and will provide all cooperation and assistance as may reasonably be necessary in order to obtain such determination.

4. **Consideration:** In consideration for the foregoing releases and dismissals, as well as those referenced below, the PARTIES agree that each Settlement Payment shall be made via a draft or drafts payable to "Robertson & Associates, LLP Client Trust Account," Tax Identification Number 95-4754358. The PARTIES further agree that each Settlement Payment shall be delivered to the offices of MARINA PACIFIC's counsel, Robertson & Associates, LLC, with a copy to PCL's counsel, Peckar & Abramson, P.C., by no later than Wednesday, October 12, 2011, which is ninety (90) days from the date of settlement. The PARTIES further agree to contribute the following amounts:

(a) ACTION agrees to pay to MARINA PACIFIC the aggregate sum of One



**Mutual Settlement Agreement and Release of All Claims**

**Page 5**

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Million One Hundred Seventy Five Thousand Dollars and Zero Cents (\$1,175,000.00);

(b) COASTAL agrees to pay to MARINA PACIFIC the aggregate sum of Five Hundred Thousand Dollars and Zero Cents (\$500,000.00) and bring its additional insured obligations current, it being expressly understood that disputes regarding contribution for additional insured obligations are not the responsibility of PCL and, in the event of any such dispute, COASTAL will pay PCL the full amount of its unpaid defense fees and costs not later than October 12, 2011, and seek contribution from the other potentially responsible insurers without withholding payment of PCL's full defense fees and costs;

(c) RAMI, on behalf of itself and its insurers, Admiral Insurance Company and Scottsdale Insurance Company, agrees to pay to MARINA PACIFIC the aggregate sum of Two Hundred Twenty Five Thousand Dollars and Zero Cents (\$225,000.00);

(d) Lexington Insurance Company, as intervenor on behalf of itself and its insured, ASMACS, agrees to pay to MARINA PACIFIC the aggregate sum of One Million Dollars and Zero Cents (\$1,000,000.00) and bring its additional insured obligations current within the same timeframe set forth in Paragraph 4;

(e) JT agrees to pay to MARINA PACIFIC the aggregate sum of Sixty Thousand Dollars and Zero Cents (\$60,000.00);

(f) H&R, on behalf of itself and its insurer, Pro-Builders Specialty Insurance Co., agrees to pay to MARINA PACIFIC the aggregate sum of Two Hundred Thousand Dollars and Zero Cents (\$200,000.00);

**Mutual Settlement Agreement and Release of All Claims**

**Page 5**

Million One Hundred Seventy Five Thousand Dollars and Zero Cents (\$1,175,000.00);

(b) COASTAL agrees to pay to MARINA PACIFIC the aggregate sum of Five Hundred Thousand Dollars and Zero Cents (\$500,000.00) and bring its additional insured obligations current, it being expressly understood that disputes regarding contribution for additional insured obligations are not the responsibility of PCL and, in the event of any such dispute, COASTAL will pay PCL the full amount of its unpaid defense fees and costs not later than October 12, 2011, and seek contribution from the other potentially responsible insurers without withholding payment of PCL's full defense fees and costs;

(c) RAMI, on behalf of itself and its insurers, Admiral Insurance Company and Scottsdale Insurance Company, agrees to pay to MARINA PACIFIC the aggregate sum of Two Hundred Twenty Five Thousand Dollars and Zero Cents (\$225,000.00);

(d) Lexington Insurance Company, as intervenor on behalf of itself and its insured, ASMACS, agrees to pay to MARINA PACIFIC the aggregate sum of One Million Dollars and Zero Cents (\$1,000,000.00) and bring its additional insured obligations current within the same timeframe set forth in Paragraph 4;

The carrier for JT, Clarendon America,  
(e) ~~V~~ agrees to pay to MARINA PACIFIC the aggregate sum of Sixty Thousand Dollars and Zero Cents (\$60,000.00) on behalf of JT;

(f) H&R, on behalf of itself and its insurer, Pro-Builders Specialty Insurance Co., agrees to pay to MARINA PACIFIC the aggregate sum of Two Hundred Thousand Dollars and Zero Cents (\$200,000.00);

**Mutual Settlement Agreement and Release of All Claims**

**Page 6**

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(g) PELLA, through its insurer, agrees to pay to MARINA PACIFIC the aggregate sum of Ten Thousand Dollars and Zero Cents (\$10,000.00);

(h) W&W agrees to pay to MARINA PACIFIC the aggregate sum of Thirty Five Thousand Dollars and Zero Cents (\$35,000.00);

(i) CMF, on behalf of itself and its insurer, Axis Surplus Insurance Co., agrees to pay to MARINA PACIFIC the aggregate sum of Sixty Seven Thousand Five Hundred Dollars and Zero Cents (\$67,500.00) and bring its additional insured obligations current, it being expressly understood that disputes regarding contribution for additional insured obligations are not the responsibility of PCL and, in the event of any such dispute, CMF will pay PCL the full amount of its unpaid defense fees and costs not later than October 12, 2011, and seek contribution from the other potentially responsible insurers without withholding payment of PCL's full defense fees and costs;

(j) PCL agrees to pay to MARINA PACIFIC the aggregate sum of Five Hundred Seven Thousand Five Hundred Dollars and Zero Cents (\$507,500.00). PCL also agrees, as additional consideration, to waive its contract retention due from MARINA PACIFIC in the amount of Five Hundred Twenty-Five Thousand Dollars and Zero Cents (\$525,000.00); MARINA PACIFIC and PCL agree that the amounts paid by PCL referenced above in no way relate to or are in satisfaction of the liquidated damages assertions made by MARINA PACIFIC in its FAC; and

(k) As stated in the Memorandum of Settlement attached hereto as Exhibit 1, PCL hereby assigns to MARINA PACIFIC its rights against Thermalair with regard to the Project's HVAC system, and promises to cooperate in providing evidence bearing on Thermalair's contract,

**Mutual Settlement Agreement and Release of All Claims**

Page 7

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duties and performance.

5. **Disbursement of Settlement Funds:** Upon (1) a judicial determination by the Court that this settlement was entered into in "good faith," and (2) a fully executed copy of this Agreement, each of the PARTIES shall cause its attorneys to disburse the settlement funds and satisfy all obligations, as set forth in Paragraph 4 et seq. above, to and for the benefit of MARINA PACIFIC and PCL.

6. **Dismissal of FAC and TACC:** Upon confirmation that the funds payable to MARINA PACIFIC set forth in Paragraphs 4(a) through 4(j) have cleared the Robertson & Associates, LLP Client Trust Account, MARINA PACIFIC shall cause the FAC to be dismissed, with prejudice, against all PARTIES. Also at that time, PCL shall cause the TACC to be dismissed, with prejudice, against all PARTIES. Any existing cross-complaints shall be summarily dismissed, with prejudice, within ten (10) days of the date that the FAC and TACC dismissals are filed, whichever is filed later.

7. **Waiver of Attorneys' Fees and Costs:** Relative to each other, only, the PARTIES expressly waive any right or claim to recover any and all attorneys' fees and costs incurred in the LITIGATION except as otherwise contemplated herein. No part of the consideration for this Agreement includes any reimbursement for attorney fees incurred or paid by MARINA PACIFIC, which fees are subject of separate agreement between MARINA PACIFIC and its attorneys of record.

8. **Mutual Release:**

(a) **Release by MARINA PACIFIC:** Except as otherwise provided in this Agreement, MARINA PACIFIC, on behalf of itself and its respective members, owners, subsidiaries, stockholders, officers, directors, principals, beneficiaries, successors, assigns, partners, joint venturers, agents, servants, employees, attorneys, insurers and representatives, and each of them, do hereby absolutely, fully and forever release, relieve, waive, relinquish and discharge the PARTIES and each of its respective members, owners, subsidiaries, stockholders, officers, directors, principals, beneficiaries, successors, assigns, partners, joint venturers, agents, servants, employees, attorneys, insurers and representatives, related or associated entities or persons of any type or nature, and each of them, of and from any and all claims which MARINA PACIFIC may have, own or hold, or at any time heretofore had, owned or held, or at any time might hereafter acquire, own or hold, arising out of, or in any way relating to the PROJECT and the LITIGATION including, but not limited to, the work, services, materials, events, transactions and occurrences forming the basis of, or in any way relating to, the specific allegations set forth in the FAC in the CLAIM, or any amendment(s) thereto.

As stated in the Memorandum of Settlement attached hereto as Exhibit 1, exclusions from the release as to PCL include the coil corrosion of the chiller referred to in the letter dated March 12, 2007.

(b) **Release by PCL:** Except as otherwise provided in this Agreement, PCL, on behalf of itself and its respective members, owners, subsidiaries, stockholders, officers, directors, principals, beneficiaries, successors, assigns, partners, joint venturers, agents, servants, employees,

**Mutual Settlement Agreement and Release of All Claims**

Page 9

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attorneys, insurers and representatives, and each of them, do hereby absolutely, fully and forever release, relieve, waive, relinquish and discharge the PARTIES, and each of its respective members, owners, subsidiaries, stockholders, officers, directors, principals, beneficiaries, successors, assigns, partners, joint venturers, agents, servants, employees, attorneys, and representatives, related or associated entities or persons of any type or nature, and each of them, of and from any and all claims which PCL may have, own or hold, or at any time heretofore had, owned or held, or at any time might hereafter acquire, own or hold, arising out of, or in any way relating to the PROJECT or the LITIGATION including, but not limited to, the work, services, materials, events, transactions and occurrences forming the basis of the specific allegations set forth in PCL's TACC in the CLAIM, or any amendment(s) thereto.

Specifically excluded from this Release are any obligations stemming from additional insured rights that PCL has against ACTION's, COASTAL's, JT's, PELLA's and W&W's insurers. Also specifically excluded from this Release by PCL as to MARINA PACIFIC are PCL's claims and defenses in response to the exclusion set forth in MARINA PACIFIC's Release in Paragraph 8(a) of this Agreement.

(c) Release by Remaining PARTIES: Except as otherwise provided in this Agreement, the remaining PARTIES, on behalf of themselves and their respective members, owners, subsidiaries, stockholders, officers, directors, principals, beneficiaries, successors, assigns, partners, joint venturers, agents, servants, employees, attorneys, insurers and representatives, and each of them, do hereby absolutely, fully and forever release, relieve, waive, relinquish and discharge

## Mutual Settlement Agreement and Release of All Claims

Page 10

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MARINA PACIFIC, PCL, each of the other PARTIES and each of their respective members, owners, subsidiaries, stockholders, officers, directors, principals, beneficiaries, successors, assigns, partners, joint venturers, agents, servants, employees, attorneys, insurers and representatives, related or associated entities or persons of any type or nature, and each of them, of and from any and all claims which the PARTIES may have, own or hold, or at any time heretofore had, owned or held, or at any time might hereafter acquire, own or hold, arising out of, or in any way relating to the PROJECT, including, but not limited to, the events, transactions and occurrences forming the basis of, or in any way relating to, the specific allegations set forth in the LITIGATION, or any amendment(s) thereto.

(d) General Release and Waiver of Civil Code Section 1542: With the exception of that otherwise stated in this Agreement, the PARTIES each acknowledge their joint intention that, upon execution by all PARTIES, this Agreement shall be effective as a full and final accord and satisfaction and settlement of, and as a bar to, each and every claim which the PARTIES now have, or have had in the past, or might have in the future against each other and any and all other individuals and entities referred to and released under the terms of this Agreement arising out of, or in any way relating to the events, transactions and occurrences forming the basis of, or in any way relating to the Project and allegations set forth in the LITIGATION, or any amendment(s) thereto. In connection with such waiver and relinquishment, the PARTIES each acknowledge that they are aware that they or their attorneys may hereafter discover facts different from, or in addition to, the facts which they or their attorneys now know or believe to be true with respect to the subject matters

**Mutual Settlement Agreement and Release of All Claims**

Page 11

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of this Agreement or the Project, but that it is their joint intention that the releases herein given shall be and remain in full force and effect, notwithstanding the discovery of any such different or additional facts. Therefore, the PARTIES each acknowledge that they have been informed by their attorneys of and that they are familiar with, CAL. CIV. CODE Section 1542, which provides as follows:

**A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER, MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.**

The PARTIES, and each of them, do hereby waive and relinquish all rights and benefits they have or may have under CAL. CIV. CODE Section 1542, to the full extent that they may lawfully waive all such rights and benefits pertaining to the subject matters of this Agreement.

9. **Authority to Enter Into this Agreement:** The PARTIES to this Agreement represent and warrant to each other that each has full power, capacity and authority to enter into this Agreement.

10. **No Prior Assignment of Claims:** The PARTIES each represent and warrant to each other that they have not heretofore assigned or transferred, or purported to assign or transfer, to any person or entity any claim released herein. Any party to this settlement who violates this warranty agrees to indemnify and hold harmless all other PARTIES against any claim (including the payment of attorneys' fees and costs actually incurred, whether or not litigation is commenced), based upon any such assignment or transfer, or purported assignment or transfer.



## Mutual Settlement Agreement and Release of All Claims

Page 12

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11. **Binding Effect:** The provisions of this Agreement shall be deemed to obligate, extend to and inure to the benefit of the legal successors, assigns, transferees, grantees, heirs, executors, administrators, principals and beneficiaries of each of the PARTIES.

12. **Integration Clause:** This Agreement, together with the Memorandum of Settlement dated July 14, 2011, attached hereto as Exhibit 1, contains the entire agreement and understanding concerning the subject matters hereof between the PARTIES, and supersedes and replaces all prior negotiations, proposed agreements and agreements, written and oral. The PARTIES each acknowledge that no party, nor any agent or attorney of any party, has made any promise, representation or warranty whatsoever, express or implied, not contained herein concerning the subject matters hereof to induce such party to execute this Agreement; and further acknowledge that they have not executed this Agreement in reliance upon any such promise, representation or warranty not contained herein.

13. **Confidentiality:** The PARTIES agree not to publish any notice, statement, disclosure, or news release to non-parties to the Claim concerning the amount of any monies paid pursuant to this Agreement or concerning any other material terms, except as otherwise required by law and except as it relates to MARINA PACIFIC's currently pending litigation against the Allen Matkins law firm for legal malpractice, in which these terms may be admitted into evidence under seal and subject to a protective order. PCL shall reasonably cooperate in that litigation. In the event that the terms of this Agreement become the subject of discovery or court order to be produced in the Allen Matkins litigation, MARINA PACIFIC agrees that it shall seek a protective order to maintain

the confidentiality of the Agreement terms, as well as provide PCL with no less than 14 days notice to allow PCL adequate time to seek a protective order. Nothing in this provision shall preclude the PARTIES from disclosing the terms of the settlement or this Agreement as is necessary to their accountant(s), tax or financial planner(s), counsel, or insurance carriers as required by law.

14. **Legal Construction:**

(a) This Agreement is made and entered into in the State of California, and shall in all respects be interpreted, enforced and governed by and under the laws of that State.

(b) This Agreement shall be construed without regard to the identity of the person who drafted its various provisions; each and every provision of this Agreement shall be construed as though each of the PARTIES participated equally in the drafting of the same, and any rule of construction that a document is to be construed against the drafting party shall not be applicable to this Agreement.

(c) The paragraph and section headings herein have been inserted for convenience only, and shall not be construed or referred to in resolving questions of interpretation or construction.

15. **Further Assurances:** The PARTIES, without further consideration, agree to execute and deliver any other documents and take such other action as is reasonably necessary, convenient or desirable to effectuate the provisions of this Agreement.

16. **Counterparts:** This Agreement may be executed in counterparts, and so executed shall constitute an agreement which shall be binding upon all PARTIES hereto, notwithstanding that the signatures of all PARTIES' designated representatives do not appear on the same page.

## Mutual Settlement Agreement and Release of All Claims

Page 14

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17. **Modification:** This Agreement may be altered, amended, modified, revoked, or terminated only by an instrument in writing expressly referring to this Agreement, executed and signed by all of the PARTIES, and by no other means. Each of the PARTIES hereby waives the right to claim, contend, or assert in the future that this Agreement was modified, canceled, superseded, or changed by oral agreement, course of conduct, or estoppel.

18. **Enforcement:** In the event any litigation, arbitration, mediation, or other proceeding ("PROCEEDING") is initiated by any party against any other party to enforce, interpret or otherwise obtain judicial or quasi-judicial relief in connection with this Agreement or otherwise arising out of or directly or indirectly related to this Agreement, the prevailing party in such PROCEEDING shall be entitled to recover from the unsuccessful party all costs, expenses, reasonable attorneys' and expert witness fees, relating to or arising out of (a) such PROCEEDING (whether or not such PROCEEDING proceeds to judgment), and (b) any post-judgment or post-award proceeding including without limitation one to enforce any judgment or award resulting from any such PROCEEDING. A party shall only move for entry of judgment if there has been a breach of this Agreement, and the entry of judgment shall only be against the breaching party. The PARTIES are not limited to Code of Civil Procedure section 664.7 procedures for enforcement of the Agreement.

19. **Warranties:** The PARTIES warrant that no promise or inducement has been made or offered except as set forth herein, and that this Agreement is not executed in reliance upon any statement or representation of the PARTIES or their representatives, concerning the nature and extent of the damages or legal liability thereof. The PARTIES further represent that they have been

represented by legal counsel during the course of the negotiations leading to the signing of this Agreement, and that they have been advised by legal counsel with respect to the meaning of this Agreement and its legal effect.

20. **Successors-in-Interest and Assigns:** This Agreement shall be binding upon and shall inure to the benefit of the successors-in-interest and assigns of each party to this Agreement. Nothing in this Paragraph shall create any rights enforceable by any person not a party or third-party beneficiary to this Agreement, except for the rights of the successors-in interest and assigns of each party to this Agreement, unless such rights are expressly granted in this Agreement to other specifically identified persons.

21. **Severability:** The PARTIES agree that should any provision of this Agreement, or any portion of any provision, be declared or determined to be rescinded, void, illegal, invalid or unenforceable, the remainder of the provision and the Agreement shall nonetheless remain binding in effect.

22. **Non-disparagement:** Each of the PARTIES promises that it shall not disparage any of the other PARTIES with respect to the Project or the matters that are subjects of this Agreement.

23. **Facsimile and Electronic Signatures:** A signature sent via facsimile or as an image attachment to an electronic mail shall be the equivalent of and shall have the same force and effect as an original signature.

**Mutual Settlement Agreement and Release of All Claims**

Page 15

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represented by legal counsel during the course of the negotiations leading to the signing of this Agreement, and that they have been advised by legal counsel with respect to the meaning of this Agreement and its legal effect.

20. **Successors-in-Interest and Assigns:** This Agreement shall be binding upon and shall inure to the benefit of the successors-in-interest and assigns of each party to this Agreement. Nothing in this Paragraph shall create any rights enforceable by any person not a party or third-party beneficiary to this Agreement, except for the rights of the successors-in interest and assigns of each party to this Agreement, unless such rights are expressly granted in this Agreement to other specifically identified persons.

21. **Severability:** The PARTIES agree that should any provision of this Agreement, or any portion of any provision, be declared or determined to be rescinded, void, illegal, invalid or unenforceable, the remainder of the provision and the Agreement shall nonetheless remain binding in effect.

22. **Non-disparagement:** *omitted for W+W Steel purposes only.* Each of the PARTIES promises that it shall not disparage any of the other PARTIES with respect to the Project or the matters that are subjects of this Agreement.

23. **Facsimile and Electronic Signatures:** A signature sent via facsimile or as an image attachment to an electronic mail shall be the equivalent of and shall have the same force and effect as an original signature.

Mutual Settlement Agreement and Release of All Claims  
Page 16

WHEREFORE, the PARTIES execute this Agreement and make it fully effective:

DATED: Oct 6, 2011

MARINA PACIFIC HOTEL AND SUITES, LLC

By: Erwin H. Sokol

Name: ERWIN H. SOKOL

Title: MANAGER

DATED: \_\_\_\_\_

PCL CONSTRUCTION SERVICES, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

ACTION GLASS & MIRROR

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

By: \_\_\_\_\_

JUAN ANTONIO OCHOA

DATED: \_\_\_\_\_

By: \_\_\_\_\_

MICHAEL LYNN MCDANIELS

**Mutual Settlement Agreement and Release of All Claims**  
**Page 16**

WHEREFORE, the PARTIES execute this Agreement and make it fully effective:

DATED: \_\_\_\_\_

MARINA PACIFIC HOTEL AND SUITES, LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: 10/6/2011

PCL CONSTRUCTION SERVICES, INC.

