

ALBUQUERQUE PUBLIC SCHOOLS

General Conditions of the Agreement between APS and the Design Professional

(Part B of the Agreement)

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ARTICLE 1

DEFINITIONS

For purposes of this Agreement (“Agreement”), the following definitions shall apply throughout the Agreement and to all attachments incorporated herein, unless otherwise specified.

1.1 APPROVAL OF SCHOOL CONSTRUCTION: The Approval of School Construction (“ASC”) is the formal approval given for construction by the Public School Facilities Authority (“PSFA”) pursuant to NMSA 1978, § 22-20-1, as applicable in particular circumstances.

1.2 APS: APS is the Board of Education of Albuquerque Public Schools and is referred to throughout the Construction Documents as if singular in number.

1.3 APS REPRESENTATIVE: The APS Representative is the individual who is an employee of the school district, named in this Agreement, otherwise known as the District Representative, with the authority to act for APS with respect to this Agreement unless otherwise specifically noted.

1.4 BIDDING: Bidding is the solicitation process to procure an offer to enter into contract for Work within the procurement rules of the Central Purchasing Office and in accordance with the Contract Documents and this Agreement.

1.5 CENTRAL PURCHASING OFFICE: The Central Purchasing Office is the APS Procurement Department.

1.6 CODES: Codes are the federal and/or state health or safety laws, codes, standards and regulations applicable to the locale where the Project is located.

1.6.1 The Building Code shall be the current New Mexico Building Code.

1.6.2 The Fire Code shall be the current New Mexico Fire Code. If there is a conflict between the Building Code and the Fire Code, the Building Code shall always prevail. Local Codes shall not be more restrictive than State-adopted Codes on any K-12 public school project.

1.7 CONSTRUCTION DOCUMENTS or CONTRACT DOCUMENTS: Construction Documents or Contract Documents are the conditions of the Contract (general, supplementary and other conditions), drawings, specifications, bid forms, agreement forms, wage rates and addenda issued prior to execution of the Construction Contract and all required documents for the public advertisement, Bidding, selection, award, construction and administration of the Construction Documents or Contract Documents for the Project.

1.8 DAY: The term “day” as used in this Agreement shall mean calendar day unless otherwise specifically defined.



1.9 DESIGN DEVELOPMENT DOCUMENTS: Design Development (DD) Documents finalize and describe the size and character of the entire Project.

1.10 DESIGN DEVELOPMENT BOOKLET: The Design Development Booklet (DD Booklet) is a compilation of information developed during the Programming, Schematic Design, and Design Development phases which is presented to the APS Capital Outlay Committee for its approval prior to proceeding to the construction phase of the Project.

1.11 DESIGN PROFESSIONAL: The Design Professional is the legal entity qualified to do business in the State of New Mexico that employs an individual or individuals licensed to practice the discipline or disciplines for the services to be performed under this Agreement.

1.12 DESIGN PROFESSIONAL PROJECT REPRESENTATIVE: A Design Professional Project Representative is the Project Design Professional or the individual assigned by the Project Design Professional to provide on-site project administration as required for the Project. The Design Professional Project Representative shall be mutually agreed upon by APS and Design Professional prior to the Bidding phase of this Project and shall be authorized to make binding decisions, as if made by the Design Professional, as they relate to the carrying out of this Agreement and the successful completion of the Project.

1.13 DIRECT SALARY: Direct Salary is gross wage paid excluding employee benefits or employer burden.

1.14 DISTRICT REPRESENTATIVE: See APS REPRESENTATIVE

1.15 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION: The General Conditions of the Contract for Construction, known herein as the General Conditions, as provided as a part of Exhibit F hereto.

1.16 MACC: Maximum Allowable Construction Cost ("MACC") is the total sum of money, excluding gross receipts tax, available for construction purposes. It may include furnishings, fixtures and equipment. In accordance with Article 4 MACC shall not include professional fees, testing fees, project contingency funds, acquisition costs or other soft costs and shall not include reimbursable costs as set forth in Article 5.

1.17 MATERIALS: Materials includes materials and systems specified in those Construction Documents which have been drafted at the time of this Agreement, or which have been drafted prior to the Bidding phase.

1.18 PRELIMINARY PROJECT DESCRIPTION: A Preliminary Project Description (PPD) helps APS and the Design Professional understand the various components and systems proposed for the Project. It also serves as an early basis for discussion of the overall building and site systems including site drainage and other geotechnical considerations.



1.19 PROJECT: The Project is the school building or other improvement which is to be constructed or remodeled. This Agreement may relate to the whole or just a part of the Project.

1.20 PROJECT DESIGN PROFESSIONAL: The Project Design Professional is the individual Architect or Engineer registered in the State of New Mexico who shall sign and affix a New Mexico Design Professional's Seal to all plans, designs, drawings, specifications, and reports required for the Project. The Project Design Professional shall be mutually agreed upon by APS and Design Professional at the time this Agreement is entered into and shall be named herein.

1.21 PROGRAM STATEMENT: A Program Statement is a document which meets the requirements of the PSFA Approval of School Construction submission and ensures the Design Professional and APS have a mutual understanding of the Project's goals and constraints, including budgetary goals and constraints, and which meets the requirements set out in section 2.1.2.1.

1.22 REIMBURSABLE EXPENSES: Reimbursable Expenses are expenses additional to the basic services compensation set out in Part A of this Agreement. Reimbursable Expenses include actual expenditures made by the Design Professional or its employees in the interest of the Project pursuant to this Agreement and limited in accordance with Article 5, Article 6, and Article 12, and as otherwise authorized by APS in writing at the time this Agreement is entered into.

1.23 REQUEST FOR APPROVAL OF SCHOOL CONSTRUCTION: PSFA Request for Approval of School Construction ("RASC") is a phased-construction, documents-approval process, with each phase requiring approval prior to proceeding to next appropriate design phase. The RASC process leads to the PSFA Approval of School Construction ("ASC").

1.24 SCHEMATIC DESIGN DOCUMENTS: Schematic Design Documents are preliminary schematic drawings and a preliminary project description ("PPD") that together clearly indicate the extent and relationship of the Project components.

1.25 SCOPE OF WORK: The Scope of Work includes the tasks set forth in this agreement required for design and construction of the structure(s) described in the Project Description in Part A of this Agreement.

1.26 SITE: The Site is the physical location on which the Project is built, including all land acquired for the Project or associated with the Project including surface drainage, wells, transmission lines, easements, rights-of-way, roadways and existing facilities that may be directly or indirectly affected by the Project or that might affect the Project.

1.27 SERVICES: Services means all work and services of any nature whatsoever performed by the Design Professional and its consultants under this Agreement.

1.28 WORK: Work means all work and services of any nature whatsoever performed



by the Contractor and its subcontractors in the construction of the Project pursuant to APS-Contractor Agreement.

1.29 OTHER DEFINITIONS: For words or combinations of words not defined herein, definitions shall be supplied by sources in the following order of precedence: (1) in accordance with the Definitions given elsewhere in these General Conditions; (2) in accordance with the context in which they are used; (3) in accordance with well-known technical or construction industry meaning, if used in context with such recognized meanings; (4) by Webster's Collegiate Dictionary.

ARTICLE 2

DESIGN PROFESSIONAL'S SERVICES AND RESPONSIBILITIES

2.0 BASIC SERVICES

2.0.1 GENERAL: The Design Professional's basic services shall consist of the following, described more fully below:

1. Programming Phase
2. Schematic Design Phase
3. Design Development Phase
4. Construction Documents Phase
5. Bidding Phase
6. Construction Phase
7. Close-out, Final and Acceptance Phase
8. Correction Period 11-month Inspection

The services to be provided during each phase listed herein include all consulting services required by the Design Professional to provide the professional architectural and engineering services incidental to the design and construction of the Project.

2.0.1.1 Basic services do not include civil engineering work outside the immediate Site proposed for the Project, geotechnical engineering, sound engineering, landscape architecture, or interior design for furniture, fixtures and equipment (FF&E) unless included in Other Conditions or Services (Part A of Agreement). On-site civil engineering is included in basic services.

2.0.1.2 Early planning and organization of design work and all Project cost estimates are to follow Construction Specifications Institute (CSI) *UniFormat*[™] conventions. The Project Manual is to follow CSI *MasterFormat*[™] convention. The Project Manual is to follow *MasterFormat*[™]'04. Plan documents are to follow *U.S. National CAD Standard (NCS)* conventions. All documents that are a part of this Project are to be archivable in electronic format in accordance with Paragraphs 2.6.15, 8.1, and 10.20.