By: 

Name: Douglas A. Schell

Title: Assistant Secretary

DATED: \_\_\_\_\_

ACTION GLASS & MIRROR

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

By: \_\_\_\_\_

JUAN ANTONIO OCHOA

DATED: \_\_\_\_\_

By: \_\_\_\_\_

MICHAEL LYNN MCDANIELS

WHEREFORE, the PARTIES execute this Agreement and make it fully effective:

DATED: \_\_\_\_\_

MARINA PACIFIC HOTEL AND SUITES, LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

PCL CONSTRUCTION SERVICES, INC.

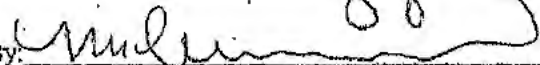
By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: 10/20/11

ACTION GLASS & MIRROR

By: 

Name: MICHAEL LYNN MCDANIELS

Title: PARTNER

DATED: \_\_\_\_\_

By: \_\_\_\_\_

JUAN ANTONIO OCHOA

DATED: \_\_\_\_\_

By: \_\_\_\_\_

MICHAEL LYNN MCDANIELS



Mutual Settlement Agreement and Release of All Claims

Page 16

WHEREFORE, the PARTIES execute this Agreement and make it fully effective:

DATED: \_\_\_\_\_

MARINA PACIFIC HOTEL AND SUITES, LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

PCL CONSTRUCTION SERVICES, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

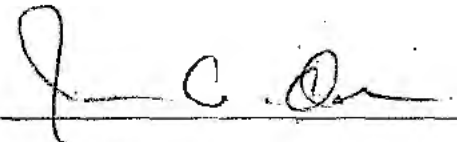
ACTION GLASS & MIRROR

By: \_\_\_\_\_

Name: \_\_\_\_\_

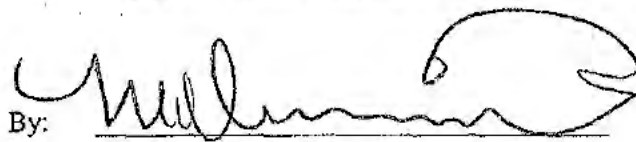
Title: \_\_\_\_\_

DATED: 10/18/11

By: 

JUAN ANTONIO OCHOA

DATED: 10/18/11

By: 


MICHAEL LYNN MCDANIELS

Mutual Settlement Agreement and Release of All Claims  
Page 17

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DATED: 10/26/11

RONIT YEMINI CORPORATION, DBA  
COASTAL TILE

By:   
Name: EYAL REGEV  
Title: Vice President

DATED: \_\_\_\_\_

RAMI DESIGNS, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

DATED: \_\_\_\_\_

LEXINGTON INSURANCE COMPANY as  
intervenor on behalf of its insured, ASMACS

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

DATED: \_\_\_\_\_

LEXINGTON INSURANCE COMPANY

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Mutual Settlement Agreement and Release of All Claims**  
**Page 17**

DATED: \_\_\_\_\_

RONIT YEMINI CORPORATION, DBA  
COASTAL TILE

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: 10.27.2011

RAMI DESIGNS, INC.

By: \_\_\_\_\_

Name: Ron Taibi

Title: President "Rami Designs, Inc."

DATED: \_\_\_\_\_

LEXINGTON INSURANCE COMPANY as  
intervenor on behalf of its insured, ASMACS

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

LEXINGTON INSURANCE COMPANY

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Mutual Settlement Agreement and Release of All Claims**  
**Page 17**

---

DATED: \_\_\_\_\_

RONIT YEMINI CORPORATION, DBA  
COASTAL TILE

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

RAMI DESIGNS, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

LEXINGTON INSURANCE COMPANY as  
intervenor on behalf of its insured, ASMACS

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: 10/13/11 *ref*

*Chertis Claims, Inc as authorized*  
LEXINGTON INSURANCE COMPANY

By: *Deborah Broom*

Name: *Deborah Broom*

Title: *A.V.P. Construction Defect*

Mutual Settlement Agreement and Release of All Claims  
Page 18

DATED: October 8, 2011

PETROLEUM BUSINESS SYSTEMS, INC., dba  
JT ELECTRIC

By: [Signature]  
Name: James U. Gelfer  
Title: Attorney retained by Carrier

It is believed that it is no longer functioning as an  
on going business and that the agent/president of  
JT is deceased  
H&R CONSTRUCTION AND SURFACING, INC.

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

DATED: \_\_\_\_\_

PELLA ARCHITECTURAL PRODUCTS, INC.  
dba PACIFIC ARCHITECTURAL MILLWORK  
nka PAM PRODUCTS, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

DATED: \_\_\_\_\_

W&W STEEL COMPANY

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Mutual Settlement Agreement and Release of All Claims

Page 18

DATED: \_\_\_\_\_

PETROLEUM BUSINESS SYSTEMS, INC., dba  
JT ELECTRIC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

H&R CONSTRUCTION AND SURFACING, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: 10/4/11

PELLA ARCHITECTURAL PRODUCTS, INC.  
dba PACIFIC ARCHITECTURAL MILLWORK  
nka PAM PRODUCTS, INC.

By: John B. Higan

Name: JOHN B. HIGMAN

Title: PRESIDENT

DATED: \_\_\_\_\_

W&W STEEL COMPANY

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Mutual Settlement Agreement and Release of All Claims  
Page 18

DATED: \_\_\_\_\_

PETROLEUM BUSINESS SYSTEMS, INC., dba  
JT ELECTRIC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

H&R CONSTRUCTION AND SURFACING, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

PELLA ARCHITECTURAL PRODUCTS, INC.  
dba PACIFIC ARCHITECTURAL MILLWORK  
nka PAM PRODUCTS, INC.

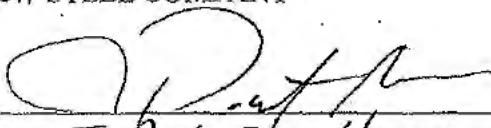
By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: 10/3/11

W&W STEEL COMPANY

By: 

Name: J. Patrick Hare

Title: Executive Vice Pres. & CEO

Mutual Settlement Agreement and Release of All Claims  
Page 19

---

DATED: 10-13-11

CMF, INC.

By: 

Name: D. B. Ducloux

Title: President/CEO



Mutual Settlement Agreement and Release of All Claims  
Page 20

APPROVED AS TO FORM AND CONTENT:

ROBERTSON & ASSOCIATES, LLP

DATED: 05/6, 2011

By: 

ALEXANDER ROBERTSON, IV, ESQ.  
ROBERT NATION, ESQ.  
Counsel for MARINA PACIFIC HOTEL  
AND SUITES, LLC

PECKAR & ABRAMSON, P.C.

DATED: \_\_\_\_\_

By: \_\_\_\_\_

TODD N. BRESSLER, ESQ.  
CHRISTOPHER S. FREDERICK, ESQ.  
SHIVA FATOORECHI, ESQ.  
Counsel for Defendant/Cross-Complainant,  
PCL CONSTRUCTION SERVICES, INC.

MURCHISON & CUMMING LLP

DATED: \_\_\_\_\_

By: \_\_\_\_\_

JEAN A. DALMORE, ESQ.  
Counsel for Defendants and Cross-Defendants,  
ACTION GLASS & MIRROR, JUAN  
ANTONIO OCHOA and MICHAEL LYNN  
MCDANIELS

**Mutual Settlement Agreement and Release of All Claims**  
**Page 20**

APPROVED AS TO FORM AND CONTENT:

ROBERTSON & ASSOCIATES, LLP

DATED: \_\_\_\_\_


By: \_\_\_\_\_

ALEXANDER ROBERTSON, IV, ESQ.  
ROBERT NATION, ESQ.  
Counsel for MARINA PACIFIC HOTEL  
AND SUITES, LLC

PECKAR & ABRAMSON, P.C.

DATED: 10/10/11

By: \_\_\_\_\_

  
TODD N. BRESSLER, ESQ.  
CHRISTOPHER S. FREDERICK, ESQ.  
SHIVA FATOORECHI, ESQ.  
Counsel for Defendant/Cross-Complainant,  
PCL CONSTRUCTION SERVICES, INC.

MURCHISON & CUMMING LLP

DATED: \_\_\_\_\_

By: \_\_\_\_\_

JEAN A. DALMORE, ESQ.  
Counsel for Defendants and Cross-Defendants,  
ACTION GLASS & MIRROR, JUAN  
ANTONIO OCHOA and MICHAEL LYNN  
MCDANIELS

Mutual Settlement Agreement and Release of All Claims  
Page 20

APPROVED AS TO FORM AND CONTENT:

ROBERTSON & ASSOCIATES, LLP

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
ALEXANDER ROBERTSON, IV, ESQ.  
ROBERT NATION, ESQ.  
Counsel for MARINA PACIFIC HOTEL  
AND SUITES, LLC

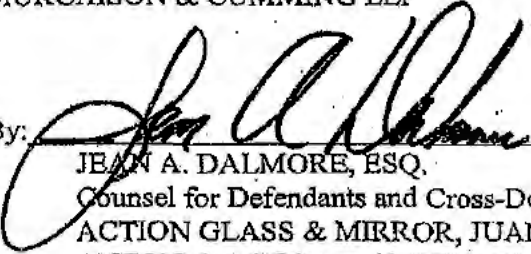
PECKAR & ABRAMSON, P.C.

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
TODD N. BRESSLER, ESQ.  
CHRISTOPHER S. FREDERICK, ESQ.  
SHIVA FATOORECHI, ESQ.  
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PCL CONSTRUCTION SERVICES, INC.

MURCHISON & CUMMING LLP

DATED: Oct. 20, 2011

By:  \_\_\_\_\_  
JEAN A. DALMORE, ESQ.  
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ANTONIO OCHOA and MICHAEL LYNN  
MCDANIELS

Mutual Settlement Agreement and Release of All Claims

Page 21

NORTHRUP SCHLUTER

DATED: October 11, 2011

By: DA S LA

DAVID S. SCHLUETER, ESQ.  
LAURA A. REILAND, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
RONIT YEMINI CORPORATION, dba  
COASTAL TILE

PRINDLE AMARO GOETZ HILLYARD  
BARNES & REINHOLTZ

DATED: \_\_\_\_\_

By: \_\_\_\_\_

TREVOR M. KNOPF, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
RAMI DESIGNS, INC.

LAW OFFICE OF KEVIN PEGAN

DATED: \_\_\_\_\_

By: \_\_\_\_\_

FRANK SINATRA, III, ESQ.  
Attorneys for LEXINGTON INSURANCE  
COMPANY and Intervenor LEXINGTON  
INSURANCE COMPANY on behalf of its  
insured, Defendant and Cross-Defendant  
ASMACS, a suspended corporation

Mutual Settlement Agreement and Release of All Claims

Page 21

NORTHROP SCHLUTER

DATED: \_\_\_\_\_

By: \_\_\_\_\_

DAVID S. SCHLUETER, ESQ.  
LAURA A. REILAND, ESQ.  
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COASTAL TILE

PRINDLE AMARO GOETZ HILLYARD  
BARNES & REINHOLTZ

DATED: Oct. 18, 2011

By:  \_\_\_\_\_

TREVOR M. KNOFF, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
RAMI DESIGNS, INC.

LAW OFFICE OF KEVIN PEGAN

DATED: \_\_\_\_\_

By: \_\_\_\_\_

FRANK SINATRA, III, ESQ.  
Attorneys for LEXINGTON INSURANCE  
COMPANY and Intervenor LEXINGTON  
INSURANCE COMPANY on behalf of its  
insured, Defendant and Cross-Defendant  
ASMACS, a suspended corporation

Mutual Settlement Agreement and Release of All Claims  
Page 21

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NORTHRUP SCHLUTER

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
DAVID S. SCHLUETER, ESQ.  
LAURA A. REILAND, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
RONIT YEMINI CORPORATION, dba  
COASTAL TILE

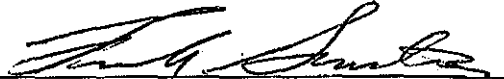
PRINDLE AMARO GOETZ HILLYARD  
BARNES & REINHOLTZ

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
TREVOR M. KNOPF, ESQ.  
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RAMI DESIGNS, INC.

LAW OFFICE OF KEVIN PEGAN


DATED: 10/19/11

By:   
FRANK SINATRA, III, ESQ.  
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COMPANY and Intervenor LEXINGTON  
INSURANCE COMPANY on behalf of its  
insured, Defendant and Cross-Defendant  
ASMACS, a suspended corporation

Mutual Settlement Agreement and Release of All Claims

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WAIT & COLFER

DATED: October 8, 2011 By:   
JAMES L. COLFER, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
PETROLEUM BUSINESS SYSTEMS, INC.,  
dba JTELECTRIC

TYSON & MENDES LLP

DATED: \_\_\_\_\_ By: \_\_\_\_\_  
PATRICK J. MENDES, ESQ.  
A. PALOMA RAMIREZ, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
H&R CONSTRUCTION AND SURFACING,  
INC.

SELMAN BREITMAN LLP

DATED: \_\_\_\_\_ By: \_\_\_\_\_  
ELAINE K. FRESCH, ESQ.  
LUIS A. BARBA, ESQ.  
Attorneys for Cross-Defendant, PELLA  
ARCHITECTURAL PRODUCTS, INC. dba  
PACIFIC ARCHITECTURAL MILLWORK  
nka PAM PRODUCTS, INC.

Mutual Settlement Agreement and Release of All Claims  
Page 22

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WAIT & COLFER


DATED: \_\_\_\_\_

By: \_\_\_\_\_

JAMES L. COLFER, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
PETROLEUM BUSINESS SYSTEMS, INC.,  
dba JT ELECTRIC

TYSON & MENDES LLP

DATED: 10/13/11

By: 

PATRICK J. MENDES, ESQ.  
A. PALOMA RAMIREZ, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
H&R CONSTRUCTION AND SURFACING,  
INC.

SELMAN BREITMAN LLP

DATED: \_\_\_\_\_

By: \_\_\_\_\_

ELAINE K. FRESCH, ESQ.  
LUIS A. BARBA, ESQ.  
Attorneys for Cross-Defendant, PELLA  
ARCHITECTURAL PRODUCTS, INC. dba  
PACIFIC ARCHITECTURAL MILLWORK  
nka PAM PRODUCTS, INC.



Mutual Settlement Agreement and Release of All Claims  
Page 22

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WAIT & COLFER

DATED: \_\_\_\_\_

By: \_\_\_\_\_

JAMES L. COLFER, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
PETROLEUM BUSINESS SYSTEMS, INC.,  
dba JT ELECTRIC

TYSON & MENDES LLP

DATED: \_\_\_\_\_

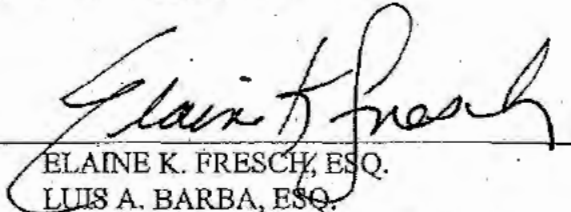
By: \_\_\_\_\_

PATRICK J. MENDES, ESQ.  
A. PALOMA RAMIREZ, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
H&R CONSTRUCTION AND SURFACING,  
INC.

SELMAN BREITMAN LLP

DATED: 10-7-11

By: \_\_\_\_\_

  
ELAINE K. FRESCH, ESQ.  
LUIS A. BARBA, ESQ.  
Attorneys for Cross-Defendant, PELLA  
ARCHITECTURAL PRODUCTS, INC. dba  
PACIFIC ARCHITECTURAL MILLWORK  
nka PAM PRODUCTS, INC.

OSMAN & ASSOCIATES

DATED: 10/3/11

By: Carrie Phelan  
CARRIE PHELAN, ESQ.  
Attorneys for Cross-Defendant, W&W STEEL  
COMPANY

COOKSEY TOOLEN GAGE DUFFY & WOOG

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
PHIL WOOG, ESQ.  
SARAH K. GALATSI, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
CMF, INC.

OSMAN & ASSOCIATES

DATED: \_\_\_\_\_

By: \_\_\_\_\_

CARRIE PHELAN, ESQ.  
Attorneys for Cross-Defendant, W&W STEEL  
COMPANY

COOKSEY TOOLEN GAGE DUFFY & WOOG



DATED: \_\_\_\_\_

By: \_\_\_\_\_

PHIL WOOG, ESQ.  
SARAH K. GALATSI, ESQ.  
Attorneys for Defendant and Cross-Defendant,  
CMF, INC.

**EXHIBIT C TO CLAIMANTS' FIRST AMENDED STATEMENT  
OF CLAIMS**

*MARINA PACIFIC ET AL. V. ALLEN MATKINS ET AL.*

ADRS Case No. 09-0641-DIJ



10/24/05

# AIA Document A111™ – 1997

## **Standard Form of Agreement Between Owner and Contractor**

*where the basis for payment is the COST OF THE WORK PLUS A FEE with a negotiated Guaranteed Maximum Price*

AGREEMENT made as of the 19th day of October in the year of 2005.  
(In words, indicate day, month and year)

**BETWEEN the Owner:**

(Name, address and other information)  
South Bay Storage, LLC  
1697 Pacific Avenue Venice, CA 90291  
Telephone: (310) 452-1111  
Facsimile: (310) 452-5479  
Attn: Erwin H. Sokol, Trustee

and the Contractor:

(Name, address and other information)  
Gary Monroe, Inc.; a California Corporation  
dba GMI Construction  
8861 Research Drive, Suite 200  
Irvine, CA 92618-4236  
Telephone: 949.428.7790  
Facsimile: 949.428.7791  
License No.: 727742  
Attn: Gary F. Monroe

The Project is:

(Name and location)  
South Bay Storage  
1234 W. Anaheim Street  
Harbor City CA 90710

**ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This document is not intended for use in competitive bidding

AIA Document A201-1997, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

This document has been approved and endorsed by the Associated General Contractors of America.

**A. Project Details:** As further detailed in Exhibits "A" through Exhibit "I", the Project includes, but is not limited to, all work, services (including certain design/build services, if any, such as the production of design documents for (1) Mechanical, (2) Electrical, (3) Plumbing, (4) Fire Protection, and (5) Fire-Life Safety), materials, equipment and tools necessary to construct and complete, to the Owner's satisfaction and in conformance with the Legal Requirements and the Contract Documents, the Project located at 1234 W. Anaheim Street, Harbor City, CA 90710 (collectively the "Work").

**B. Project Phases:** The first phase of the Work ("First Phase") shall include the construction of approximately 678 linear feet of retaining walls, as more fully described in Exhibit "A" and in the Construction Documents. The subsequent phases of the Work to construct the storage buildings, office and site work ("Subsequent Phases") will be added to this Agreement by one or more Change Orders approved in writing by the Owner and Contractor prior to commencing such subsequent phases of the Work. The Contractor shall comply with all Legal Requirements applicable to the Contractor including, but not limited to, all laws, codes, statutes, rules, regulations, and the interpretation of same, by any applicable authorities having jurisdiction over the Project (collectively "Legal Requirements"). Notwithstanding any of the above, the Contractor shall not be responsible for comply with the Americans with Disability Act beyond constructing the

Project in accordance with the Construction Documents. However, the Contractor shall comply with the subdivision approvals and conditional permits, copies of which have been provided by the Owner to the Contractor. Further, if the Contractor becomes aware of any bid fixing or fixing of prices and does not replace such bids or prices with competitive bids or prices, then the Contractor shall pay the Owner for the difference between the fixed bids and prices and competitive bids or prices.

**C. Hillside Work:** Included in and adjacent to the Project Site is a hillside area with several residential properties therein. The Owner is informed that the hillside area has experienced instability in the past. Accordingly, extensive retaining walls and grading are included in Contractor's Scope of Work to remediate this situation and eliminate any future instability. In performing this Work, the Contractor shall comply with all Legal Requirements, including all local hillside ordinances. Further, the Contractor shall meet with the Owner and the owners of the adjacent residential properties to review the Contractor's Scope of Work to be performed in the hillside areas. Finally, the Owner's geotechnical consultant has conducted a survey of the adjacent residential properties, including room by room surveys and measurements in order to document the current base line status of these residential properties. The intent of such surveys is to assist in evaluating any claims for subsidence, cracking or other impacts that may result from the grading and retaining wall Work. The Contractor shall make a good faith effort to perform this Work so as to avoid any subsidence, cracking or other impacts to the adjacent properties.

**D. Owner and Owner's Representative Not Acting As Contractors:** Although Mark Sokol, Erwin Sokol and Jeff Bay are licensed contractors, they are not, in any way, acting as contractors on this Project. All requirements under this Agreement, the Exhibits and the A201-1997 are to be performed exclusively by the Contractor and its subcontractors and not in any way by the Owner. If any claims are asserted against the Owner or the Owner's Representative alleging that they acted as licensed contractors for this Project, the Contractor shall provide them with defense and indemnity pursuant to Article 3.18 of the A201-1997. Any decisions required of the Owner hereunder, such as approvals of Change Orders, shall be decisions made by the Owner strictly in its capacity as an owner and not a contractor. Further, all such decisions must be made by the Owner in writing and not by the Owner's Representative as further detailed in Paragraph 14.3, herein.

The Architect is:  
(Name, address and other information)  
Valli Architectural Group  
81 Columbia, Suite 200  
Aliso Viejo, CA 92656  
Telephone: (949) 349-1777  
Facsimile: (949) 349-1778

The Owner and Contractor agree as follows:

#### ARTICLE 1 THE CONTRACT DOCUMENTS

**§ 1.1 Contract Documents.** The Contract Documents consist of the following, which, together with Modifications made in the manner provided therein and issued subsequent to the execution of the Agreement, form the "Contract":

- (i) The Agreement;
- (ii) The General Conditions of the Contract for Construction, AIA Document A-201-1997, modified and attached hereto and incorporated herein by this reference ("A-201-1997"); and
- (iii) The Project Specifications and Drawings, incorporated herein by this reference, prepared by the Architect and listed in Article 15 and Exhibit "A". Such Project Specifications and Drawings may be revised by the Owner, of which the Drawings govern the Specifications for quantity and location, and the Specifications govern the Drawings for quality and performance. The Work called for in the Drawings and not mentioned in the Specifications, or vice versa, shall be performed as if fully set forth in both.

**§ 1.2 Discrepancy and Priority of Documents.** If, and to the extent of any inconsistency, ambiguity, discrepancy or error in the Contract Documents (referred to collectively in this Article 1 as “Discrepancy”), the Contractor shall immediately notify the Owner, and unless agreed to otherwise by the parties, correct the Discrepancy by providing the Project with the highest quality or largest quantity reasonably inferable from the Contract Documents and in the Owner’s best interest. The Contractor shall give precedence to the Contract Documents in the following order of priority:

- (i) Modifications and Change Orders executed by the Owner and the Contractor and issued after execution of this Agreement;
- (ii) This Agreement, including all Exhibits attached hereto, except Article 15 and the “Scope of Work, Project Specifications, Drawings and Project Manual” contained in Exhibit “A”;
- (iii) The A201-1997 to this Agreement;
- (iv) The Specifications listed in Exhibit “A” and Article 15 of this Agreement; and
- (v) The Drawings listed in Exhibit “A” and Article 15 of this Agreement.

## **ARTICLE 2 THE WORK OF THIS CONTRACT**

**§ 2.1 Execution of Work.** The Contractor shall fully execute the Work described in the Contract Documents, and reasonably inferable as necessary to produce the results intended by the Contract Documents, in conformance to the Legal Requirements and to the satisfaction of the Owner.

**§ 2.2 Contractor Liability.** While performing its Work, The Contractor shall not deviate from the intent or the information provided in the Construction Documents and other Contract Documents. The Contractor must carefully review and analyze all such documents and suggest any changes or modifications to all such documents as necessary to perform the Work for the Project. The Contractor shall be liable for all damages resulting from the Contractor’s negligence, willful misconduct or breach or contract arising out of or occurring on the entire Project with respect to all Work performed by the Contractor, its subcontractors, sub-subcontractors, consultants, suppliers of any tier and entities performing pursuant to a purchase order (collectively, “Subcontractors”) without qualification. Furthermore, Owner’s agents will continue to refine the Drawings and Specifications and participate in the efforts to meet the Owner’s desired budget. Owner’s agents will perform their services in a reasonable manner so as not to delay the Project completion. The Contractor will endeavor in good faith to assist the Owner and its agents in this effort.

**§ 2.3 Recommendations/Value Engineering.** If requested by the Owner at no additional cost, the Contractor shall assist the Owner and the Architect in making revisions to the Drawings and Specifications by furnishing recommendations to the Owner and the Architect and performing value engineering and general consultative services, which will assist in achieving the Owner’s design objectives including, without limitation, the time of construction, cost of construction, functional performance and aesthetic goals. Factors that the Contractor shall consider includes, without limitation; space use, selection of building materials and systems, availability of labor, methods of construction and any other similar items. Particular attention shall be given to alternate design proposals, possible economies and identification of options that will maximize the benefits that the Owner will derive from the completion of the Work. As requested by the Owner, the Contractor shall prepare a specific analysis of the cost effectiveness and performance capabilities of any building system or component under consideration or specified for the Work, recommendation on logistics and any other studies that are required to successfully complete the Work. The Owner agrees that the Contractor is not a design professional or a design/build for this Project except for specific design/build Scopes of Work as detailed in the Construction Documents, if any. Any recommendations made by the Contractor shall be reviewed by the Owner’s design consultants. With respect to design issues, except for design/build aspects of the Work, the Owner shall rely solely upon the Owner’s design consultants and the Contractor shall have no liability with respect to the design, except for design build aspects of the Work, notwithstanding that the design may have been modified due to recommendations made by the Contractor.

**§ 2.4 Skilled Personnel.** The Contractor shall furnish only skilled and properly trained staff for the performance of the Work. The persons in the Contractor’s employ filling the following positions shall be persons approved by the Owner:

Project Manager: Dan Tedder  
Project Superintendent: Peter Barrett



§ 2.4.1 **Owner Approval of Changes in Personnel.** Any such person shall not be changed without the written consent of the Owner, unless such person becomes unable to perform any required duties due to death, disability, transfer or termination of employment with the Contractor. If any such person is no longer capable of fulfilling the requirements of their position, the Owner and Contractor shall agree on mutually acceptable substitute.

§ 2.4.2 **Superintendent.** During the performance of the Work, the Contractor shall keep a competent Project Superintendent at the Project Site fully authorized to act on behalf of the Contractor. Notice from the Owner to the Project Manager in connection with the Work shall be considered notice to the Contractor.

§ 2.5 **Financial Condition.** See Paragraph 2.13 (c) of this Agreement.

§ 2.6 **Standard of Care.** Contractor warrants that the Work will meet or exceed Owner's expressed intended purposes and will be provided within a high standard of care consistent with other construction firms providing similarly complex and high quality services and work in similar projects within Southern California. Contractor shall supervise and be responsible to Owner for the performance of Work by Contractor and any and all of the Contractor's Subcontractors and shall be present on the Project site at all times during the performance of such Work.

§ 2.7 **Subcontractors.** The Contractor shall prepare agreements between itself and each Subcontractor and shall supervise the furnishing of all services, labor and supplies required by such agreements. The parties shall conduct "buy out" meetings to review all of the bids before any subcontracts are awarded. The parties shall mutually agree upon the Contractor's Subcontractors to be retained for the Project. The Contractor shall then retain the selected Subcontractors using the Contractor's standard subcontract agreement. The Contractor shall receive the Owner's prior-written approval before any material modifications are made to the Contractor's form subcontract or before any modified subcontracts are executed by any Subcontractors.

§ 2.8 **Licenses.** The Contractor shall be properly licensed and shall provide, through properly licensed professionals, Subcontractors or consultants, all applicable construction and design/build services for all Work and any necessary structural, mechanical, plumbing and electrical aspects of the Work as detailed herein.

§ 2.9 **Construction.** Unless otherwise specified in the Contract Documents, all materials shall be new and of good quality and the Contractor shall, if required by the Owner or any Agency (as defined in Paragraph 2.13, herein) furnish satisfactory evidence to the Owner and such Agency as to the kind and quality of materials.

§ 2.10 **Administrative Staff.** The Contractor's Fee shall (i) include all the Work performed by its executive and administrative staffs, estimating departments, engineering departments, purchasing departments, accounting and auditing departments, and (ii) include their availability, as applicable, to assist in value engineering, the purchase of materials and equipment, the preparation of estimates, the material detailing, the negotiation of Subcontracts and the expediting of the delivery of materials in connection with the Work.

§ 2.11 **Project Meetings.** Appropriate executive, administrative, supervisory and field personnel of the Contractor shall attend Project meetings with the Owner and its agents and representatives at least weekly or at such times and in such places as the Owner shall reasonably determine.

§ 2.12 **Payments.** The Contractor shall receive, audit and approve all Applications for Payments from the Subcontractors performing the Work and providing materials for the construction of the Project before submitting its Application for Payment to the Owner. Unless otherwise required by law, the Contractor shall pay all such Subcontractors within ten (10) days after receipt of payment from the Owner except for any amount that the Contractor is entitled to retain for retainage, including additional retainage for incomplete or unsatisfactory Work under any Subcontract and for the Contractor's obligation to maintain the Project site free of mechanic's lien or material suppliers' liens as long as all undisputed amounts are paid by the Owner to the Contractor. All such payments shall be made in accordance with the provisions contained herein.

§ 2.13 **Agencies.** The Contractor shall furnish any and all governmental agencies, lenders and entities providing funds for construction or permanent financing of the Project (collectively, the "Agencies" or the "Lenders") with such documents, instruments and certificates as may be required by the Agencies in a form acceptable to the Agencies with respect to the Work and the payment of the costs in connection therewith which may include, without

limitation, (a) the Contractor's Consent and Agreement, (b) an Assignment of Construction Contracts, (c) the Contractor's resume and a current financial statement and the last audited financial statement, (d) a breakdown of the cost by category (and in compliance with the Agencies' requirements) of the Work included in the construction of the Project certified by the Contractor to be true and complete in substantially the form of a cost certificate, (e) a disbursement schedule (in form and content acceptable to the Agencies) setting forth the dates on which the Contractor expects to request payment and specifying the portion(s) of the Work, materials and other costs to be covered by such requests for payment ("Disbursement Schedule"), (f) one (1) set of "as-built" drawings marked to include all changes and modifications thereto and including the Drawings and Specifications, as revised, for architectural, structural, mechanical, plumbing, electrical and other Work, with one (1) hard copy set of "blue line" prints and one (1) set of sepia plans (all certified by the Contractor) (collectively "As-Built Drawings"), (g) certificates that the Work has, to date, been performed in accordance with the Contract Documents, all Legal Requirements, in compliance with all safety requirements, the Schedule and that the Work will be substantially completed on or before the Date of Substantial Completion and finally completed on or before the Date of Final Completion, (h) a certificate of Substantial Completion, and (i) a Temporary Certificate of Occupancy issued by the governmental authorities having jurisdiction over the Project. Two (2) copies of each of the documents described in clauses (a), (b), (c), (d) and (e) above shall be executed by the Contractor and submitted to the Owner. The documents described in clauses (f), (g), (h) and (i) above shall be executed by the Contractor and delivered to the Owner and each Agency, if necessary, on or before the date the Contractor submits its final Application for Payment for the Work. Before final payment, the Contractor shall deliver to the Owner the As-Built Drawings accurately reflecting the building's condition.

**§ 2.14 Site Decorum.** The Contractor shall control the conduct of its employees while on the Project so as to prevent unwanted interaction initiated by the Contractor's employees towards the occupants of and visitors to the Project Site (the "Occupants") and any other individuals not associated with the Project. In the event the Contractor's employees initiate unwanted interaction or use profanity, illegal drugs or alcohol, loiter or gather unnecessarily, the Contractor shall either upon the request of the Owner or at its own initiative, replace such employees with others of equivalent technical skill at no additional cost to the Owner. Furthermore, (i) no radios, other than the two-way communication type, will be allowed on the Project Site; (ii) no smoking is allowed in the manager's unit and during installation of the Project finishes; (iii) no weapons of any kind will be allowed on the Project Site; and (iv) eating will be allowed only in areas so designated by the Owner.

**§ 2.15 Owner Improvements.** The Contractor shall cooperate in good faith with all the Owner-retained contractors, if any, to facilitate the construction and installation of certain Owner improvements in the Project ("Owner Improvements") as the Owner may designate in writing and coordinate the Work with the work of all such contractors hired to construct and install the Owner Improvements ("Owner's Contractors"), including but not limited to:

- (i) Shared use of site and completed portions of the Project, including storage;
- (ii) Shared use of parking for construction personnel as shall be reasonably approved by Project Superintendent;
- (iii) Allow the Owner's Contractors to commence construction as reasonably approved in writing by the Owner and Contractor;
- (iv) Protection of each other's adjacent materials; and
- (v) Shared use of loading, elevator or hoisting facilities.

The Owner-retained contractors, the Contractors and Subcontractors are each responsible for their own staging, parking, hoisting, and installation of their work. Each of these entities will be required to adhere to the work and safety plan outlined by the Contractor for this Project, which has been generally approved by the Owner, including the coordination of the remediation of contaminated soil by the Owner-retained contractor, if applicable. Each Owner-retained contractor shall name the Contractor as an additional insured on its policies.

The costs of providing and performing the above items, including, but not limited to coordination, access, storage, and use of the Project, shall be included in the Contract Sum. Notwithstanding anything herein, if the Owner Improvements are coordinated by the Contractor, but the Owner-retained contractors still create unavoidable situations where the Contractor must demobilize, remobilize or is otherwise disrupted (collectively "Interferences"), the Contractor shall provide the Owner with a Change Order reflecting the Contractor's reasonable direct expenses for such interference.

**§ 2.16 Ongoing Operations/Work Hours.** Working hours for this Project shall be in accordance with the applicable Legal Requirements. Furthermore, the Contractor understands and agrees that the Work may take place in connection with or adjacent to ongoing business operations. As may be necessary and appropriate, the Owner may request that the Contractor schedule its operations so as to limit or minimize equipment noise during peak class or activity times.

### ARTICLE 3 RELATIONSHIP OF THE PARTIES

The Contractor accepts the fiduciary relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Owner, Architect, and the consultants and separate Contractors retained by Owner and exercise the Contractor's best skill, efforts and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests and consistent with the representations and warranties set forth herein. The Owner agrees to furnish and approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with the requirements of the Contract Documents.

### ARTICLE 4 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

**§ 4.1 Commencement of Work.** The date of commencement of the Work shall be the date of this Agreement 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 ("Commencement Date").

*(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 Work shall commence within five (5) days of receipt of the Owner's written notice to proceed for the First Phase of the Work. The Subsequent Phases shall commence within five (5) days of receipt of the Owner's written notice to proceed and if the following items are provided to the Contractor: (a) reasonable evidence that the Owner has obtained property insurance for the Project; (b) reasonable acceptance of the retaining walls by the Owner and applicable public agencies; (c) all necessary permits for the Subsequent Phases are obtained by the Owner with the full cooperation and assistance of the Contractor; (d) Change Orders for the Subsequent Phases are executed by the Owner and Contractor; and (e) the Owner has provided reasonable evidence of funding for the Subsequent Phases. If, prior to commencement of the Work, the Owner requires time to record mortgages, mechanic's liens and other security interests, the Owner's time requirement shall be as follows: Not Applicable

**§ 4.2 Contract Time.** The Contract Time shall be measured from the Commencement Date and should be calculated by counting calendar days (Monday through Sunday).

**§ 4.3 Substantial Completion.** The Contractor shall achieve Substantial Completion of the First Phase of the Work not later than one hundred and two (102) calendar days from the Commencement Date ("Completion Date"). The dates for Substantial Completion of the Subsequent Phases shall be established by Change Order. Final Completion of the entire Work shall be achieved within thirty (30) days of Substantial Completion of all phases of the Work (the "Final Completion Date"). "Final Completion" shall mean the date on which (i) the Owner and Architect accept the interior and the exterior of all the Work; (ii) the Owner and Architect are satisfied that all Punchlist Work has been completed; and (iii) the Contractor has obtained a certificate of occupancy for the Work. Time is of the essence with respect to this Agreement. Contractor agrees to use its best efforts to substantially complete the First Phase of the Work within one hundred and two (102) calendar days from the Commencement Date and all Subsequent Phases of the Work as agreed to by Change Order.

*(Insert number of calendar days. Alternatively, a calendar date may be used when coordinated with the date of commencement. Unless stated elsewhere in the Contract Documents, insert any requirements for earlier Substantial Completion of certain portions of the Work.)*

The Contractor acknowledges that the Owner will incur actual damages, including but not limited to, loss of income, if the Work is not substantially complete by the date indicated in this Paragraph 4.3 or Exhibit "B". If Contractor shall fail to complete the Work on or prior to the date indicated in Paragraph 4.3 or Exhibit "B", or a portion of the Work on or prior to the dates indicated in Paragraph 4.3 or Exhibit "B", and such delay is not caused by (i) the negligence or willful misconduct of the Owner, its agents, employees or assignees, or (ii) the failure of the Owner and the Architect to provide the drawings necessary to obtain the building permits within the time periods set forth in the Project Schedule, the Contractor shall reimburse the Owner for any damages actually incurred by the Owner.

Notwithstanding any other provision herein, the Contractor shall not be liable for any delay caused by force majeure events, extreme weather conditions or acts of war.

**§ 4.3.1 Early Completion.** The parties agree that once a mutually agreeable schedule is provided for the entire Project by the Contractor, that the Contractor and the Owner may, at the Owner's sole discretion, enter into a Change Order whereby the Owner may provide an early completion bonus to the Contractor for each day that the Project is deemed complete and ready for its intended use as determined by the applicable jurisdiction.

**§ 4.4 Project Schedule.** In Exhibit "B", the Contractor shall provide a Project Schedule. Further, the Contractor shall provide an updated Project Schedule within seven (7) days after execution of this Agreement ("Project Schedule"). The updated Project Schedule shall provide the same Commencement Date and Substantial Completion Date as the Project Schedule in Exhibit "B". The Project Schedule shall be related to the entire Project to the full extent required by the Contract Documents, shall include a schedule for all required submittals, and shall provide for expeditious and practicable execution of the Work. The Project Schedule shall indicate the dates for starting and completing the various stages of construction and shall be revised as required by the conditions of the Work, subject to the Owner's written approval. The Project Schedule shall cover all activities, milestones and trades required for the execution of the Work with scheduling and delivery dates for long-lead-time materials and equipment. The adequacy of the information in the submitted Project Schedule is subject to the written approval of the Owner. With each Application for Payment submitted by the Contractor in accordance with the Contract, other than the final Application for Payment, the Contractor shall submit to the Owner and Architect a current Project Schedule revised to indicate the portion of the Work executed during the time period covered by the Application for Payment, all progress slippages occurring during previously covered time periods, and the corrective action taken for the slippage carried over into the time period covered by the Application for Payment, the anticipated delays or difficulties, and all other information required to adequately present the actual status of the progress of the Work as of the date of the Application for Payment as may be further required by the Owner.

**§ 4.5 Failure to Meet Project Schedule.** In the event the Contractor falls behind the Project Schedule to such an extent that the Owner in good faith determines that the Contractor will be unable to achieve Substantial Completion by the date set forth in the Project Schedule, as such date may be extended as provided in the Contract Documents, the Contractor shall, within five (5) working days following the Owner's demand therefor, provide to the Owner, in writing, a detailed explanation of the measures the Contractor will take in order to recover from the delay so that the progress of the Work complies with the Project Schedule. If, in the Owner's good faith business judgment, Owner believes the Contractor's intended recovery measures will not cause the Contractor to recover from the delay (provided such delay arises from a cause which is the Contractor's or its Subcontractor's responsibility) so as to achieve Substantial and Final completion on schedule, the Owner may direct the Contractor to accelerate the progress of the Work, at the Contractor's sole cost, except that the Contractor may use its Contingency for all or a portion of the acceleration costs, such Contingency being established from savings captured during the Project "buy-out". However, the acceleration costs shall not cause any adjustment to the GMP. Such methods of acceleration may, at the Owner's election, include, without limitation, employing such additional forces or paying such additional overtime wages and the actual, reasonably necessary compression and inefficiency costs attributable to such acceleration, as may be required in order to assure that the progress of the Work is in compliance with the Project Schedule and assure timely Substantial and Final Completion of the Work. The cost of such overtime work, together with the actual, reasonably necessary compression and inefficiency costs attributable to such acceleration shall be borne entirely by the Contractor and not increase the Cost of the Work and GMP unless the delays were caused by the Owner or an entity controlled by the Owner, or something not the fault of the Contractor and then such costs may be added to the Cost of the Work or GMP pursuant to the Change Order provisions of this Contract. Further, the GMP will be increased by such an amount, only if additional costs exceed the Contingency.

## ARTICLE 5 BASIS FOR PAYMENT

### § 5.1 CONTRACT SUM

**§ 5.1.1 Contract Sum.** The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum is the Cost of the Work as defined in Article 7 of this Agreement plus the Contractor's Fee.