2.0.1.3 Design Professional shall incorporate all APS design guidelines and standards into the design of the project.

2.0.2 FURNISHINGS AND EQUIPMENT: If APS has optionally added Furnishings and Equipment work as an additional provision to Other Conditions or Services (Part A of Agreement), the Design Professional shall provide all required work for design, selection, preparation of Construction Documents and bidding for the procurement of Project-related furniture, fixtures, and equipment ("FF&E). Following installation of FF&E, Design Professional shall inspect the installation and prepare a list of items requiring correction. Upon notification from the installer that all corrections have been made, Design Professional shall again inspect the site to confirm that corrections were properly done, and, if so, shall authorize final payment for the FF&E.

2.0.3 PROJECT BUDGET: The Design Professional shall request from APS an accounting of funds available or anticipated to be available for work on the Project that may include, but is not limited to, furniture, fixtures and equipment and other requirements to fully complete, occupy, operate and maintain the facility. APS, in collaboration with the Design Professional, will establish an overall Project Budget for utilization by the Design Professional in the performance of services.

2.0.4 APPROPRIATIONS: The terms of this Agreement are contingent upon sufficient appropriations and authorization of public funds for the performance of this Agreement. If sufficient appropriations and authorizations are not made, this Agreement shall terminate upon written notice given by APS to the Design Professional. APS's determination that sufficient appropriations are not available shall be accepted by the Design Professional and shall be final.

2.0.5 GEOTECHNICAL ENGINEERING: The Design Professional shall, during the Schematic Design Phase, submit to APS a statement of necessary geotechnical or soils engineering services that will be required. If the Design Professional does not believe the services of a geotechnical engineer are required for the Project, a written notice of such determination shall be provided to APS. Geotechnical engineering and any necessary surveys shall be an Additional Service or a Reimbursable Expense.

2.0.6 CIVIL ENGINEERING: The Design Professional shall, during the Schematic Design Phase, submit to APS a statement of need and extent of civil engineering required for the project to protect new and existing structures on or around the Site from adverse conditions. Civil engineering work outside of the immediate site proposed for the Project, and any necessary surveys shall be provided by APS or shall be an Additional Service or a Reimbursable Expense.

2.0.7 QUALIFICATIONS, STANDARD OF CARE AND COORDINATION: The



Design Professional affirms that its employees and consulting professionals shall possess the experience, knowledge, and character necessary to qualify them individually for the services to be performed by them under this Agreement. All services shall be performed in accordance with the standards of their respective profession.

By accepting this contract, the Design Professional affirms that there shall be adequate participation, coordination and cooperation by Design Professional and all consulting professionals in the development of the Construction Documents so that the components of the Project are coordinated:

1. to avoid conflicting design information within the Construction Documents that could cause unnecessary delay or expense during the Construction Phase, and to avoid Project design conflicts with the Site, existing facilities, traffic and pedestrian routing, and the general area of the Project; and,
2. so that the Project will function as intended.

2.0.7.1 INTERDISCIPLINARY COORDINATION MEETINGS: The Design Professional shall, as a part of the coordination process in the provision of Basic Services, hold Interdisciplinary Coordination Meetings and require attendance of appropriate consulting professionals at suitable times during the development of the Construction Documents.

2.0.7.2 COORDINATION WITH OTHER APS CONTRACTORS: The Design Professional shall participate with other separate contractors, APS's agents and employees and APS in reviewing and coordinating their Work when directed to do so. The Design Professional shall make any revisions to the schedule for the provision of Basic Services deemed necessary after joint review and mutual agreement with APS. If the Design Professional believes that such coordination efforts will be extensive enough to justify Additional Services, the Design Professional shall promptly submit a request for Additional Services, in writing, prior to proceeding with the Services. APS shall then give due consideration to the Design Professional's request and, if it is mutually agreed, Additional Services will be authorized.

2.0.8 DESIGN PHASE REVIEWS:

2.0.8.1 REQUIRED PSFA REVIEW: Any K-12 school project requiring permitting by the NM Construction Industries Division ("CID") must, prior to construction or letting of contracts for construction, be first authorized by a Public School Facilities Authority ("PSFA") Approval of School Construction ("ASC") per NMSA 1978, § 22-20-1. Each of the following design phases shall be submitted to PSFA, as part of the Approval of School Construction ("ASC") process: Program Statement, Schematic



Design, Design Development (two sets of documents for each of these phases) and final or Construction Documents (three sets of documents). Each design phase submittal to PSFA shall be approved and signed by the APS Representative prior to submission to PSFA. APS's approval (and PSFA's approval) of all or any portion of the Services shall not create a duty from APS (or PSFA) to the Design Professional, the Contractor or any third person. Responsibility and liability for the quality of the Services shall remain exclusively with the Design Professional, regardless of any APS or PSFA approvals. Procedures for submittal to PSFA are set out in Exhibit G.