**§ 5.1.2 Contractor's Fee.** The Contractor's Fee, except as it may be limited by the Guaranteed Maximum Price, shall be five percent (5%) of the Cost of the Work for the First Phase and the Subsequent Phases of the Work. For additive Change Orders beyond the First Phase and the Subsequent Phases, the Contractor's Fee shall be ten percent

(10%) of the Cost of the Work for the aggregate amount of Change Orders up to twenty five thousand dollars (\$25,000) and five percent (5%) of the Cost of the Work for the aggregate amount of Change Orders over twenty five thousand dollars (\$25,000). For deductive Change Orders, the Contractor's Fee shall be five percent (2.5%) of the Cost of such deducted Work. The Contractor's Fee shall not be added to insurance costs. Further, as detailed herein, there shall be no retention on insurance costs and General Conditions amounts actually incurred and paid for by the Contractor.

*(State a lump sum, percentage of Cost of the Work or other provision for determining the Contractor's Fee, and describe the method of adjustment of the Contractor's Fee for changes in the Work.)*

**§ 5.1.2.1 Fees for No-Impact Modifications.** For changes in the Work that do not increase the Contract Time or the GMP, there shall be no Contractor's Fee added to the Change Order.

## **§ 5.2 GUARANTEED MAXIMUM PRICE**

**§ 5.2.1 Guaranteed Maximum Price.** The sum of the Cost of the Work and the Contractor's Fee, along with the insurance costs, General Conditions costs, and any other costs to be incurred by the Contractor to perform the Work is guaranteed by the Contractor not to exceed the Guaranteed Maximum Price (the "GMP"). The GMP for the First Phase of the Work shall be Six Hundred Eighteen Thousand Five Hundred Six Dollars and Thirty-One Cents (\$618,506.31). The GMP for Subsequent Phases of the Work shall be agreed to by the Contractor and Owner by prior written Change Orders. The Contractor will provide at least three (3) subcontractor bids from each trade and for the General Conditions Cost line items for leased equipment. Work performed by outside forces will be "open book." Subcontracts will be awarded to the lowest responsible bid, unless Owner requests that the Contractor select a higher responsible bidder. Costs which would cause the GMP to be exceeded shall be paid by the Contractor without reimbursement by the Owner. A detailed breakdown of the elements constituting the GMP shall be attached hereto as Exhibit "C" ("Schedule of Values"). The attachment of the Schedule of Values to this Agreement shall not be deemed a guarantee by the Contractor of the costs of any individual line items constituting the Cost of the Work, rather it shall be used in approving Applications for Payments and shall constitute Contractor's guarantee that the Contract Sum shall not exceed the GMP. The GMP is subject to adjustment only by Change Orders authorized by the Owner in writing in accordance with the requirements of the Contract Documents.

For the purpose of this Contract, wherever the term Schedule of Values appears, it shall mean the Schedule of Values contained in Exhibit "C". Further, wherever the term Scope of Work appears in the Contract it shall refer to the Scope of Work detailed herein and in the Exhibits. The Exhibits to this Agreement are fully incorporated herein and include the following: Exhibit "A" Scope of Work, Project Specifications, Drawings and Project Manual; Exhibit "B" Project Schedule; Exhibit "C" Schedule of Values; Exhibit "D" General Condition Costs; Exhibit "E" Qualifications and Exclusions; Exhibit "F" Early Release of Retention Schedule; Exhibit "G" Lien Waiver Forms; and Exhibit "H" Alternative Dispute Resolution; and Exhibit "I" Additional Insureds.

**§ 5.2.1.1 Contingency.** The GMP for the First Phase and the GMP for the Subsequent Phases shall include a contingency amount not to exceed one percent (1%) of the Cost of the Work for contingency items, as defined below ("Contingency"). It is understood that the Contingency is the maximum sum available to cover the costs resulting from: (i) Any shortfall in buy-outs in any line item of the Cost of Work; (ii) Required Scope of Work that was not part of the original buy-out with the relevant subcontractor (if the amount exceeds the line item budget); and (iii) Any other reasonable shortfall in the Contractor's or Subcontractors' schedule of values or bids including the need for additional supervision, additional cleaning of the site, additional amounts due to subcontractors not honoring their bids, and additional amounts due to ambiguities in the Construction Documents. This allocation of Contingency funds shall be executed by mutual written agreement and the amount of initial Saving that shall be returned to the Owner shall be reduced by an amount equal to the requested change. The Contractor acknowledges that it has a clear understanding of the Project Scope of Work. The Contractor shall provide its best effort in managing the cost of corrections so as to avoid using the Contingency. The Contingency maybe used to fund any shortfall of Contractor's General Conditions. Offsets against the Contingency shall be documented and approved in writing by the Owner prior to proceeding with any of the Work associated with the use of such Contingency funds. Use of the Contingency shall require prior approval by the Owner and/or by Owner's representative.

**§ 5.2.1.2 No GMP or Schedule Increases.** The GMP or Completion Date shall not be adjusted and no Change Order shall be issued, notwithstanding any provision in the Contract Documents to the contrary, for any of the following: (i) additional costs or delays occasioned by or related to the negligence, error, omission, inaction, mistake or failure of the Contractor, its employees, agents and Subcontractors; (ii) additional costs or delays related to

equipment, materials or supplies, whether because such equipment, material or supplies are late in arriving or are determined to be inadequate or in disrepair upon arrival; (iii) additional costs or delays related to any subcontractors or suppliers, including delays resulting from the financial condition of any such subcontractors or suppliers; and/or (iv) avoidable additional costs or delays.

§ 5.2.2 **GMP Alternates.** The Guaranteed Maximum Price is based on 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 when the amount expires.)* See Exhibit "E" entitled Qualifications and Exclusions.

§ 5.2.2.1 **Savings.** Savings, if any, within the GMP, shall be provided seventy-five percent (75%) to the Owner and twenty-five percent (25%) to the Contractor if the Contractor substantially completes the First Phase and the Subsequent Phases of the Work as scheduled and as described herein and in Exhibit "A". Savings will be calculated based on the GMP minus the final Cost of Work, Contractor's Fee, General Conditions and insurance costs ("Final Cost of the Work"). If the Final Cost of the Work is below the GMP, and calculated at the Project completion after all subcontracts and purchase orders are closed, the resulting Savings shall be shared by the Owner and the Contractor as detailed herein. The Owner shall retain One Hundred Percent (100%) of any remaining allowance funds.

§ 5.2.3 **Price Breakdown.** The Contractor and all Subcontractors shall provide a Schedule of Values including a price breakdown for labor and materials in the Project attached hereto as Exhibit "C."

§ 5.2.4 **Allowances.** Allowances, if any, may be included in Exhibits "C", "D" and "E".  
*(Identify and state the amounts of any allowances, and state whether they include labor, materials, or both.)*

*(Paragraph deleted)*

§ 5.2.5 **Assumptions.** Assumptions, if any, on which the Guaranteed Maximum Price is based are set forth in Exhibits "C", "D" and "E". The actual Cost of the Work shall be the basis of Applications for Payment and shall not exceed the GMP.

§ 5.2.6 **Changes to Drawings and Specifications.** To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, the Contractor has provided in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 5.2.7 **Schedule of Values.** The Contractor shall furnish the Owner with (i) a Schedule of Values as required by Section 9.2 of the General Conditions and (ii) a Project Schedule that updates the Project Schedule contained in Exhibit "B", as required under Section 3.10 of the General Conditions. Both such documents shall be in form and substance satisfactory to the Owner and include such supporting data and documents as the Owner or the Architect may reasonably require.

§ 5.2.8 **Representations and Warranties.** BY EXECUTING THIS AGREEMENT AND FURNISHING THE OWNER WITH THE GMP, SCHEDULE OF VALUES AND PROJECT SCHEDULE, THE CONTRACTOR REPRESENTS AND WARRANTS THAT CONTRACTOR HAS RECEIVED SUFFICIENT INFORMATION, AS

DESCRIBED BELOW IN THIS PARAGRAPH 5.2.8, TO ENABLE THE CONTRACTOR TO ESTABLISH FIRMLY THE GMP AND PROJECT SCHEDULE. AS OF THE DATE HEREOF, TO THE BEST OF THE CONTRACTOR'S KNOWLEDGE AFTER DUE INQUIRY AND AFTER COMPLETING A THOROUGH AND COMPREHENSIVE INVESTIGATION OF THE CONTRACT DOCUMENTS, MATERIALS AND INFORMATION FURNISHED, AND THE MEETINGS WITH THE OWNER AND ARCHITECT, CONTRACTOR IS ABLE TO ESTABLISH FIRMLY THE GMP AND PROJECT SCHEDULE.

#### ARTICLE 6 CHANGES IN THE WORK

§ 6.1 Adjustments to GMP. Adjustments to the Guaranteed Maximum Price on account of changes in the Work may be determined by any of the methods listed in Paragraph 7.3.3 of the A201-1997.

§ 6.2 Contractor's Fee. The Contractor's Fee for Changes in the Work shall be calculated in accordance with the provisions of Subparagraph 5.1.2 of this Agreement.

§ 6.3 [Intentionally Deleted]

§ 6.4 [Intentionally Deleted]

#### ARTICLE 7 COSTS TO BE REIMBURSED

##### § 7.1 COST OF THE WORK

The term "Cost of the Work" shall mean costs necessarily incurred by the Contractor, or its parent companies, or companies owned or controlled by the Contractor, or the subsidiaries or other affiliates of any of the above companies, in good faith and in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Contractor must disclose any such companies prior to using them in any capacity of the Project and obtain the Owner's written approval prior to using such companies. The Cost of the Work shall include only the items set forth in this Article 7 and as detailed in the attached Exhibits. As used herein, the term "costs" shall mean actual costs paid or payable by the Contractor less all discounts, rebates and salvage obtained pursuant to the terms contained in Article 9. The Contractor shall disclose to the Owner all discounts, rebates and salvage and all discounts, rebates and salvage shall be passed through to the Owner so long as the Owner advances the funds or otherwise complies with the terms of the applicable discount.

##### § 7.2 LABOR COSTS

§ 7.2.1 Construction Wages. Wages of construction workers directly employed by the Contractor to perform the construction of the Work at the site or, with the Owner's approval, at off-site workshops at the rates indicated in the Schedule of Values.

§ 7.2.2 Off Site Wages. Wages or salaries of the Contractor's supervisory and administrative personnel when stationed off the site with the Owner's written approval and then at the costs (including wages and other labor costs) set forth in the Schedule of Values.

*(If it is intended that the wages or salaries of certain personnel stationed at the Contractor's principal or other offices shall be included in the Cost of the Work, identify in Article 14 the personnel to be included and whether for all or only part of their time, and the rates at which their time will be charged to the Work.)*

§ 7.2.3 Supervisory or Administrative Wages. Wages and salaries of the Contractor's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work, with the Owner's prior written approval and then at the costs set forth in the Schedule of Values.

§ 7.2.4 Benefits. Costs paid or incurred by the Contractor for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel, but not bonuses, not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Paragraph 7.2.1 through 7.2.3 of this Agreement and, with respect to employees who devote less than full time to the performance of the Work are prorated based on that portion of the wages and salaries of such employees that is so included in the Cost of Work. Such costs shall be deemed to include the amounts indicated in Exhibits "C", "D", and "E". Such costs are deemed included in the rates indicated in the Schedule of Values.

### § 7.3 SUBCONTRACT COSTS

**§ 7.3.1 Subcontractor Payments.** Payments made by the Contractor to Subcontractors in accordance with the requirements of the subcontracts properly entered into under this Agreement and must not be made if objected to by the Owner or the Lenders, if any. Further, such payments must be made in accordance with the requirements of subcontracts as long as the form of such subcontracts are approved in writing by the Owner and the Lenders under this Agreement. In no event shall any Change Order, Construction Change Directive, order for a minor change in the Work or other change in a subcontract result in an increase in the amount payable to the Subcontractor of more than the actual, direct cost to the Subcontractor of making that change plus a total not to exceed ten percent (10%) overhead and five percent (5%) profit of such actual cost for the Subcontractor's overhead and profit without the prior written consent of the Owner, which consent may be withheld in the Owner's sole discretion; provided, however, that if the Owner signs a Change Order or issues a Construction Change Directive which provides for lump sum adjustment to the GMP, the Owner's acceptance of such lump sum adjustment shall be final and binding upon the Contractor and Subcontractor.

### § 7.4 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

**§ 7.4.1 Completed Construction Costs.** Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

**§ 7.4.2 Excess Materials.** Costs of materials described in the preceding Paragraph 7.4.1 of this Agreement in excess of those actually installed but required to provide for reasonable waste and spoilage. Unused excess materials, if any, shall be properly stored at the Project Site, or in accordance with the Owner's instructions, and become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Contractor. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

### § 7.5 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

**§ 7.5.1 Additional Costs.** Cost, including transportation and maintenance, of all materials, supplies, equipment, temporary facilities and hand tools (not customarily owned by the construction workers) consumed in the performance of the Work. Any such items used but not consumed, which are paid for by the Owner, shall become the property of the Owner and shall be delivered to the Owner upon completion of the Work in accordance with instructions furnished by the Owner. Upon demand by the Owner the Contractor shall furnish the Owner with any information and documentation necessary to verify the period of time for which such items were used in connection with the Work. Also, no such item that costs more than Ten Thousand Dollars (\$10,000) in the aggregate shall be purchased by the Contractor to be used in the performance of the Work without the prior written consent of the Owner who may require that any or all such items be returned. Where amounts realized from the sale or salvage of an item are credited to the Owner as provided herein, the price to be obtained by the Contractor upon a sale of such item in excess of Ten Thousand Dollars (\$10,000) shall be subject to the prior written approval of the Owner.

**§ 7.5.2 Rental Charges.** Rental charges of all necessary machinery and equipment, exclusive of hand tools used at the site of the Work, whether rented from the Contractor or others, including installation of minor repairs and replacement, dismantling, removal, transportation and delivery costs thereof shall not exceed the current prevailing local rental rates. Substantially similar pieces of equipment utilized for the work at different times shall be considered as the same piece of equipment utilized for the work at different times shall be considered as the same piece of equipment for purposes of reimbursable cost limitations. Rental charges shall be made only during such periods as such equipment is being used on the Work, except for equipment which must remain on the Project Site during the term of contract for exclusive use on the Work. Any equipment, which must remain on the Project Site during the term of the Contract, shall be specifically identified in a written schedule approved by the Owner and Contractor, which shall also include the expected duration of such equipment's exclusive use and the rental rate to be charged thereafter. All such equipment shall be delivered to the Project Site in first class condition. Unless otherwise agreed by the Owner, the Contractor shall obtain bids from no less than two (2) responsible suppliers other than the Contractor itself, or an Affiliate as defined in Paragraph 10.6 for all machinery and equipment to be rented. The Owner shall, with the advice of the Contractor and the Architects, determine which bid (which may be the Contractor's bid) is to be accepted. In no event, however, with the respect to rental of the Contractor's own equipment, shall such rental rates exceed seventy-five (75%) of the current "The AED Green Book" charges without the prior-written approval. In no event shall the total of rental charges for machinery or equipment exceed the fair



market value of the machinery or equipment when first utilized on the job. The Contractor shall pay any excess rental charges.

§ 7.5.3 **Debris and Waste.** Costs of removal and disposal of debris and waste from the Project Site. All Subcontracts shall require Subcontractors to remove and dispose of debris created by their activities, and the Contractor shall enforce such requirements or affect an appropriate back charge to those Subcontractors who fail to meet their requirements in this regard. If so required by the Owner, the Contractor shall remove and dispose of debris created by the Owner's separate contractors, if any, and the cost of the same shall be authorized by a written pre-approved Change Order.

§ 7.5.4 **Site Office Expenses.** Costs of document reproductions, facsimile transmissions and long-distance telephone calls, postage and parcel delivery charges, telephone service at the site and reasonable petty cash expenses of the site office.

§ 7.5.5 **Travel Expenses.** That portion of the reasonable travel and subsistence expenses of the Contractor's personnel incurred while traveling out of town in discharge of duties connected with the Work, if approved in advance by the Owner in writing. Expenses shall be substantiated by documentation in form and substance reasonably satisfactory to the Owner. The superintendent's and project manager's automobile allowance is detailed in Exhibit "C".

§ 7.5.6 **Off Site Storage.** Costs of materials and equipment suitably stored off site at a mutually acceptable location, if approved in advance by the Owner in writing. Materials stored off site may be billed on Applications for Payment only when the Owner is provided a certificate of insurance, a bill of lading and the location of the material.

#### § 7.6 MISCELLANEOUS COSTS

§ 7.6.1 **Insurance.** The Contractor and its Subcontractors shall provide the insurance required in Article 11 of the General Conditions including, but not limited to, Worker's Compensation, Employer's Liability, Professional Liability for design/build aspects of the Work, if any, Commercial General Liability, Auto Insurance, and an Umbrella Liability policy. The cost of all such policies shall be included in the GMP. That portion of insurance and bond premiums, if any, that the Contractor is obligated by the Agreement to obtain and maintain, that can be directly attributed to this Contract, which shall be included in the Cost of the Work. Bond premiums for those subcontractors for whom Contractor will provide bonds shall be reimbursed at net of invoice value discounts, including, but not limited to, trade and volume discounts, dividends, rebates and modifiers. All insurance required for the Project, including, but not limited to commercial general liability and excess liability insurance shall be for the Project dedicated policies and shall be charged at the rates approved by the Owner in writing.

§ 7.6.1.1 **Self Insurance.** The Contractor shall not self-insure without prior written approval of the Owner. The Contractor shall be deemed to self-insure and thereby require the Owner's prior written approval to the extent that its policy deductibles are appreciably greater than usual and customary deductibles for contractors engaged in projects of similar scope to this Project. There shall be no reimbursement for self-insurance, except to the extent premiums are actually paid to other entities and no self-insurance costs shall be included in the Cost of the Work for calculating the Contractor's Fee.

§ 7.6.1.2 **Insurance from an Affiliated Entity.** The Contractor shall not obtain insurance through a parent, subsidiary or other affiliated entity without prior written approval of the Owner. Premiums or other insurance costs in connection with insurance placed with a parent, subsidiary or other affiliated entity shall not be higher than the rates that could be obtained from third parties.

§ 7.6.2 **Taxes.** Sales, use or similar taxes imposed by a governmental authority that are related to the Work.

§ 7.6.3 **Fees and Assessments.** Fees and assessments (other than those that the Subcontractors are required to obtain pursuant to the Construction Documents), for the building permit and for other permits, licenses and inspections for which the Contractor is required by the Contract Documents to pay. Notwithstanding any provisions to the contrary in this Agreement, while the cost of such permits and fees may be reimbursed, they shall not be included in the calculation of the Contractor's Fee.

**§ 7.6.4 Laboratory Fees.** Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Paragraph 13.5.3 of the A201-1997 or other provisions of the Contract Documents, and which do not fall within the scope of Paragraph 7.7.3 of this Agreement shall be billed directly to the Owner and shall not be billed to the Contractor as a Cost of the Work.

**§ 7.6.5 Royalties and License Fees.** Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Contractor resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Contractor's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Paragraph 3.17.1 of the A201-1997 or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

**§ 7.6.6 Data Processing.** Data processing costs related to the Work and limited to the actual amortized cost, or value consumed, or hardware and software used on the Project Site. The Contractor shall provide the Owner with a list of all equipment to be used on the Project Site and an amortization schedule to support the amount billed and to be billed by the Contractor. Any data processing performed off site, or at the Contractor's principal office or branches, shall be excluded from reimbursement.

**§ 7.6.7 Deposits.** Deposits lost for causes other than the Contractor's negligence or failure to fulfill a specific responsibility to the Owner as set forth in the Contract Documents.

**§ 7.6.8 Dispute Resolution Costs.** The Contractor may charge the Owner for costs of resolving disputes if such costs benefit the Owner and are agreed upon in advance in writing by the Owner. The intent of this provision is to reimburse the Contractor, Subcontractors or suppliers for protecting the Owner's interests, but not when such legal costs are due to disputes with the Owner or caused by the acts, negligence, errors or misconduct of the Contractor, Subcontractors or suppliers.

**§ 7.6.9 Relocation Expenses.** Expenses incurred in accordance with the Contractor's standard personnel policy for relocation to the area of the Project Site and temporary living allowances of personnel required for the Work, if approved by the Owner in advance and in writing.

#### **§ 7.7 OTHER COSTS AND EMERGENCIES**

**§ 7.7.1 Other Approved Costs.** Other costs incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

**§ 7.7.2 Emergency Costs.** Costs due to emergencies incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.6 of the General Conditions to the extent not (1) caused by the Contractor, Subcontractor or anyone for whom either is responsible, or (2) capable of being prevented through timely notice of a condition unsafe to the Owner.

**§ 7.7.3 Losses and Reconstruction.** Losses and expenses, not compensated by insurance or otherwise, sustained by the Contractor in connection with the Work, provided they have resulted from causes other than the fault or neglect of the Contractor (or any of its subcontractors) or failure of the Contractor (or any of its subcontractors) to comply with all of the requirements of the Contract Documents. Such losses shall include settlements if made with the prior written consent and approval of the Owner. No such losses and expenses shall be included in the Cost of Work for the purpose of determining the Contractor's Fee unless such loss requires substantial reconstruction and the Contractor is placed in charge thereof. In such event, the Contractor shall be paid for its services an aggregate fee and overhead reimbursements equal to fifteen percent (15%) of the cost of any substantial reconstruction, provided such substantial reconstruction is not: (i) required due to fault or negligence of the Contractor (or any of its subcontractors) or failure of the Contractor (or any of its subcontractors) to comply with any of the requirements of the Contract Documents, or (ii) incidental reconstruction which for purposes of this Paragraph 7.7.3 is hereby deemed to mean any reconstruction involving a cost of Ten Thousand Dollars (\$10,000) or less.

**§ 7.7.4 No Double Payments.** Notwithstanding the breakdown or categorization of any costs to be reimbursed in this Article 7 or elsewhere in the Contract Documents, there shall be no duplication of payment in the event any

particular items for which payment is requested can be characterized as falling into more than one of the types of compensable or reimbursable categories.

**§ 7.7.5 Time and Material Rates.** If time and materials work is required by the Owner by written and executed Change Order, all personnel, labor, material and equipment rental that is provided by the Contractor shall be provided at cost without mark-up or fee. Cost shall consist of the following:

**Labor:** At rates established in Exhibit "C."

**Supervisory & Administrative Personnel:** At the rates established in Exhibit "C."

**Material:** Cost of material delivered to jobsite.

**Equipment:** Established rental rates as set forth in Exhibit "C."

**Subcontractors:** Amounts billed by subcontractors shall be billed in accordance with the Contract Documents.

**§ 7.8 Miscellaneous Costs.** Costs of any known fees, assessments, gross receipts tax, or special licenses required by governmental agencies having jurisdiction, which costs shall be included in the GMP, and reimbursed as a Cost of the Work.

**§ 7.9 Costs Defined.** Costs as defined herein shall be actual costs paid by the Contractor, less all discounts, rebates, and salvages which shall be taken by the Contractor, subject to Article 9 of this Agreement. All payments made by the Owner pursuant to this Article 7, whether those payments are actually made before or after the execution of the Contract, are included within the GMP, provided however, in no event shall the Owner be required to reimburse the Contractor for any portion of the Cost of Work incurred prior to the Commencement Date unless the Contractor has received the Owner's written consent prior to incurring such cost.

#### ARTICLE 8 COSTS NOT TO BE REIMBURSED

**§ 8.1 Costs not Reimbursed.** The Cost of the Work shall not include (and Contractor shall not be reimbursed, or otherwise paid for, the items set forth below in Article 8, nor any item not specifically and expressly included in the items described in Article 7 above; provided, however, the Contractor shall, nevertheless, provide all labor, materials and equipment and other items necessary for the proper execution and completion of the Work notwithstanding that the Contractor is not reimbursed):

**§ 8.1.1 Wages.** Wages and other compensation of the Contractor's personnel including, but not limited to, officers, executives general managers estimators, auditors, safety personnel, purchasing and contracting agents and other employees stationed at the Contractor's principal office, branches or offices other than the site office, except as may be approved in advance by the Owner in writing.

**§ 8.1.2 Expenses of Principal Office.** Expenses of the Contractor's principal office and offices other than the site office.

**§ 8.1.3 Overhead.** Overhead and general expenses, except as may be expressly included in Article 7.

**§ 8.1.4 Capital Expenses.** The Contractor's capital expenses, including interest on the Contractor's capital employed for the Work.

**§ 8.1.5 Rental Costs.** Rental costs of machinery and equipment, except as specifically provided in Paragraph 7.5.2 of this Agreement.

**§ 8.1.6 Contractor's Negligence.** Except as provided in Paragraph 7.7.3 of this Agreement, costs due to the negligence or failure to fulfill a specific responsibility of the Contractor, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including, but not limited to costs for the correction of damaged, defective or nonconforming Work, disposal and replacement of

materials and equipment incorrectly ordered or supplied, and making good damage to property not forming part of the Work.

§ 8.1.7 **Other Costs.** Any cost not specifically and expressly described in Article 7.

§ 8.1.8 **Costs Exceeding GMP.** Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded.

§ 8.1.9 **Association Costs.** The cost of any dues, assessments or contributions paid to the Contractor's technical or trade associations.

§ 8.1.10 **Taxes.** Taxes of any kind except as provided in Paragraph 7.6.2.

§ 8.1.11 **Unapproved Changes in Work.** The cost of any changes in the Work not approved, in writing, by the Owner except for minor changes in the Work ordered by the Owner pursuant to Paragraph 7.4.1 of the A201-1997.

§ 8.1.12 **Licenses.** The cost of any business license, contractor's license or other similar license required so that the Contractor may engage in business or carry on the business of a contractor at the site of the Work or at any other location.

§ 8.1.13 **Other Compensation.** Any bonuses or other compensation payable to construction workers or any other personnel that are payable in addition to their regular periodic wages or salaries, except for the supplemental compensation which is included in the Contractor's employee benefits expense rate as referenced in Paragraph 7.2.4 of this Agreement.

§ 8.1.14 [Reserved.]

§ 8.1.15 **Indemnities.** Indemnities from the Contractor or any Subcontractor. Pursuant to Article 11 of the A201-1997, Contractor's insurance waives any and all recovery rights against the Owner.

§ 8.1.16 **Negotiations.** All costs related to negotiating this Contract including, but not limited to, attorney's fees.

#### ARTICLE 9 DISCOUNTS, REBATES AND REFUNDS

§ 9.1 **Cash Discounts.** Cash discounts obtained on payments made by the Contractor shall accrue to the Owner if (1) before making the payment, the Contractor included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Contractor with which to make payments; otherwise, cash discounts shall accrue to the Contractor. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Contractor shall make provisions so that they can be secured. The Contractor shall give the Owner at least thirty-six (36) calendar days prior notice of the date upon which a payment must be made so that a cash discount (other than customary trade discounts for early payment) may be obtained and shall act diligently and use its best efforts to obtain such discounts, rebates and refunds. If the Contractor fails to pay for an item within the allowable discount period after the Owner provides the necessary funds, any resulting disallowed discount shall be charged to the Contractor and shall not be a Cost of Work.

§ 9.2 **Owner Credits.** Amounts that accrue to the Owner in accordance with the provisions of Paragraph 9.1 of this Agreement shall be credited to the Owner as a deduction from the Cost of the Work and reduce the Guaranteed Maximum Price.

#### ARTICLE 10 SUBCONTRACTS AND OTHER AGREEMENTS

§ 10.1 **Subcontracts.** Those portions of the Work that the Contractor does not customarily perform with the Contractor's own personnel shall be performed under subcontracts or by other appropriate agreements with the Contractor. Those portions of the Work that the Contractor customarily performs with its own forces may be performed by the Contractor under a separate subcontract to the Contractor but only after the Contractor submits bids for at least three (3) other Subcontractors for such Work and demonstrates that the Contractor's cost of that Work is less than the other bids. Any such bids must be delivered concurrently to the Owner and Contractor for any Work which the Contractor might self-perform. Without the prior written consent of the Owner no person shall be

permitted to enter the site of the Work or to perform any portion of the Work unless such person or his or her employer is a party of a written subcontract or other appropriate written agreement with the Contractor or the Owner and such person or his or her employer has delivered to the Owner the insurance certificates and bonds required by such subcontract or written agreement. The Owner may designate specific persons or entities from whom the Contractor shall obtain bids. The Contractor shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated especially for the Work, and shall analyze the bids and select a Subcontractor subject to the Owner's reasonable objection. The Owner shall then determine, with the advice of the Contractor and the Architect, which bids will be accepted. The Contractor shall not be required to contract with anyone to whom the Contractor has reasonable objection, but, at the request of the Owner, shall set forth, in writing, the basis for such objection. Likewise, the Contractor shall not contract with anyone to whom the Owner has reasonable objection.

**§ 10.2 Bidder Qualifications.** If a specific bidder among those whose bids are delivered by the Contractor to the Owner (1) is recommended to the Owner by the Contractor; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Contractor may require that a Change Order be issued to adjust the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Contractor and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner. For the purpose of this Paragraph 10.2, a bidder shall be deemed qualified only if it has: (a) a sufficient net worth and experience and competence so that it can meet without material adverse effect upon its financial condition or work force, all of its then current payment and performance obligations, including those related to its portion of the Work; (b) enough properly skilled workers so that it will not delay the Project Schedule; (c) a reputation for high quality work in its trade; and (d) no prior material failures to meet payment and performance obligations in connection with other work.

**§ 10.3 Subcontract Agreements.** Subcontracts or other agreements shall conform to the requirements of the Contract Documents and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

**§ 10.4 Scope of Work.** Scopes of Work contained in the subcontracts may be modified from time to time, with the written approval of the Owner.

**§ 10.5 "Flow-Down" and Subcontracts.** All subcontract, sub-subcontracts, supplier agreements, consultant agreements and other agreements entered into by the Contractor and Subcontractors with respect to the Work shall conform to the requirements of the Contract Documents and all Subcontractors shall be bound by the obligations of the Contractor under this Agreement and the Contract Documents to the extent of the services and Work provided by such Subcontractors pursuant to their subcontractual obligations. The form of the subcontract to be used by the Contractor in connection with the Work shall be submitted to the Owners and must be satisfactory to the Owner and the Lenders, if any, in form and substance (as evidenced by the Owner's written approval thereof) and shall not be modified in any material respect, nor shall any such modified subcontract be submitted to a Subcontractor for execution, without the prior written consent of the Owner.

**§ 10.6 [Intentionally deleted.]**

**§ 10.7 Subcontract Assignments.** Each subcontract shall include the following provisions: "In the event that the General Contractor defaults under this Subcontract or in the event that the General Contractor is replaced by the Owner, the Owner's construction lender, or their designee as the replacement General Contractor for the Project covered by this Subcontract, at the request and option of the Owner or the Owner's construction lender, the Subcontractor will perform under and in accordance with the terms of this Subcontract for any replacement General Contractor. Further, the Subcontractor shall execute all documents reasonably necessary to assign its subcontract to the replacement General Contractor, Lender or Owner. None of these provisions shall be construed to impose on the Owner or the Owner's construction lender any obligation with respect to the Subcontractor whatsoever."

**§ 10.8 No Subcontractor Privity with the Owner.** Nothing contained in any of the Contract Documents shall create any contractual relationship of "privity of contract" between the Owner, Lender, or any consultant retained by the Owner, and any Subcontractor.

**§ 10.9 Self Performed Work.** The Contractor, or an Affiliate, as defined below, shall be permitted to perform trade Work with the Contractor's or such Affiliate's own forces only if (i) the Owner consents thereto in writing after full

disclosure in writing by the Contractor to the Owner of the affiliation or relationship of affiliate to the Contractor and (ii) the Owner approves in writing the cost thereof. Only one fee as outlined in Paragraph 5.1.2 will be charged by the Contractor or Affiliate for any overhead, profit or other forms of mark-up or fee for such trade Work performed by the Contractor's or Affiliate's own forces. In no event will the Contractor be permitted to charge any overhead profit or other form of mark-up or fees as a general contractor for trade work performed with its own forces or those of an affiliate including, without limitation, the Contractor's Fee under this Agreement. Any trade Work performed by the Contractor's own forces or by an Affiliate if required by the Owner, shall be covered in separate agreement between the Owner and the Contractor or the Affiliate. Such agreement shall, without limitation, satisfy all requirements for Subcontracts as set forth in Paragraph 5.3.1 of the A201-1997. The term "Affiliate" is hereby deemed to mean any party or entity related to or affiliated with the Contractor or in which the Contractor has direct or indirect ownership or control, including, without limitation; (i) any entity owned in whole or in part by the Contractor; (ii) any party or entity with more than a ten percent (10%) interest in the Contractor; (iii) any entity in which any officer, director, employee, partner or shareholder (or member of the family of any of the foregoing persons) of the Contractor or any entity owned by the Contractor has a direct or indirect interest.

**§ 10.10 Contractor's Liability for Subcontractors.** The Contractor shall direct and supervise each of its Subcontractors and shall have full and complete authority with respect to such direction and supervision subject to the terms of this Agreement. The Contractor shall be responsible and liable to the Owner for all acts or omissions of its Subcontractors and their agents and employees, and any other person performing any of the Work under a contract with the Contractor.

#### ARTICLE 11 ACCOUNTING RECORDS

**§ 11.1 Financial Management of Materials and Labor.** The Contractor shall check all materials, equipment and labor entering the Project Site or stored elsewhere and shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Contract, and the accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to, and shall be permitted to audit and copy, the Contractor's records, estimates, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Contract, and the Contractor shall preserve these for a period of ten (10) years after final payment, or for such longer period as may be required by law. All records shall be maintained in accordance with generally accepted accounting procedures consistently applied for the Project. Subcontractors retained by the Contractor on a cost-plus basis, if approved by the Owner in writing, shall have the same obligations to retain records and permit audits as required of the Contractor under this Article 11.

**§ 11.2 Inspection of Records.** If any inspection by the Owner or Agencies of the Contractor's records, books, correspondence, instruction drawings, receipts, vouchers, memoranda and any other data relating to the Contract Documents reveals any overcharges that cumulatively equal in excess of Ten Thousand Dollars (\$10,000), including, without limitation, any unjustified or unsubstantiated charges or untimely request for payment as described in Article 11, the Contractor shall pay the Owner upon demand an amount equal to one hundred percent (100%) of such overcharge, as reimbursement for said overcharge. The requirements of this Section 11.2 shall not apply to any portion of an overcharge which is the subject of a good faith dispute between the Owner and the Contractor or between the Contractor and a Subcontractor.

#### ARTICLE 12 PAYMENTS

##### § 12.1 PROGRESS PAYMENTS

**§ 12.1.1 Applications for Payments.** Payments shall be based on the Schedule of Values. The Contractor shall, by the seventh (7<sup>th</sup>) day of each month ("Current Month") deliver to the Owner and, if required by the Owner or the Architect, or if required by the Owner or any person or entity providing financing in connection with the Project (individually and collectively – "Lender"), an Application for Payment, on form AIA Document G702, showing in complete detail (itemized by the Subcontractor and the Contractor's own forces, if any) all monies paid out or costs incurred by the Contractor on account of the Cost of Work during the period commencing on the first (1<sup>st</sup>) day of the month preceding the Current Month and ending on the last day of said preceding month ("Payment Request Period") for which the Contractor is to be reimbursed under the terms of the Contract Documents and the amount of the Contractor's Fee due as provided in the Contract Documents, together with such supporting documentation as may be required, by the Owner, Architect or Lender. Such supporting documentation shall include, without limitation, copies or requisitions from Subcontractors, the items referred to in Paragraph 12.1.4 of this Agreement, and conditional waivers and releases of liens, stop notices for the current Application for Payment from the

Contractor, all Subcontractors, and anyone having liens, stop notice rights or rights against a bond for the Project (collectively, "Lien Claimants") and, for Lien Claimants providing labor or materials in excess of Five Thousand Dollars (\$5,000) unconditional waivers and releases of liens, stop notices and bond rights for all prior payments, from such Lien Claimants (provided that if any Lender requires such unconditional waivers and releases on liens, stop notices and bond rights from any other Lien Claimants, then Contractor shall provide unconditional waivers and releases of liens in accordance with the provisions of California Civil Code Section 3262(b)). The Applications for Payment shall be on the AIA Document G702 form. The lien release forms shall be in conformance with the forms attached as Exhibit "G". The Owner may, because of subsequently discovered evidence or subsequent observations, nullify a reasonable portion or any part of its approval of an Application for Payment, or any portion thereof, to the extent as may be necessary in the Owner's reasonable opinion to protect the Owner from loss for any of the reasons set forth in Paragraph 9.5.1 of the A201-1997. Except with the Owner's prior written approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered or stored at the site and shall not store materials or equipment in excess of Ten Thousand Dollars (\$10,000) at any time without the prior written approval of the Owner.

§ 12.1.2 [Intentionally Deleted.]

§ 12.1.3 [Intentionally Deleted.]

§ 12.1.4 **Itemized Statement.** With each Application for Payment, the Contractor shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, to the Owner, along with an itemized statement in form satisfactory to the Owner and the Lenders showing in complete detail all monies paid out and to be paid out by the Contractor on account of the Cost of Work during the month covered by such Application for Payment for which the Contractor is to be reimbursed under Article 5, the amount of the Cost of the Work due as provided in Article 5, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Contractor on account of the Cost of the Work equal or exceed (1) the sum of all progress payments already received by the Contractor; less (2) that portion of those payments attributable to the Contractor's Fee; plus (3) payrolls for the period covered by the present Application for Payment. Additionally, with each Application for Payment, the Contractor shall submit to the Owner, the document described in Section 9.3 of the A201-1997 and in the Contract Documents.

§ 12.1.5 **Schedule of Values.** Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Contractor's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect or Owner may require. This schedule, unless objected to by the Architect or Owner, shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 12.1.6 **Percentage of Completion.** Applications for Payment shall show the percentage of completion of each portion of the Work that has been completed as of the end of the period covered by the Application for Payment. Applications for Payment shall also set forth the amount of money required to complete the Work (including all approved Change Orders) and such other information as the Owner or Lender may reasonably require. All Applications for Payment must contain a signed certification by the Contractor that the progress of the Work is in accordance with the Drawings, Plans, Specifications, and all applicable laws that are known or should reasonably be expected to be known to the Contractor and the Construction Schedule and that the Work will be completed on or before the Date of Substantial Completion and finally complete on or before the Date of Final Completion. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed; or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Contractor on account of that portion of the Work for which the Contractor has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

§ 12.1.7 **Progress Payments.** Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows (but shall not exceed the amount set forth in such Application for Payment or, if the Owner or Architect approved only a portion of any Applications for Payment, shall not exceed the aggregate amount of the items so approved by the Owner or Architect):

- .1 take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. For the purposes of this Subparagraph 12.1.7.1 only Work for which complete documentation has been provided in accordance with the provisions of Paragraph 12.1.4 shall be deemed to have been completed. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Paragraph 7.3.8 of the A201-1997;
- .2 add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment which with the Owner's prior consent have been delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing by the Owner;
- .3 add the Contractor's Fee, less retainage of ten percent (10%). The Contractor's Fee shall be computed upon the Cost of the Work described in the two preceding Clauses at the rate stated in Paragraph 5.1.2 or, if the Contractor's Fee is stated as a fixed sum in that Subparagraph, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work in the two preceding Clauses bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .4 subtract the aggregate of previous payments made by the Owner;
- .5 subtract the shortfall, if any, indicated by the Contractor in the documentation required by Paragraph 12.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation; and
- .6 subtract amounts, if any, for which the Architect, Owner, or Owner's Representative, if any, has withheld or nullified a Certificate for Payment as provided in Section 9.5 of the A201-1997. The Owner and/or, to the extent requested by the Owner, the Architect shall review the Application for Payment for each Payment Request Period and the Architect, or the Owner, (through the Owner's Representative) shall issue to the Owner a certificate for payment ("Certificate for Payment") for ninety percent (90%) of such amount as the Owner approves, which Certificate for Payment, provided it is received by the Owner from the Architect or Owner's Representative not later than the seventh (7<sup>th</sup>) day of the month, shall be payable on or before the thirtieth (30<sup>th</sup>) day of the same month, together with all back-up documentation; provided, however, payment to the Contractor must also be approved by any Lender, which approval shall not be unreasonably withheld, and in the event any Lender does not approve all or a portion of the Work completed during the Payment Request Period, the Application for Payment or the Certificate for Payment, the Owner shall only be obligated to pay to the Contractor that amount which the Lender approves. If a Certificate for Payment is received by the Owner after the application date fixed above due to deficiencies in the Contractor's Application for Payment, then payment of undisputed amounts shall be made by the Owner no later than twenty-five (25) days after the Owner receives the Certificate of Payment from the Architect or Owner's Representative. Progress payments, at the Owner's option and as a last resort during dispute resolution proceedings, may be made in the form of checks made jointly payable to Contractor and any Subcontractor to whom monies are owing. The Owner shall notify the Contractor, in writing, of any reasons for withholding a Certificate for Payment for any portion of the amount set forth in the Application for Payment. No portion of the sums retained by the Owner pursuant to this Subparagraph 12.1.7.6 shall be payable until final payment is made pursuant to Section 12.2 of this Agreement, or in the case of defective Work, until such Work is remedied. Notwithstanding anything herein, there shall not be any retention held on the Contractor's insurance costs and General Conditions costs.