2.0.8.2 PLAN REVIEW BY OTHER AGENCIES: Plan reviews by other authorities having jurisdiction to review or approve aspects of the Project, including the state agencies listed in this Subparagraph, will be coordinated by the Design Professional. The Design Professional will determine which reviews are necessary, route them to the correct entity and then return all approvals or rejections with required actions back to APS's agent to be included in the next design phase submission. The expected turn around time for each phase, excluding Construction Documents review, is expected to be approximately **14 days** (excluding intervening holidays) but may be more, depending on the complexity of the Project. The Construction Document Review, otherwise known as Bidding and Permit Review, is estimated to require approximately 21 days. APS makes no warranty or promise with respect to how long review may take. Other authorities having jurisdiction may include (but are not limited to):

1. Construction Industries Division, Regulation and Licensing Department (CID);
2. City of Albuquerque Planning Department
3. State Fire Marshal's Office (SFMO);
4. Energy, Minerals, and Natural Resources Department (EMNRD);
5. Public Education Department (PED);
6. Occupational Health and Safety Bureau, Environment Department;

and

7. Food Quality Section, Environment Department.

2.0.9 FINAL DESIGN REVIEW, BIDDING AND PERMITTING: The Design Professional will be responsible for obtaining the appropriate building permit-ready documents. Upon APS approval, the Design Professional, as APS's agent, will prepare three (3) sets of permit-ready construction documents. An appropriately licensed contractor for the Project will then submit the permit ready documents, along with a building permit application and appropriate permit fee.

2.1 PROGRAMMING PHASE



2.1.1 APS shall schedule a meeting with the Design Professional to review the roles and relationships among all parties.

2.1.2 A Project Program Statement shall be provided by the Design Professional, drawn from information provided by APS, including the District Facility Master Plan and educational program requirements, from meetings with the designated APS building committee, parents, and principals, and from the knowledge and experience of the Design Professional. The Project Program Statement shall ensure that the Design Professional and APS have a mutual understanding of the Project's goals and constraints, including budgetary goals and constraints.

2.1.2.1 The Program Statement shall be an abbreviated document that states the overall Project budget and MACC, and sets out goals, facts, regulations, conditions and concepts that bind the Project. The Program Statement shall clearly provide information concerning how the Project serves the needs of the school(s) and district, the number of students to be served, the number of classrooms, the number of support spaces, infrastructure requirements, educational programs to be supported, and other pertinent information.

2.1.2.2 Lengthy research and analysis of historical information, demographics, and New Mexico Public Education Department requirements; development of drawings or documents defining existing structures; or similar tasks shall not be the responsibility of the Design Professional under this Agreement, unless the Agreement is specifically modified to include any of these either as part of Basic Services or as an Additional Service or Reimbursable Expense.

2.1.3 The Design Professional shall transmit the Project Program Statement to APS along with written confirmation that the Design Professional has visited the site, has become familiar with the local conditions, has correlated observations with current code requirements and life safety needs, and has a clear understanding of observable existing conditions for the Project. Should the Design Professional conclude that the MACC and the Scope of Work to be accomplished are incompatible, proposed recommendations to reconcile the incompatibility shall be included for consideration by APS, but the Design Professional shall continue to design the Project on the basis of the original Scope of Work for the Project until advised otherwise by APS.

2.1.4 The Design Professional shall obtain the written approval of APS for the Project Program Statement, which will be included in the Design Development Booklet. The Project Program Statement must be approved by APS before the Design Professional commences work on the Schematic Design Phase. Should APS determine that the Project Program as set out in the statement does not meet the needs or desires of APS, the Design Professional will revise the Project



Program Statement until it is approved by APS.