**§ 12.1.8 Early Released Retention.** The retention for the Work of certain Subcontractors may be released prior to final payment by agreement of the Owner and Lender, provided that the particular Subcontractor for whom retentions being released is not in default under its subcontract and has completed, to the Owner's and Tenant's satisfaction, all of its portion of the Work, including, without limitation, Punchlist Work attributable thereto ("Early Released Retention"). Such Early Released Retention shall not be released earlier than thirty (30) days after



completion and acceptance of the Work of such Subcontractor's trades subject to Early Released Retention set forth in Exhibit "F", attached hereto. The Owner shall hold all retention other than the Early Released Retention until final payment is made in accordance with Paragraph 12.2.1 of this Agreement. Except with the Owner's prior approval, payments to Subcontractors shall be subject to retainage set forth in Subparagraph 12.1.7.3 herein, and in the Schedule of Values.

**§ 12.1.9 Accuracy of Application.** In taking action on the Contractor's Applications for Payment, the Architect, Owner, or Owner's Representative, and Lender shall be entitled to rely on the accuracy and completeness of the information furnished by the Contractor and shall not be deemed to represent that the Architect, Owner, or Owner's Representative, or any Lender for the Project has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Paragraph 12.1.4 of this Agreement or other supporting data; that the Architect or Owner has made exhaustive or continuous on-site inspections or that the Architect or Owner has made examinations to ascertain how or for what purposes the Contractor has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner. The Architect or Owner shall neither have control over or charge of, nor be responsible for, the construction means, materials, techniques, sequences or procedures in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, unless modified by the Architect's drawings, specifications, designs or requirement in the Contract Documents governing the construction means, methods, techniques or sequences.

**§ 12.1.10 Stored Materials.** Payments for stored materials may be made subject to the Owner's and Lender's approvals, such approvals shall not unreasonably be withheld, and the Contractor's compliance with the Owner's and Lender's requirements, including, without limitation, the perfection and protection of any Lender's security interest, and the receipt of certificates of insurance evidencing adequate insurance coverage.

**§ 12.1.11 Compliance with Lender Requirements.** Notwithstanding and in addition to the foregoing, the Contractor shall comply with such requirements for the Applications for Payment as the Lenders may reasonably impose as condition to disbursement of funds. Until the Contractor complies with such reasonable requirements, payments may be declined by the Owner, provided that the Lenders have declined to disburse the funds necessary to make such payment, and the Contractor shall not have the right to stop the Work. Such payment will be made by the Owner when the Contractor has complied with such reasonable requirements subject, however, to any reasonable restrictions imposed by the Lenders with respect to the time or times when disbursement of funds will be made.

**§ 12.1.12 Mechanic's Lien Releases.** For itself and each Subcontractor, the Contractor shall deliver to the Owner, a conditional mechanic's lien waiver and release for the current Application for Payment amounts and an unconditional mechanic's lien waiver and release for the prior Application for Payment, using the forms contained in Exhibit "G" and relating to that portion of the work for which the Application for Payment is being submitted. Such mechanic's lien waivers and releases contained in Exhibit "G" are in forms approved by the Owner and the Lender and in compliance with the California Civil Code. If the Contractor fails to deliver any such mechanic's lien waiver and release, payment with respect to the portion of the Work covered by such mechanic's lien waiver and release may be declined until the delivery of such waiver and release, and the Contractor shall not have the right to stop the Work.

## **§ 12.2 FINAL PAYMENT**

**§ 12.2.1 Final Payment.** Final payment constituting the unpaid balance of the Cost of the Work and the Contractor's Fee (subject to any retention with minor Work or defective Work) shall be due and payable forty-five (45) days after the Architect or Owner's Representative issues a Certificate of Substantial Completion (as defined below) and a Certificate of Completion ("CoFo") from the applicable governmental authorities. The "Certificate of Substantial Completion" means a written certificate that: (i) sets forth the date upon which Substantial Completion has been achieved; (ii) states the responsibilities of the Owner and the Contractor for maintenance, utilities and insurance; (iii) lists the items of Work to be completed or corrected ("Punchlist Work"); and (iv) fixes the time within which the Contractor shall complete such Punchlist Work which time shall not be later than forty-five (45) days, unless otherwise agreed to in writing by the Owner, after the Contractor's submittal of its Application for Payment upon Substantial Completion. Final payment shall be made, provided that the Contractor has first delivered to the Owner (or Architect if the Owner so requests) such other evidences of the Contractor's full payment of Subcontractors (with exception of retentions and final payments which are to be paid out of the final payment of the Owner to the Contractor) and the absence of any liens generated by the Work as may be required by the Owner;

and Lender or a title insurance carrier prior to insuring the absence of all liens generated by the Work; and provided further, that (a) the Owner has first received a Certificate of Payment, which Certificate of Payment states that the evidences delivered by the Contractor are sufficient to indicate said payment of Subcontractors and absence of liens and (b) the Contractor has delivered to the Owner (i) maintenance and operating manuals for all equipment (ii) all warranties and guaranties in connection with the Work, (iii) spare parts averages and maintenance materials and (iv) As-Built Drawings for the Project. Final payment, at the Owner's option, may be made in the form of checks made jointly payable to the Contractor and any Subcontractor entitled to payment out of the funds provided by the final payment, provided, however, that no such check shall be payable to more than two payees or in an amount greater than the amount of payment claimed by the Subcontractor payee and approved by the Contractor. The Contractor shall provide evidence satisfactory to the Owner and, if requested by the Owner, to the Architect establishing the identities of such persons and the amounts of the payments to which they are entitled. The Owner may retain an amount equal to three (3) times the cost to complete the Punchlist Work, as determined by the Owner, until such time as the Punchlist Work is complete. Within seven (7) days following the Contractor's written notification to the Architect that the Punchlist Work has been completed, the Owner or Owner's Representative shall conclusively determine whether such Punchlist Work has in fact been completed. The Owner or Owner's Representative shall document in writing the date on which it is determined that the Punchlist Work was completed to the Owner's satisfaction. The Owner shall make payment for this punchlist Work within ten (10) working days after the date on which the Owner or Owner's Representative determines such Punchlist Work has been completed to the Owner's satisfaction.

*(Paragraphs deleted)*

**§ 12.2.2 Recording of Notice of Completion.** Within eight (8) calendar days from actual completion of the entire Scope of Work under this Contract, the Contractor shall prepare and record a valid Notice of Completion and serve it upon all necessary entities and individuals as required under California law.

*(Paragraph deleted)*

**§ 12.2.3 [Intentionally Deleted.]**

*(Paragraph deleted)*

**§ 12.2.4 [Intentionally Deleted.]**

**§ 12.2.5 Subsequent Costs.** If, subsequent to final payment and at the Owner's request, the Contractor incurs costs described in Article 7 of this Agreement and not excluded by Article 8 of this Agreement to correct defective or nonconforming Work, the Owner shall reimburse the Contractor such costs and the Contractor's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Contractor has participated in savings as provided in Section 5.2 of this Agreement, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Contractor.

## **ARTICLE 13 TERMINATION OR SUSPENSION**

**§ 13.1 Termination.** The Contract may be terminated as provided in Article 14 of the A201-1997, as amended.

**§ 13.2 [Intentionally Deleted.]**

**§ 13.2.1 [Intentionally Deleted.]**

**§ 13.2.2 [Intentionally Deleted.]**

**§ 13.2.3 [Intentionally Deleted.]**

**§ 13.3 [Intentionally Deleted.]**

**§ 13.4 Suspended Work.** The Work may be suspended by the Owner as provided in Article 14 of the General Conditions, as amended. Further, the Owner may retain one hundred and fifty percent (150%) of any disputed amounts and shall timely pay all "Remaining Amounts" that are then due and payable. If the Owner withholds any more than fifty percent (150%) of any disputed amounts, then the Contractor may suspend the Work until such Remaining Amounts are paid.

**ARTICLE 14 MISCELLANEOUS PROVISIONS**

**§ 14.1 General Conditions.** Where reference is made in this Agreement to a provision A201-1997 (also referred to as the “General Conditions”) or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents. Terms used in this Agreement, which are defined in the Contract Documents shall have the meanings designated in this Agreement or the Contract Documents. In interpreting inconsistencies, ambiguities, discrepancies or errors among the Contract Documents, the order of priority in Section 1.1 above shall apply.

**§ 14.2 Payments.** Undisputed 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.)*

Six percent (6%) 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.)*

**§ 14.3 Owner's Representative.** The Owner's representative (“Owner's Representative”) is:  
*(Name, address and other information.)*

Jeffrey Bay

The address and telephone number of Jeffrey Bay will be provided by the Owner in writing upon execution of this Agreement.

Owner's Representative will be authorized to act on behalf of and in the name of the Owner in connection with the Project regarding the items contained in this Agreement, the General Conditions and as otherwise authorized by the Owner in writing. The Owner may from time to time designate a different Owner's Representative or the Architect as the Owner's Representative. All matters requiring written approval under this Agreement, the Exhibits, the A201-1997 or any other Contract Documents must be approved in writing by the Owner, not the Owner's Representative. The Contractor will copy the Owner on all notices, request for approval, Change Orders, Applications for Payment and claims delivered to the Architect or the Owner's Representative.

**§ 14.4 Contractor's Representative.** The Contractor's representative (“Contractor's Representative”) will be provided by the Contractor in writing upon execution of this Agreement.

If approved by the Owner, the Contractor's Representative is authorized to act on behalf of and in the name of the Contractor in connection with the Project.

**§ 14.5 Change in Representative.** Neither the Owner's Representative nor the Contractor's Representative shall be changed without ten (10) days' written notice to the other party, provided that the Owner shall have the right to approve the substitution of and the indemnity of any substitute of the Contractor's Representative.

**§ 14.6 Progress During Dispute.** In the event of any dispute between the Owner and the Contractor, the Contractor shall proceed with the performance of its obligations under the Contract Documents in accordance with the Project Schedule, with reservations of all rights and remedies the Contractor may have at law or in equity. The Owner will continue to make payments in accordance with Article 9 of the A201-1997.

**§ 14.7 Contractor's Representative.** Contractor's Representative shall be an individual approved by the Owner. The Contractor shall cause said Contractor's Representative, identified to the Owner, to be on the Project Site at all times during the course of the Work and shall authorize said Contractor's Representative to receive and act upon instructions from the Owner on the Contractor's behalf given pursuant to the Contract Documents.

**§ 14.8 Owner's Approvals.** Whenever the consent, approval or agreement of the Owner is required under any of the Contract Documents, such consent, approval or agreement, to be effective, must be in writing. The Contractor

shall request such consents, approvals and agreements in a timely manner so that completion of the Work will not be delayed. Any costs incurred as a result of the Contractor's failure to request any timely consent, approval or agreement of the Owner shall be borne entirely by the Contractor.

§ 14.9 **[Reserved.]**

§ 14.10 **Improvement Bonds.** The Contractor hereby agrees to cooperate with and assist the Owner in taking such action as is necessary to exonerate and release the Owner from its obligations under any and all street, gutter, sidewalk and similar improvement bonds related to the Project, if any, as quickly as possible. The Owner shall be responsible for all such improvement bonds.

§ 14.11 **Independent Contractor.** Nothing herein contained shall be construed as creating the relationship of employer and employee or principal and agent as between the parties hereto, and the Contractor and Subcontractors shall be deemed at all times to be an independent contractor with respects to its performance hereunder.

§ 14.12 **Execution.** Neither the Owner nor the Contractor shall have any rights or obligations with respect to the terms and conditions contained in this Agreement unless and until this Agreement has been executed by the Owner and Contractor.

§ 14.13 **Notices.** All notices or demands of any kind which either party hereto may be required or desire to serve upon the other under the terms of the Contract shall be served upon such other party by personal service (which may be by private messenger or air freight courier), or mailing a copy thereof by certified or registered mail postage prepaid, with return requested to the addresses set forth on the first page of this Agreement. In case of delivery of notice by mail, such delivery shall be deemed complete on the actual date of delivery as shown by the addressee's certified or registered mail receipt or at the expiration of the third (3<sup>rd</sup>) business day following the date of mailing, whichever occurs first. In case of delivery by personal service, such delivery shall be effective on the date of such delivery. The persons and addresses to which notices and demands shall be delivered may be changed from time to time by notice served as provided herein by either party upon the other. Failure to accept a notice shall not affect the validity thereof.

§ 14.14 **Lenders or other Agencies.** The Contractor acknowledges that the Owner is financing the Work through a construction Lender or through other funding sources or Agencies, and the Owner must comply with certain Lender or Agency terms and conditions in order to obtain payments from the Lender or Agency. The Contractor agrees to use its best efforts to comply with the reasonable requirements of Lender or Agency which bear upon the performance of the Work and the Disbursement of funds. The Owner shall have the right to assign the Contract Documents, including this Agreement, to entities including the Lender or Agencies for security purposes or for any other purpose. Such assignment by the Owner shall not require the consent of the Contractor. The Contractor shall:

- (a) make the site of the Work available at all times for inspection by the Owner, Lender and other Agencies and their agents;
- (b) consent to and execute all documents requested by the Owner, Lender and other Agencies in connection with the collateral assignment of the Contract Documents to them;
- (c) promptly furnish the Owner, Lender and other Agencies with information, documentation and materials that the Owner, Lender and other Agencies may reasonably request from time to time with respect to the Project; and
- (d) upon request by title insurer designated by the Owner, promptly furnish to title insurer such affidavits, indemnities and guarantees as are reasonable and customary in commercial construction for such title insurer to issue "date down" endorsements to the title insurance policies of the Owner, Lender and other Agencies insuring such against mechanics liens from the Contractor and its Subcontractors for Work furnished in connection with the prior Applications for Payment for which the Contractor has received payment.

§ 14.15 **Review of Drawings and Specifications.** Architectural dimensions shall be checked by the Contractor for consistency and accuracy prior to the ordering of any material and prior to the installation thereof. The Contractor shall immediately inform the Owner and Architect of any defects, suspected defects, and/or inconsistencies in the Drawings and Specifications which come to the Contractor's attention. The Contractor shall not commence any

corrective Work without the Owner's written approval. The cost of any corrective work to repair any design defect shall be the Owner's responsibility, provided that the Owner shall have first approved, in writing, an such work.

**§ 14.16 Notice of Completion.** At the completion of the Project, the Contractor shall file and record a valid Notice of Completion with the County Recorder in accordance with applicable law.

**§ 14.17 Instrument Execution.** In connection with the financing of the Project, the Contractor and all Subcontractors must execute and deliver, and (if appropriate) acknowledge all instruments reasonably required by the Owner or the Lender, including, but not limited to, certificates relating to the completion of the Work and subordinations of any rights, interest, and claims under the Contract Documents and subcontracts, at law, or otherwise, to the liens, benefits, rights and privileges of any lender and filing the Contract with the County Recorder.

**§ 14.18 Lien Subordination.** The Contractor hereby subordinates all the Contractor's, laborer's, mechanics', materialmen's, and other similar liens that it may have or acquire under the Contract Documents or otherwise as to the Project, the Work and the property upon which the Work is being constructed to the lien and security interest securing payment of sums now or hereafter borrowed by the Owner from the Lender. At the request of the Owner, the Contractor shall execute such additional documents as may be requested from time to time by the Owner or any such Lender to evidence the provisions hereof, and shall cause the Subcontractors and any other parties furnishing labor or materials for the Work to subordinate their liens to such aforesaid sums.

**§ 14.19 Owner Approval.** Notwithstanding anything to the contrary contained in any of the Contract Documents, all requests for payment by the Contractor, and all Change Orders shall require the written approval of the Owner, prior to commencement of any such Change Orders.

**§ 14.20 Final Expressions.** The terms of the Contract Documents are intended by the parties to be a final expression of their understanding with respect to such terms as included in the Contract Documents and may not be contradicted by evidence of any prior or contemporaneous statements, representations, agreements or understandings. The parties further intend that the Contract Documents constitute the complete and exclusive statement of their terms and that no extrinsic evidence whatsoever may be introduced in any judicial proceeding involving the Contract Documents. No addition to, deletion from or modifications of any term or provision of the Contract Documents shall be effective unless it is made in a writing signed by the parties hereto.

**§ 14.21 Access.** Notwithstanding anything in the Contract Documents to the contrary, the Owner shall have, at reasonable times, the right to enter the Project Site for the purpose of conducting marketing activities and inspecting the Work. The Contractor shall provide for such access.

**§ 14.22 Labor Indemnity.** To the fullest extent permitted by law and in addition to any other indemnity provisions provided for at law, in equity or in the Contract Documents, and not as a limitation thereof, the Contractor shall indemnify, defend, protect and hold harmless the Indemnified Parties (as defined in Section 3.18 of the A201-1997) and the Project from and against all Claims, including, but not limited to, loss of rents and profits, resulting or arising from or related to the Contractor's failure to maintain harmonious labor relations at the Project Site. The indemnity set forth in this Section shall survive the termination of the Contract Documents.

**§ 14.23 Time.** Time is of the essence. The Contractor acknowledges and agrees that it has reviewed and negotiated the various time limits or periods set forth in the Contract Documents and that any changes in such time limits or periods made in accordance with the terms of the Contract Documents will be similarly reviewed and negotiated by it. The Contractor agrees to perform its obligations with due diligence within such time limits and period in accordance with the terms of the Contract Documents, acknowledging that in the event it fails to do so, the Owner will suffer damages, costs and expenses by reason of such failure of performance, including, without limitation consequential damages.

**§ 14.24 Publicity.** The Contractor agrees that it will not, without the prior written approval of the Owner, (i) publicize the fact that the Owner has entered into the Contract Documents, or (ii) disclose, confirm or deny any details of the Contract Documents, except to the extent reasonably necessary for the Contractor to perform the Work or otherwise required by law. The Contractor agrees that it will not use the Owner's name in connection with the Contractor's publicity with respect to the Project without the prior review and written approval in each instance by the Owner. The Contractor shall also insert the terms of this provision in all contracts and/or agreements executed

in connection with the services to be performed under the Contract Documents and require that its Subcontractors do the same.

**§ 14.25 Pre-Commencement Termination.** The Owner shall have the right to terminate the agreements contained within the Contract Documents at any time prior to the Commencement Date, or such later date prior to the actual commencement of the construction if construction does not actually commence by the Commencement Date; and, in such event, the Owner shall pay to the Contractor all amounts earned pursuant to Article 7 up to the date of termination including all reasonable costs of cancellation of material orders, subcontracts or demobilization as full and final payment to the Contractor.

**§ 14.26 Reimbursables.** Phrases used throughout the Contract Documents such as "the Contractor shall provide, without cost to Owner...", "Contractor shall bear all costs...", and words of similar meaning shall be interpreted as signifying reimbursable costs to the extent such costs are included within the definition of the Cost of the Work otherwise such costs shall not be reimbursable.

**§ 14.27 Owner's Liability.** Notwithstanding anything to the contrary contained in this Agreement or in any of the other Contract Documents, no partner, member, person or entity holding any interest in the Owner shall be personally liable, whether directly or indirectly, by reason of any default by the Owner in the performance of any of the obligations of the Owner under this Agreement, including, without limitation, the Owner's failure to pay the Contractor as required hereunder, and in the event of any such default, the Contractor hereby agrees to look solely to its contract rights against the Owner and its lien rights against the Project Site to secure the performance and payment of all such obligations.

**§ 14.28 Standard.** The Contractor agrees that it shall perform its obligations hereof in a manner consistent with that of industry standards for a first-class construction firm experienced in performing work similar to the size, complexity and nature of the Work required for the Project.

**§ 14.29 Compliance with all Laws.** The Contractor shall observe and abide by and perform all of its obligations hereunder in accordance with the applicable laws, rules and regulations of all governmental authorities having jurisdiction over the Project.

**§ 14.30 Headings.** The headings of the Contract Documents are used herein for references purposes only and should not govern, limit or be used in construing the Contract Documents or any provision hereof. Where the context of the Contract Documents so requires, the use of the neutral gender shall include the masculine and feminine genders, the masculine gender shall include the feminine and neutral genders, and the singular number shall include the plural and vice versa. Each party hereto acknowledges that (i) each party hereto is of equal bargaining strength; (ii) each such party has actively participated in the preparation, and negotiation of the Contract Documents; (iii) each such party has had the opportunity to consult with such party's attorneys and advisors relative to entering into the Contract Documents, and (iv) any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of the Contract Documents, any portion hereof, any amendments hereto, or any Exhibits attached hereto.