2.2 SCHEMATIC DESIGN PHASE

2.2.1 From the approved Project Program Statement, the Design Professional shall prepare Schematic Design documents. The Schematic Design Documents should include preliminary schematic drawings in which the conceptual design and the scale and relationship of components of the Project are established, as well as a Preliminary Project Description (“PPD”) and a Level 1 UniFormat™ probable cost estimate. The Schematic Design should describe:

1. the merits of the design solution(s) as it applies to the Project Program;
2. the general planning and functional concepts of probable architectural, structural, mechanical and electrical systems;
3. types of materials envisioned;
4. approximate dimensions, areas and volumes of the programmed areas;
5. conceptual site considerations, including location, utilities, drainage and geotechnical factors;
6. conceptual building plans, including preliminary elevations, floor plans and sections;
7. physical function(s) of components described in sub-Paragraph 2, and if APS has optionally added this work as an additional provision to Other Conditions or Services (Part A of Agreement), the Design Professional shall include considerations of probable life cycle costs of the project’s components; and,
8. if a new HVAC system is contemplated, and if required by Other Conditions or Services (see Part A of this Agreement), a feasibility report as part of this Schematic Design Phase on the use of energy sources other than fossil fuels for the heating and air conditioning of the proposed building;
9. how the proposed design conforms to APS design guidelines, and whether any part of the plan diverges from those guidelines.

2.2.2 The Design Professional shall brief APS on the Schematic Design, including the elements required by this Paragraph 2.2.2. The Design Professional shall prepare study model(s) if APS requests such models or the Design Professional determines that such models are appropriate.

2.2.3 The Design Professional shall request site survey data in accordance with Paragraph 3.3.

2.2.4 APS shall work with the Design Professional to ensure that information needed for clear definition of Project requirements is made available to the Design Professional in the form of written memoranda. The Design Professional shall request from APS information sufficient to develop program criteria including APS’s goals, objectives, functions and needs, as well as an organizational chart of individuals who will occupy the Project and lists of equipment that requires utility services (other than incidental 110 volt, 60HZ



devices requiring less than 10 amps), required infrastructure, and connections of equipment such as voice and data telecommunication. To the extent practicable and reasonable, the Design Professional shall incorporate APS's requests into the Construction Documents. The Design Professional shall advise APS, in writing, of any information required that has not been provided by APS, or of any conflicts between the established program requirements and the MACC. The Design Professional is solely responsible to APS for the types of material incorporated into the construction, for the size of the facilities constructed, and for designing within the MACC unless otherwise advised by APS. Should the Design Professional conclude that the MACC and the Scope of Work to be accomplished are incompatible, proposed recommendations to reconcile the incompatibility shall be included for consideration by APS, but the Design Professional shall continue to design the Project on the basis of the original Scope of Work for the Project until advised otherwise by APS.

2.2.5 Following corrections or revisions required by APS, the Design Professional shall obtain the written approval of APS for the Schematic Design Documents, which will be included in the DD Booklet.

2.2.6 The responsibility for designing the Project as defined within the Scope of Work remains with the Design Professional. Should the Design Professional at any time conclude that the MACC and the Scope of Work to be accomplished are incompatible, APS shall be notified immediately in writing, with proposed recommendations to reconcile the incompatibility, but the Design Professional shall continue to design the Project on the basis of the then current Scope of Work for the Project until advised otherwise by APS.

2.3 DESIGN DEVELOPMENT PHASE

2.3.1 From the approved Schematic Design, the Design Professional shall prepare the Design Development Booklet, which finalizes and describes the size and character of the entire project. In addition, the Design Professional shall prepare a written statement that identifies the need for any additional data, surveys, or tests.

2.3.2 The Design Professional shall submit to APS for review and written approval the Design Development Booklet and a refined Level 2 UniFormat™ probable cost estimate. Should the Design Professional conclude, at any time, that the MACC and the Scope of Work to be accomplished are incompatible, APS shall be notified immediately in writing, with proposed recommendations to reconcile the incompatibility. Should the Design Professional conclude that the MACC and the Scope of Work to be accomplished are incompatible, proposed recommendations to reconcile the incompatibility shall be included for consideration by APS, but the Design Professional shall continue to design the Project on the basis of the original Scope of Work for the Project until advised otherwise by APS.



2.3.3 Following corrections or revisions required by APS, the Design Professional shall acquire the approval, in writing, of the APS Representative of all documents associated with the Design Development Phase.

2.3.4 After approval of the Design Development Booklet by the APS Representative, the booklet will be submitted to the APS Board for approval, and a copy will be sent to the PSFA.