**§ 14.31 Counterparts.** The Contract Documents may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

**§ 14.32 Severability.** If any provision of the Contract Documents, or any application of any such provision to any party or circumstances, shall be determined by any court of competent jurisdiction to be invalid and unenforceable to any extent the remainder of the Contract Documents or the application of such provisions to such person or circumstances, other than the application as to which such provision is determined to be invalid or unenforceable, shall not be affected thereby, and each provision shall be valid and shall be enforced to the fullest extent permitted by law.

**§ 14.33 Contractor Assignment.** The Contractor shall not assign the whole or any portion of its interest under the Contract Documents or any payments due or to become due the Contractor hereunder not, except as specifically permitted in the Contract Documents, subcontract any of its obligations hereunder without first obtaining in each instance the prior-written consent of the Owner which consent may be withheld in the Owner's sole discretion. No assignment, whether voluntary or involuntary by operation of law, under legal process of proceedings, by

receivership, in bankruptcy or otherwise, shall be valid or effective without such prior-written consent of the Owner. Should the Contractor attempt to make or suffer to be made any such assignment, except as aforesaid, the Owner may, at its option, terminate the agreements contained within the Contract Documents upon written notice to the Contractor. Should the Owner consent to any such assignment, such consent shall not constitute a waiver of any of the restrictions of this Section and the same shall apply to each successive assignment hereunder, if any. Any assignment in contravention of the provisions of this Section shall be void. All Subcontracts and Subcontractors' bonds, if any, shall expressly permit assignment to the Owner, Lender, and any other Agency in the event of the termination of this Agreement.

**§ 14.34 Representations/Warranties.** The Contractor represents and warrants the following (in addition to any other representations and warranties contained in the Contract Documents) as a material inducement to the Owner to execute this Agreement, which representations and warranties shall survive the execution and delivery of this Agreement, any termination of this Agreement and the final completion of the Work:

- (1) the Contractor and its subcontractors are financially solvent, able to pay all debts as they mature and possess sufficient working capital to complete the Work and perform all of its obligations hereunder;
- (2) the Contractor is able to furnish the plant, tools, material, supplies, equipment and labor required to complete the Work and perform its obligations hereunder and has sufficient experience and competence to do so;
- (3) the Contractor is authorized to do business in the State of California, Harbor City, and is properly licensed by all necessary governmental and public and quasi-public authorities having jurisdiction over the Contractor, the Work and the Project;
- (4) the Contractor's execution of this Agreement and performance thereof is within the Contractor's duly authorized powers;
- (5) the Contractor's duly authorized representative has visited the site of this Project and is familiar with the Project Site conditions under which the Work is to be performed; and has correlated observations with the requirements of the Contract Documents, and
- (6) the Contractor is a large, sophisticated contractor who possesses a high level of experience and expertise in the business, administration, construction, construction management and superintendence of projects of the size, complexity and nature of this particular Project, and will perform the Work with care, skill and diligence of such a contractor.

**§ 14.35 Owner's Site Conveyance.** The Owner may elect to sell, lease, mortgage or otherwise transfer any of the Owner's interest in any portion of the Project Site ("Site Conveyance"). In connection with any Site Conveyance, provided that the Contractor has been timely paid all undisputed amounts, the Contractor shall execute and deliver to the Owner, and shall cause any Subcontractors to execute and deliver to the Owner, such documents for the benefit of the Owner, any purchaser and any title insurance company issuing title insurance, a full and complete release of all mechanics and suppliers liens and rights, with respect to the property which is the subject of such Site Conveyance, together with such other documents as a title company may require to induce it to issue its policy of title insurance with respect to the Site Conveyance without requiring the Owner's indemnity against mechanics and suppliers liens. Notwithstanding any of the other provisions of the Contract, the Contractor agrees that, if the Owner sells to a bona-fide purchaser ("New Owner") its interest in the land on which the Project is located, and if the Owner is not in material default under this Agreement, and if the Contractor is reasonably satisfied with the qualifications and creditworthiness of the New Owner, as the Contractor determines in Contractor's reasonable discretion, the Contractor shall accept the New Owner as owner under the Contract and shall release the Owner from any and all liability to the Contractor under the Contract, after the Owner has satisfied all of its obligations hereunder which accrued prior to the date of such sale.

**§ 14.36 Cash Flow Estimate.** In order to assist the Owner in its management of the cash needs of the Project, prior to the first payment hereunder, Contractor shall submit to the Owner a schedule of anticipated payment requests ("Cash Flow Estimate"), setting forth Contractor's best estimate of the amounts for which it will be requesting payment with each Application for Payment to be submitted by it during the next two (2) months. Thereafter, as part of each Application for Payment, Contractor will present Owner with a revised Project Cash Flow Estimate to update previously furnished information and maintain a two (2) month forecast. The parties acknowledge and agree, however, that although a projected Cash Flow Estimate is to serve as a cash management aid to the Owner, the amounts shown in any such schedule shall not be determinative of the actual amounts to be paid to the Contractor during the two (2) months covered thereby.

§ 14.37 **Escalation Clause.** The Contractor shall utilize its best efforts to purchase materials as early as possible and to lock in prices as early as possible in order to avoid market increases in materials (collectively, "Escalating Materials"). However, if Escalating Materials are encountered on the Project that are beyond the control of the Contractor and its Subcontractors, sub-subcontractors, suppliers and vendors, the Contractor may elect to present a Change Order to the Owner for the Owner's prior-written approval of the cost of such Escalating Materials. Such Change Order shall only include increases in the Costs of the Work, equal to the actual increases in such Escalating Materials, plus the Contractor's Fee, resultant increases in the GMP, if any, and for increases in the Contract Time consisting of actual delays to the critical path, if any, due to unavoidable delays in obtaining such Escalating Materials.

§ 14.38 **Accounting and Records.** The Contractor shall keep and maintain full, complete and detailed records for the Project, including the proper maintaining of books, accounts, documents, papers and records (collectively, "Records") of all Work. Provisions of this Paragraph shall be applicable to the Records of Subcontractors performing Work for the Contractor, and the Contractor shall include such provisions in all its Subcontracts and other agreements.

§ 14.39 **Record Retention Policy.** The Contractor shall keep all of its Records, as defined herein, relating to the Work for ten (10) years after actual completion of all the Work.

§ 14.40 **Confidentiality.** The Contractor shall treat all information relating to the Project and all information supplied to the Contractor as confidential and proprietary information and shall not permit the release of such information to others or make any public announcement or publicity releases without the Owner's prior written authorization. Also, the Contractor shall require all Subcontractors to comply with the requirements of this paragraph.

§ 14.41 **Engineering and Design.** The Contractor may sublet all or a portion of the engineering and design services described in this Agreement, if any, to subcontractors or consultants; however, the Contractor shall be and remain primarily liable and responsible to the Owner for the performance and furnishing of all engineering and design/build services, if any, enumerated in this Agreement and the Contract Documents.

§ 14.42 **Ownership of Construction Documents.** The Construction Documents, including any drawings and specifications developed by the Contractor or its Subcontractors, referred to herein are and shall remain the property of the Owner for their unrestricted use without further permission or involvement of the Contractor, whether the Work for which the Construction Documents were prepared is constructed or not. Any misuse or reuse of the Construction Documents for another project without written verification or adaptation by the Owner shall be at the Contractor's or Subcontractor's sole risk and shall not relieve the Contractor or Subcontractor from liability regarding such misuse or reuse.

§ 14.43 **Disputes.** Disputes between the parties arising under the Contract Documents shall be subject to the alternative dispute resolution provisions set forth in Exhibit "H".

§ 14.44 **Evidence of Financing.** At the written request of the Contractor, the Owner shall provide the Contractor with written evidence of financing for the Project.

§ 14.45 **Architect.** For the purpose of this Contract, wherever the word Architect appears in reference to the subcontracts or payments, it shall mean instead Owner or Owner's Representative.

## ARTICLE 15 ENUMERATION OF CONTRACT DOCUMENTS

§ 15.1 [Intentionally Deleted.]

§ 15.1.1 [Intentionally Deleted.]

§ 15.1.2 [Intentionally Deleted.]



§ 15.1.3 **Supplementary Conditions.** The Supplementary and other Conditions of the Contract are those contained in the Project Manual as indicated in Exhibit "A".

§ 15.1.4 **Specifications.** The Specifications are those contained in the Project Manual as indicated in Exhibit "A".

*(Paragraph deleted)*

§ 15.1.5 **Drawings.** The Drawings are as indicated in Exhibit "A".

*(Paragraph deleted)*

*(Paragraph deleted)*

§ 15.1.6 **Addenda.** The Addenda, if any, are as follows: Not Applicable.

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 15.

§ 15.1.7 **Other Documents.** Other Documents, if any, forming part of the Contract Documents are as follows:  
*(List here any additional documents, such as a list of alternates that are intended to form part of the Contract Documents. A201-1997 provides 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.)*

Exhibit "A" Scope of Work, Project Specifications, Drawings and Project Manual

Exhibit "B" Project Schedule

Exhibit "C" Schedule of Values (G702 Detailed Break-Down of the Cost of the Work)

Exhibit "D" General Conditions Costs

Exhibit "E" Qualifications and Exclusions

Exhibit "F" Early Release of Retention Schedule

Exhibit "G" Lien Waiver Forms

Exhibit "H" Alternative Dispute Resolution

Exhibit "I" Additional Insureds

#### ARTICLE 16 INSURANCE AND BONDS

*(List required limits of liability for insurance and bonds. A201-1997 gives other specific requirements for insurance and bonds.)*

See Article 11 of the A201-1997, as modified for this Project.

§ 16.1 **Contractor Disclosure.** CONTRACTORS ARE REQUIRED BY LAW TO BE LICENSED AND REGULATED BY THE CONTRACTORS' STATE LICENSE BOARD WHICH HAS JURISDICTION TO INVESTIGATE COMPLAINTS AGAINST CONTRACTORS IF A COMPLAINT REGARDING A PATENT ACT OR OMISSION IS FILED WITHIN FOUR YEARS OF THE DATE OF THE ALLEGED VIOLATION. A COMPLAINT REGARDING A LATENT ACT OR OMISSION PERTAINING TO STRUCTURAL DEFECTS MUST BE FILED WITHIN TEN YEARS OF THE DATE OF THE ALLEGED VIOLATION. ANY QUESTIONS CONCERNING A CONTRACTOR MAY BE REFERRED TO THE REGISTRAR. CONTRACTORS' STATE LICENSE BOARD, P.O. BOX 26000, SACRAMENTO, CALIFORNIA 95826.

§ 16.2 **Contractor's License.** The Contractor hereby warrants and represents that it is duly licensed contractor under the laws of the State of California, and that its Contractor's License Number is 461703.

§ 16.2 **Date of Agreement.** This Agreement is entered into as of the day and year first written above and is executed in at least three original copies, of which one is to be delivered to the Contractor, one to the Architect for use in the administration of the Contract, and the remainder to the Owner.

South Bay Storage, LLC  
1697 Pacific Avenue

Gary Monroe, Inc., a California Corporation

Final versions of contract (A-111, A-201)  
per Bryan Jackson's most recent emails

10/24/05

*Handwritten initials and signature*

By:

*Handwritten signature of Owner*

*Handwritten signature of Contractor*

OWNER (Signature)

CONTRACTOR (Signature)

10-24-05

(Printed name and title)

Gary F. Monroe, President  
(Printed name and title)

**Exhibit "A"**  
**to**  
**AIA Document A111 Agreement**  
**Between South Bay Storage, LLC ("Owner")**  
**and Gary Monroe., Inc. ("Contractor")**  
  
**Scope of Work, Project Specifications,**  
**Drawings and Project Manual**



**Exhibit "B"**  
**to**  
**AIA Document A111 Agreement**  
**Between South Bay Storage, LLC ("Owner")**  
**and Gary Monroe, Inc. ("Contractor")**  
**Project Schedule**

**Exhibit "C"**  
**to**  
**AIA Document A111 Agreement**  
**Between South Bay Storage, LLC ("Owner")**  
**and Gary Monroe, Inc. ("Contractor")**

**Schedule of Values**

**(G702 Detailed Break-Down of the Cost of the Work)**

**South Bay Storage  
1234 West Anaheim Street  
Harbor City, CA 90710**

**EXHIBIT "C" SCHEDULE OF VALUES**

ITEM NO.	DESCRIPTION	QUAN	UNIT	UNIT PRICE	TOTAL COST
<b>1</b>	<b>GENERAL CONDITIONS</b>				
01110	PROJECT MANAGER	15.5	WK	\$ 865.00	\$ 13,407.50
01120	SUPERVISION	14.5	WK	\$ 2,321.00	\$ 33,654.50
01140	PROJECT ENGINEER	0	NIC	\$ -	\$ -
01150	ESTIMATOR	0	NIC	\$ -	\$ -
01170	COORDINATOR	0	NIC	\$ -	\$ -
01180	ACCOUNTANT	0	NIC	\$ -	\$ -
01210	GENERAL LABOR	0	NIC	\$ -	\$ -
01250	DAILY CLEAN UP	0	NIC	\$ -	\$ -
01260	TRASH DUMPSTERS RENT	3	EA	\$ 450.00	\$ 1,350.00
01310	TRAILER SETUP	0	NIC	\$ -	\$ -
01320	TRAILER RENTAL	0	NIC	\$ -	\$ -
01360	TRAILER FURNITURE	0	NIC	\$ -	\$ -
01380	OFFICE SUPPLIES	1	LS	\$ 250.00	\$ 250.00
01390	POSTAGE	1	LS	\$ 400.00	\$ 400.00
01410	TEMP TOILETS & WASH STATIONS	5	EA	\$ 120.00	\$ 600.00
01415	TEMP POWER HOOK UP	1	ALLOW	\$ 3,500.00	\$ 3,500.00
01416	TEMP BUILDING LIGHTING	0	NIC	\$ -	\$ -
01420	TEMP POWER USAGE	3.3	MO	\$ 350.00	\$ 1,171.15
01425	TEMP WATER USAGE	0.0	NIC	\$ -	\$ -
01430	PHONE HOOK UP	1	ALLOW	\$ 800.00	\$ 800.00
01431	PHONE USAGE	3.3	MO	\$ 400.00	\$ 1,338.46
01435	FAX MACHINE	1	LS	\$ 450.00	\$ 450.00
01440	JOB RADIOS	0	NIC	\$ -	\$ -
01445	DRINKING WATER / COOLER	3.3	MO	\$ 100.00	\$ 334.62
01460	PED TUNNEL/ TRAFFIC CONTROL	0	NIC	\$ -	\$ -
01465	EQUIPMENT RENTAL	1	LS	\$ 200.00	\$ 200.00
01510	FIRST AID	1	LS	\$ 350.00	\$ 350.00
01530	SAFETY INSPECTIONS	1	EA	\$ 250.00	\$ 250.00
01540	JOB SITE SECURITY	0	NIC	\$ -	\$ -
01605	TEMP FENCING	0	NIC	\$ -	\$ -
01610	PROJECT SIGN	0	NIC	\$ -	\$ -
01620	BLUEPRINTS	0	NIC	\$ -	\$ -
01635	SMALL TOOLS	1	LS	\$ 200.00	\$ 200.00
01639	CLEAN STREET	0	NIC	\$ -	\$ -
01640	DUST CONTROL	0	NIC	\$ -	\$ -
01645	AUTO/GAS ALLOWANCE	3.3	MO	\$ 550.00	\$ 1,840.38
01650	WEATHER PROTECTION	0	NIC	\$ -	\$ -
01670	SAFETY/BARRIERS	0	NIC	\$ -	\$ -
01690	SUBSISTENCE/TRAVEL	0	NIC	\$ -	\$ -
01691	RENTAL CAR	0	NIC	\$ -	\$ -
01820	CONCRETE TESTING	0	NIC	\$ -	\$ -
01910	PLAN CHECK FEES	0	NIC	\$ -	\$ -

**South Bay Storage  
1234 West Anaheim Street  
Harbor City, CA 90710**

**EXHIBIT "C" SCHEDULE OF VALUES**

ITEM NO.	DESCRIPTION	QUAN	UNIT	UNIT PRICE	TOTAL COST
01911	BUILDING PERMITS	0	NIC	\$ -	\$ -
01913	GRADING PERMIT	0	NIC	\$ -	\$ -
01914	POLLUTION PERMIT	0	NIC	\$ -	\$ -
01915	OFFSITE BOND	0	NIC	\$ -	\$ -
01916	WATER/SEWER FEES	0	NIC	\$ -	\$ -
01917	MISC. PERMITS/FEES	0	NIC	\$ -	\$ -
01918	SOILS TESTING	0	NIC	\$ -	\$ -
01919	CITY BUSINESS LICENSE	1	LS	\$ 250.00	\$ 250.00
01950	BUILDER'S RISK INSURANCE	0	NIC	\$ -	\$ -
01960	CITY TAXES	0	SEE BELOW	\$ -	\$ -
01970	PERFORMANCE BOND	0	NIC	\$ -	\$ -
	<b>TOTAL GENERAL CONDITIONS:</b>	<b>\$ 60,346.62</b>			
<b>2</b>	<b>SITE WORK</b>				
02020	SURVEY & SLOPE MONITORING	1	ALLOW	\$ 10,000.00	\$ 10,000.00
02030	FINAL CLEAN UP	0	NIC	\$ -	\$ -
02041	EROSION CONTROL	1	ALLOW	\$ 10,000.00	\$ 10,000.00
02050	DEMOLITION	0	NIC	\$ -	\$ -
	TREE REMOVAL	0	NIC	\$ -	\$ -
02140	DEWATER/PRESATURATION	0	NIC	\$ -	\$ -
02190	WATER QUALITY MANAGEMENT	1	ALLOW	\$ 2,000.00	\$ 2,000.00
<b>02200</b>	GRADING	1	BID	\$ 101,000.00	\$ 101,000.00
	OVER-EX AND RECOMPACT	0	NIC	\$ -	\$ -
	EXPORT	0	NIC	\$ -	\$ -
	BACK FILL WALLS	0	INC	\$ -	\$ -
02250	FINISH GRADING	0	NIC	\$ -	\$ -
02444	CHAIN LINK FENCE	1	BID	\$ 9,950.00	\$ 9,950.00
02450	WROUGHT IRON GATE	0	NIC	\$ -	\$ -
02500	ASPHALT PAVING	0	NIC	\$ -	\$ -
02505	OFFSITE PAVING - SLOT PATCH	0	NIC	\$ -	\$ -
	CONCRETE PAVING	0	NIC	\$ -	\$ -
	TOXIC WASTE REMOVAL	0	NIC	\$ -	\$ -
02510	STRIPING	0	NIC	\$ -	\$ -
	STALLS	0	NIC	\$ -	\$ -
	WHEEL STOPS	0	NIC	\$ -	\$ -
	HANDICAP STALLS	0	NIC	\$ -	\$ -
	SIGNAGE H/C	0	NIC	\$ -	\$ -
02600	UNDERGRND PLUMB/UTILITIES	0	NIC	\$ -	\$ -
	NEW TRANSFORMER	0	NIC	\$ -	\$ -
	CABLE TV	0	NIC	\$ -	\$ -
	GAS METER	0	NIC	\$ -	\$ -
	WATER CONNECTION	0	NIC	\$ -	\$ -
02661	WATER LINE	0	NIC	\$ -	\$ -
	FIRE HYDRANT	0	NIC	\$ -	\$ -
	WATER METER	0	NIC	\$ -	\$ -



**South Bay Storage**  
**1234 West Anaheim Street**  
**Harbor City, CA 90710**

**EXHIBIT "C" SCHEDULE OF VALUES**

ITEM NO.	DESCRIPTION	QUAN	UNIT	UNIT PRICE	TOTAL COST
02665	FIRE LINE	0	NIC	\$ -	\$ -
	SEWER CONNECTION	0	NIC	\$ -	\$ -
02700	SEWER LINE	0	NIC	\$ -	\$ -
02750	STORM DRAIN CONNECTION	0	NIC	\$ -	\$ -
02751	STORM DRAIN	1	BID	\$ 16,048.00	\$ 16,048.00
02755	FRENCH DRAIN	1	BID	\$ 11,000.00	\$ 11,000.00
02790	STREET LIGHTS	0	NIC	\$ -	\$ -
02800	SITE CONCRETE	0	NIC	\$ -	\$ -
	V-GUTTER	1	BID	\$ 16,771.00	\$ 16,771.00
	ONSITE CURB	0	NIC	\$ -	\$ -
	PARKING LOT BASES	0	NIC	\$ -	\$ -
	SIDE WALK	0	NIC	\$ -	\$ -
	GATE TRACK	0	NIC	\$ -	\$ -
	PIPE BOLLARDS	0	NIC	\$ -	\$ -
	TRASH ENCLOSURE	0	NIC	\$ -	\$ -
	MONUMENT SIGN	0	NIC	\$ -	\$ -
	DRIVE APPROACH	0	NIC	\$ -	\$ -
02805	OFFSITE CONCRETE	0	NIC	\$ -	\$ -
	CURB & GUTTER	0	NIC	\$ -	\$ -
	CITY SIDEWALK	0	NIC	\$ -	\$ -
02870	SITE FURNISHINGS	0	NIC	\$ -	\$ -
02890	TRAFFIC SIGNALS	0	NIC	\$ -	\$ -
02900	LANDSCAPE/IRRIGATION	0	NIC	\$ -	\$ -
02950	SHORING	0	NIC	\$ -	\$ -
	<b>TOTAL SITE:</b>			\$ 176,769.00	
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<b>3</b>	<b>CONCRETE</b>				
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03100	CONCRETE FORMWORK	0	INC	\$ -	\$ -
03200	REBAR	0	INC	\$ -	\$ -
	WIRE MESH	0	NIC	\$ -	\$ -
03300	CAST IN PLACE CONCRETE	1	BID	\$ 203,100.00	\$ 203,100.00
03350	SHOTCRETE/GUNITE	0	NIC	\$ -	\$ -
03400	PRECAST CONCRETE	0	NIC	\$ -	\$ -
03450	CONCRETE SEALING	0	NIC	\$ -	\$ -
03500	DECK CONCRETE	0	NIC	\$ -	\$ -
03600	GROUT	0	INC	\$ -	\$ -
03800	SITE CONCRETE PAVING	0	NIC	\$ -	\$ -
03900	SANDBLASTING	0	NIC	\$ -	\$ -
	<b>TOTAL CONCRETE:</b>			\$ 203,100.00	
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<b>4</b>	<b>MASONRY</b>				
<hr/>					
04200	CONCRETE BLOCK	0	INC	\$ -	\$ -
	SITE RET. WALLS	1	BID	\$ 119,766.00	\$ 119,766.00
	<b>TOTAL MASONRY:</b>			\$ 119,766.00	

South Bay Storage  
1234 West Anaheim Street  
Harbor City, CA 90710

**EXHIBIT "C" SCHEDULE OF VALUES**

ITEM NO.	DESCRIPTION	QUAN	UNIT	UNIT PRICE	TOTAL COST
<b>7</b>	<b>THERM &amp; MOIST CONTROL</b>				
07100	WATER PROOFING	1	BID	\$ 11,474.00	\$ 11,474.00
	ELEVATOR PIT WATER PROOF	0	NIC	\$ -	\$ -
07200	INSULATION	0	NIC	\$ -	\$ -
07245	EXT. INS. & FINISH SYSTEM	0	NIC	\$ -	\$ -
07250	FIREPROOFING	0	NIC	\$ -	\$ -
	FIRESTOPPING	0	NIC	\$ -	\$ -
07270	FIRE CAULKING	0	NIC	\$ -	\$ -
07500	ROOFING	0	NIC	\$ -	\$ -
	METAL MANSARD	0	NIC	\$ -	\$ -
07600	SHEET METAL / FLASHING	0	NIC	\$ -	\$ -
	ROOF HATCH	0	NIC	\$ -	\$ -
	SKYLIGHTS	0	NIC	\$ -	\$ -
07680	ELEVATOR ACCESS DOORS	0	NIC	\$ -	\$ -
07700	SECURITY BARS	0	NIC	\$ -	\$ -
07900	CAULKING	0	NIC	\$ -	\$ -
	<b>TOTAL THERM CONTROL:</b>			<b>\$ 11,474.00</b>	
	<b>SUBTOTAL</b>				<b>\$ 571,455.62</b>
01900	CONTR. CONTINGENCY	2.00%			\$ 11,429.11
	<b>SUBTOTAL</b>				<b>\$ 582,884.73</b>
01950	CONTRACTORS INSURANCE	8.78/1000			\$ 5,373.61
	<b>SUBTOTAL</b>				<b>\$ 588,258.34</b>
17000	CONTRACTORS OH&P	5.00%			\$ 29,412.92
	<b>SUBTOTAL</b>				<b>\$ 617,671.26</b>
	BUILDERS RISK INSURANCE				BY OWNER
	<b>SUBTOTAL</b>				<b>\$ 617,671.26</b>
01960	CITY BUSINESS TAX				\$ 835.05
	<b>TOTAL PROJECT</b>				<b>\$ 618,506.31</b>

**Exhibit "D"**  
**to**  
**AIA Document A111 Agreement**  
**Between South Bay Storage, LLC ("Owner")**  
**and Gary Monroe, Inc. ("Contractor")**

**General Conditions Costs**

The General Conditions Costs shall be \_\_\_\_\_ Dollars  
(\$60,346.62) for the First Phase and shall be established by Change Order for Subsequent  
Phases.

**Exhibit "E"**  
**to**  
**AIA Document A111 Agreement**  
**Between South Bay Storage, LLC ("Owner")**  
**and Gary Monroe, Inc. ("Contractor")**  
**Qualifications and Exclusions**

South Bay Storage  
1234 West Anaheim Street  
Harbor City, CA 90710

**"EXHIBIT E" QUALIFICATIONS AND EXCLUSIONS**

**The following items are excluded from our bid:**

- 1 Government or Utility Company Fees
- 2 Performance or Material Bonds
- 3 Testing and Inspections
- 4 Building Permit Costs or Fees
- 5 Course of Construction Insurance including Deductibles
- 6 Cost of Plans or Specifications, and Blueprints
- 7 Asbestos Toxic Material Investigation, Testing or Removal
- 8 De-Watering or Well-Point Pumping System
- 9 Hard Rock Excavation
- 10 Removal or Disposal of unforeseen underground objects
- 11 Dewater or Presaturation
- 12 Job Site Security
- 13 Painting
- 14 Site grading or any work not shown on Sheets S-1 thru S-3 by Mehers Houghton & Partners 5/30/05
- 15 Export or import of soil

**Qualifications:**

- 1 This estimate assumes that the storage buildings and related site work will be added by change order or a separate contract.
- 2 The estimate is based on using gray precision CMU
- 3 This estimate is based on starting construction no later than October 18, 2005.
- 4 Construction water to be provided by Owner
- 5 The chain link fence will be 42" high and 515' long with 1-7/8" posts and 1-5/8" top rail and 9 gauge fabric.

**Exhibit "F"**  
**to**  
**AIA Document A111 Agreement**  
**Between South Bay Storage, LLC ("Owner")**  
**and Gary Monroe, Inc. ("Contractor")**  
**Early Release of Retention Schedule**

**Exhibit "G"**  
**to**  
**AIA Document A111 Agreement**  
**Between South Bay Storage, LLC ("Owner")**  
**and Gary Monroe, Inc. ("Contractor")**

**Lien Waiver Forms**

**[Attached]**

# CONDITIONAL WAIVER AND RELEASE UPON

## PROGRESS PAYMENT [Civil Code § 3262(d)(1)] Upon receipt by the

undersigned of a check from \_\_\_\_\_  
(Maker of Check)

in the sum of \$ \_\_\_\_\_ payable to \_\_\_\_\_  
(Amount of Check) (Payee or Payees of Check)

and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanic's lien, stop notice, or bond right the undersigned has on the job of \_\_\_\_\_

\_\_\_\_\_ (Owner) located at \_\_\_\_\_  
to the following extent.

(Job Description) This release covers a progress payment for labor, services, equipment, or material furnished to \_\_\_\_\_ through \_\_\_\_\_  
(Your Customer) (Date)

only and does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based upon work performed or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release as follows: \_\_\_\_\_

This release of any mechanic's lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment. Before any

(Title) \_\_\_\_\_ (Company Name) By \_\_\_\_\_



THE UNDERSIGNED HAVE PERFORMED LABOR FOR WAGES ON THE PROJECT DESCRIBED ON THE FACE OF THIS FORM AND HAVE BEEN PAID IN FULL TO DATE

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BE SURE TO COMPLETE OTHER SIDE

**UNCONDITIONAL WAIVER AND RELEASE UPON  
PROGRESS PAYMENT** [Civil Code § 3262(d)(2)]

The undersigned has been paid and has received a progress payment in the sum of

\$ \_\_\_\_\_ for labor, services, equipment or material furnished to  
(Your Customer)

on the job of \_\_\_\_\_ located at  
(Owner)

(Job Description)

and does hereby release any mechanic's lien, stop notice, or bond right that the undersigned has on the above referenced job to the following extent. This release cover a progress payment for labor, services, equipment, or materials furnished to \_\_\_\_\_ through \_\_\_\_\_

(Your Customer) (Date)

only and does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based upon work performed or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release as follows:

(Change Orders Not Covered By This Release)

This release of any mechanic's lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment. Dated:

\_\_\_\_\_  
(Company Name) By

(Title) **NOTICE: THIS DOCUMENT WAIVES RIGHTS**

**UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.**

THE UNDERSIGNED HAVE PERFORMED LABOR FOR WAGES ON THE PROJECT DESCRIBED ON THE FACE OF THIS FORM AND HAVE BEEN PAID IN FULL TO DATE

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**BE SURE TO COMPLETE OTHER SIDE**

**CONDITIONAL WAIVER AND RELEASE UPON**

**FINAL PAYMENT** [Civil Code § 3262(d)(3)] Upon receipt by the undersigned of a check from \_\_\_\_\_

(Maker of Check)

in the sum of \$ \_\_\_\_\_ payable to \_\_\_\_\_

(Amount of Check) (Payee or Payees of Check)

and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanic's lien, stop notice, or bond right the undersigned has on the job of \_\_\_\_\_

(Owner) located at \_\_\_\_\_

\_\_\_\_\_  
(Job Description) This release covers the final payment to the undersigned for all labor, services, equipment, or material furnished on the job, except for disputed claims for additional work in the amount of \$ \_\_\_\_\_, with such additional work described as follows: \_\_\_\_\_

(Work Not Covered By This Release)

Before any recipient of this document relies on it, the party should verify evidence of payment to the undersigned. Dated: \_\_\_\_

\_\_\_\_\_  
(Title) (Company Name) By \_\_\_\_\_



**UNCONDITIONAL WAIVER AND RELEASE UPON FINAL PAYMENT** [Civil Code § 3262(d)(4)]

The undersigned has been paid in full for all labor, services, equipment or material furnished to

\_\_\_\_\_ on the job of \_\_\_\_\_

(Your Customer) (Owner)

located at \_\_\_\_\_ and does hereby waive and

(Job Description)

release any right to a mechanic's lien, stop notice, or any right against a labor and material bond on the job, except for disputed claims for extra work in the amount of \$ \_\_\_\_\_,

with such extra work described as follows: \_\_\_\_\_

\_\_\_\_\_. (Work Not Covered By This Release) Dated: \_\_\_\_

(Company Name) By \_\_\_\_\_

**(Title) NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.**

THE UNDERSIGNED HAVE PERFORMED LABOR FOR WAGES ON THE PROJECT DESCRIBED ON THE FACE OF THIS FORM AND HAVE BEEN PAID IN FULL TO DATE

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**BE SURE TO COMPLETE OTHER SIDE**

**Exhibit "H"**

to

**ALA Document A111 Agreement**

**Between South Bay Storage, LLC ("Owner")  
and Gary Monroe, Inc. ("Contractor")**

**ALTERNATIVE DISPUTE RESOLUTION**

**1. Design and Construction Phase**

**a. Project Neutral**

The Owner, Architect and Contractor may agree to select a Project Neutral for the Project. The Project Neutral shall be experienced both in the design and construction of major real estate developments as well as the mediation of design and construction disputes. The parties shall select the Project Neutral from among the members of the construction panel of the American Arbitration Association or from other panels as mutually agreed to by the parties.

The Project Neutral, in close consultation with all involved parties, shall assist in resolving any disputes, claims, or other controversies that might arise from the commencement of design through issuance of the final certificate of occupancy and acceptance of the Project by the Owner. The Project Neutral shall have no adjudicatory authority and, therefore, shall act solely as a mediator in working with the parties.

If requested in writing by the parties, the Project Neutral shall attend the regular job meetings at the site of the Project. Also, the Project Neutral shall attempt to be available to attend any specific job-related meeting if so requested by the Owner, Architect and Contractor in writing. The Project Neutral also shall be available to confer or meet with any party or parties if so requested by the Owner, Architect and Contractor.

If the services of the Project Neutral are retained, they shall be provided on an hourly basis and the cost will be borne in equal parts by the Owner, Architect, Contractor, and any other necessary parties, including, but not limited to, consultants, subcontractors, sub-subcontractors, and suppliers (collectively, "Subcontractors") except as agreed to in writing between any Subcontractor and the parties.

The confidentiality of any discussion involving the Project Neutral shall be protected by all applicable statutes and case law with respect to mediation.

The term of service by the Project Neutral shall end on the same date as the Architect's services for the Construction Phase as detailed in Subparagraph 2.6.1 of the Agreement. The Project Neutral may be involved in subsequent dispute resolution negotiations or proceedings under the terms and conditions set forth herein.

**b. Executive Negotiations**



If there is any unresolved dispute(s), such dispute(s) may be resolved at any time by designated executives of the involved parties through direct negotiations before, in lieu of, or after engaging the Project Neutral. These direct negotiations shall be between or among executives with authority to resolve the dispute(s). To this effect, the executives shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable resolution satisfactory to the involved parties. These discussions are intended to be informal and must be conducted face-to-face.

The executives taking the lead in such negotiations may involve any other individuals or entities in the discussions that the lead executives deem appropriate.

Unless required by statute, no arbitration, court or other legal proceeding (except mechanic's lien rights) shall be initiated prior to sixty (60) days after issuance of the temporary certificate of occupancy and acceptance of the Project by the Owner.

The confidentiality of the executive negotiations shall be protected by all applicable statutes and case law with respect to settlement negotiations.

If, at the end of the sixty (60) day period following issuance of the temporary certificate of occupancy and acceptance of the Project by the Owner there are any dispute(s) remaining unresolved, such dispute(s) shall then be the subject of facilitated negotiation (i.e., with a professional construction mediator) (herein "mediation") between or among the involved parties.

**c. Mediation**

If, at the end of the sixty (60) day period following issuance of the temporary certificate of occupancy and acceptance of the Project by the Owner there are any disputes remaining unresolved, such remaining dispute(s) may next be attempted to be resolved by mediation. Such mediation shall be conducted under the Construction Industry Mediation Rules of the American Arbitration Association. The cost of the mediation proceeding and the mediator shall be allocated under the rules and policies of the American Arbitration Association.

During mediation, the involved parties shall endeavor in good faith to resolve any and all remaining disputes which they have on the Project. Unless required by statute, no arbitration or other proceeding shall be initiated prior to thirty days after any party serves a written demand for mediation with the American Arbitration Association.

The confidentiality of the mediation shall be protected by all applicable statutes and case law with respect to mediated settlement negotiations.

If, after the passage of thirty (30) days from service of any written demand for mediation on the American Arbitration Association the mediation does not result in settlement of all disputes, then any unresolved claim or controversy arising from or relating to this contract shall be settled by arbitration or judicial reference to an arbitrator as described in the following Subsections. The parties may agree to extend this thirty (30) day period.

**2. Post-Completion Dispute Resolution**

a. **Disputes with Less than \$10,000.00 in Controversy – Arbitration**

Within thirty (30) days from when a mediator declares the parties are at an impasse on one or more of their claims and/or controversies, or if no mediation occurs within the sixty (60) day period for Executive negotiations, the parties shall exchange letters which shall state in summary form those claims and/or controversies which each party contends are unresolved and the party's asserted value of those claims and/or controversies.

If after exchange the parties agree the total amount in controversy (*i.e.*, taking into account both claims and counter-claims) is less than \$10,000.00, then such remaining disputes shall be settled by arbitration administered by American Arbitration Association in accordance with its Construction Industry Arbitration Rules, using a single arbitrator, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

b. **Disputes with \$10,000.00 or More in Dispute – Judicial Reference**

If after exchange of the letters the parties (1) cannot agree whether or not there is more or less than \$10,000.00 in dispute regarding Architect's claims or the threshold amount asserted by the Contractor, as specified in the Contractor's Agreement ("Contractor's Threshold"), or (2) agree that more than \$10,000.00 (or the Contractor's Threshold amount) is in dispute, the parties stipulate that trial by jury and judge is waived as to all unresolved claims or controversies. The party or parties seeking affirmative relief then will file a court action (or cross-complaint in an existing court action). The parties, however, expressly stipulate that all such court-filed claims or controversies shall be referred by the court to a referee who is agreed to by all parties pursuant to the LCCP Rules, as defined below, who will hear and determine all issues with respect to such claims and controversies, both as to the facts and the law, in a proceeding before the American Arbitration Association in accordance with its Construction Industry Arbitration Rules, the Rules of its Large, Complex Case Dispute Resolution Program (*i.e.*, the "LCCP Rules"), and its Judicial Reference Procedures, as applicable.

The arbitrator selected shall be named in an order of the court as the referee, in accordance with the applicable law as to judicial references.

Within thirty (30) days of when the hearings in the case are closed under the LCCP Rules, the referee shall report its statement of decision to the court. Such statement of decision by the referee shall include a detailed, written opinion explaining the decision, including the referee's findings of fact and conclusions of laws. Judgment on the referee's decision may be entered by the court as if the action had been tried in court.

The cost of the referee and/or the American Arbitration Association proceedings shall be borne by the participating parties as determined by the arbitrator or the court after the referee's decision is provided to the court. An order so providing can be entered by the court without further notice.

The intent of this Section is that the parties settle remaining claims valued together at \$10,000.00 (or the Contractor's Threshold amount) by way of judicial reference. The parties agree to take such actions as to enable a judicial reference whereby (1) the dispute is

heard and determined under the LCCP Rules, (2) the statement of decision by the referee is provided to the court which then may enter the statement of decision as a judgment as if the case had been tried by the court, and (3) the normal rules with respect to appeals would apply as to the judgment thereby entered by the court.

**3. Incorporation by Reference**

The Architect agrees to incorporate these dispute resolution provision into any contracts, subcontracts and any other agreements with Subcontractors which it may enter into with respect to the Project. The expectation of the parties is that any entity or individual working on the Project for the Architect will be bound to resolve their disputes which involve the Owner, Architect, Contractor and/or any of their Subcontractors in one proceeding in which all parties will participate and be bound.

**[END OF EXHIBIT "H"]**

**Exhibit "I"**  
to  
**AIA Document A111 Agreement**  
**Between South Bay Storage, LLC ("Owner")**  
**and Gary Monroe, Inc. ("Contractor")**

**Additional Insureds**

1. South Bay Storage, LLC
2. Erwin H. Sokol, Trustee for the Frances Sokol Trust
3. Erwin H. Sokol and Caren J. Sokol Trust
4. Erwin H. Sokol and Mark Sokol, dba: S&S Associates
5. Tri Mark Properties Inc.

**[END OF EXHIBIT "I"]**

**PROOF OF SERVICE**

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 601 S. Figueroa Street, Suite 2370, Los Angeles, California 90017. On December 13, 2011, I served the foregoing document described as:

**CLAIMANTS' FIRST AMENDED STATEMENT OF CLAIMS AGAINST RESPONDENTS FOR (1) LEGAL MALPRACTICE AND (2) BREACH OF FIDUCIARY DUTIES**

on the interested parties in this action on the dates and in the manner that follow:

- by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.
- by electronic transmission. I caused the document(s) listed above to be transmitted on December 13, 2011 [per the parties' agreement; per court order] to the email addresses set forth below.
- by placing the document listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for Delivery to the addresses set forth below.
- by transmitting the document listed above by facsimile to the recipients whose facsimile numbers are listed below.

Hon. Dzintra I. Janavs (Ret.), Arbitrator ADR SERVICES, INC. 915 Wilshire Boulevard, Suite 1900 Los Angeles, California 90017 Fax: (213) 683-9797 Email: Terry@adrservices.org	George Stephan, Esq. Efrat M. Cogan, Esq. BUCHALTERNEMER, PC 1000 Wilshire Boulevard, Suite 1500 Los Angeles, California 90017 Email: gstephan@buchalter.com Email: ecogan@buchalter.com
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postal meter date is more than one day after date of deposit for mailing in affidavit.

Executed on December 13, 2011 at Los Angeles, California.

- I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Mark Anchor Albert