2.3.4 APS Board approval of the Design Development Booklet is required before Design Professional commences work on the Construction Documents Phase.

2.4 CONSTRUCTION DOCUMENTS

2.4.1 From the approved Design Development Documents, the Design Professional shall prepare the Construction Documents based upon information contained in the Design Development Drawings and other documents previously approved by APS that set forth in detail the requirements for the construction of the entire Project. All Construction Documents must conform to the New Mexico Procurement Code.

2.4.2 Construction Documents shall include written and graphic elements indicating contracting requirements, specifications and contract drawings. If Contractor(s) is/are to provide professional design services, layouts of equipment, or certifications related to systems, materials or equipment that are not included in the Construction Documents, the Design Professional shall clearly define and identify such services and specify all performance and design criteria that such services must satisfy. Neither APS nor the Contractor shall be responsible for the adequacy of the performance or design criteria specified by the Design Professional and required by the Construction Documents.

2.4.3 Construction Documents are expected to include the coordinated information needed to describe the anticipated performance, including, but not limited to:

1. site grading, emergency access, utility locations and the like;
2. all building components and systems;
3. layout, location or dimensions of equipment, components, devices, diffusers and the like;
4. schematics, definitions and capacities of controls, operating logic, sequencing, piping, circuitry, ducting and the like;
5. roof slopes, flashings, dissimilar material transitions and the like; and
6. details, schedules and specifications of all of the above.

2.4.4 Layout, location and type of alarm system devices and panels; fire



prevention system riser and heads; HVAC controls, logic and sequencing; and similar details shall be defined by the Construction Documents and shall not be defined entirely by performance requirements.

2.4.5 Construction Documents shall include the Project Manual containing the project specifications and shall also include, at a minimum, bid forms, wage determination (if required), General Conditions of the Contract for Construction, Project Requirements, and the APS and Contractor Agreement. The Project Manual shall also include, as a part of Division 1, a Required Submittals List indexed by MasterFormat™ divisions identical to the indexing of items (or categories of items) of work within the specifications for which shop drawings or other submittals will be required. The Required Submittals List shall indicate the submittal items that must be submitted together as a package to facilitate the Design Professional's efficient review of like or interrelated items that must be compared or correlated to one another.

2.4.6 When the Construction Documents are approximately 50 per cent complete, the Design Professional will submit the documents to APS for preliminary review by all APS departments which are affected by or have an interest in the Project. The Design Professional shall proceed to complete the Construction Documents, which shall incorporate the comments resulting from this APS review..

2.4.7 When the Construction Documents are approximately 95 per cent complete, the Design Professional will again submit the drawings to APS for review and approval. After that approval, upon completion of the Construction Documents and before proceeding to the Bidding phase, the Design Professional shall brief APS on the Construction Documents, specifically addressing previous APS concerns and requirements. The Design Professional shall, at this briefing, furnish to APS a final and detailed Level 3 UniFormat™ probable cost estimate, including funding requirements in accordance with the Statewide Adequacy Standards. If the Design Professional elects to employ out-of-house cost estimating expertise, any fees incurred in the preparation of the cost estimate(s) shall be paid by the Design Professional.

2.4.7 The responsibility for designing the Project as defined in the Project Description (set out in Part A of this contract) is the Design Professional's, in accordance with Article 4 of this Agreement. Should the Design Professional at any time conclude that the budget and the Scope of Work to be accomplished are incompatible, APS shall be notified immediately, in writing, with proposed recommendations to reconcile the budget and Scope of Work. The Design Professional shall obtain the written approval of APS for any proposed changes to the Scope of Work prior to proceeding with revisions to the in-progress Construction Documents, and the Design Professional shall continue to design the Project on the basis of the then-current Scope of Work for the Project until advised otherwise by APS.



2.4.8 The Design Professional shall return all original documents and drawings provided under Paragraph 3.3 to APS upon APS's request, but in no case later than the completion of the Construction Documents Phase. Payment for the Construction Documents Phase will not be made to the Design Professional until APS has received those documents and drawings.

2.4.9 BID DOCUMENTS AND FINAL APPROVALS:

2.4.9.1 Following corrections or revisions required by APS, the Design Professional shall acquire the approval, in writing, of APS of all documents associated with the Construction Documents Phase.

2.4.9.2 Upon giving its approval, APS shall consider the Construction Documents ready for submission to the local governmental jurisdiction with authority to issue a building permit..

2.4.9.3 The Design Professional shall assist APS in filing the required documents for the approval of governmental and other authorities having jurisdiction over the Project.

2.4.9.4 Following corrections or revisions required by APS, agencies and jurisdictions having authority, the Design Professional shall provide a signature approval block on the front sheet of the drawings and specifications, and shall obtain the approval signatures for:

1. APS;
2. Other agencies (if any, and as appropriate), and
3. Utility companies (as appropriate).

APS shall provide a form of signature approval block upon request.

2.5 BIDDING AND NEGOTIATION PHASE: After submission of Construction Documents to the Permitting Authority and when requested to do so by APS, the Design Professional will commence the Bidding and Negotiation Phase. *No advertisements to bid may occur prior to PSFA issuing its Approval of School Construction for the Project.*

2.5.1 The Design Professional shall assist APS in obtaining bids and in awarding and preparing contracts for construction. All costs related to legal notice and initial advertising of project to bid shall be the responsibility of APS.

2.5.2 An Invitation to Bid shall be prepared by the Design Professional as directed by APS, and shall include the bid date, location and time. The APS Procurement Office will advertise for bids for this Project in conformance with the Procurement Code.



2.5.3 PROJECT WAGE RATE DETERMINATION: The Design Professional shall request from the State of New Mexico Labor and Industrial Division a minimum wage rate determination for the Project pursuant to NMSA 1978, § 13-4-11. The Design Professional shall provide the Division with a description of the Project, an estimate of its construction cost, an approximate bid-opening date, and any other pertinent information required by the Labor and Industrial Division. The Design Professional shall include the wage rate determination in the Bidding Documents.

2.5.4 The Design Professional shall assist the Owner with advertisement of the request for bids and shall concurrently load digital and read-only project description to any website that may be designated by APS.

2.5.5 The Design Professional shall provide sets of Construction Documents as required by APS, in the format required by Section 10.20.

2.5.6 The Design Professional shall clarify and answer any questions about the Construction Documents during the Bidding process and shall issue Addenda, as required and as authorized by APS, to all Bidders no later than **four (4) days** prior to the date of the opening of Bids, except for an Addendum that withdraws the Request for Bids or one that includes postponement of the date for receipt of Bids.

2.5.7 The Design Professional shall review all bids, proposals, alternates or substitutions, if any, with APS, and shall then submit written recommendations as to their acceptance or rejection.

2.6 CONSTRUCTION PHASE – ADMINISTRATION OF THE CONSTRUCTION CONTRACT:

2.6.1 The Construction Phase will commence with the award of the Contract for Construction and shall continue through Certification of Final Completion.

2.6.2 The Design Professional Project Representative will provide administration of the Contract as described in the Construction Documents, and will be a representative of the Design Professional:

1. during construction;
2. until final payment is due; and,
3. from time to time during the period for correction of Work described in the General Conditions of APS-Contractor Agreement.

2.6.3 The Design Professional Project Representative shall be a representative of the Design Professional during the Construction Phase and shall advise and consult with APS. The Design Professional Project Representative shall protect the interests of APS. Instructions to the Contractor shall be forwarded only



through the Design Professional Project Representative. The Design Professional Project Representative shall have authority to act on behalf of APS only to the extent provided in the Construction Documents and any amendments thereto, unless otherwise authorized in writing in accordance with other provisions of this Agreement.

2.6.4 The Design Professional Project Representative shall, consistent with the General Conditions, have authority to reject work that does not conform to the Construction Documents. Where rejected Work is not promptly corrected, the Design Professional Project Representative may, if appropriate, recommend to APS that the Work shall stop. Whenever, in the Design Professional Project Representative's professional opinion, it is necessary or advisable for the implementation of the intent of the Construction Documents, the Design Professional Project Representative, with prior approval of APS, will have authority to require special inspection or testing of the Work in accordance with the provisions of the Construction Documents, whether or not such Work has been fabricated, installed, or completed.

2.6.5 The Design Professional Project Representative shall render written decisions, in accordance with the General Conditions, regarding the execution and progress of the Work and the interpretation of the Construction Documents in accordance with the General Conditions.

2.6.6 The Design Professional Project Representative's decisions on matters relating to aesthetic effect will, with APS's consent, be final.

2.6.7 Interpretations and decisions of the Design Professional Project Representative shall be consistent with the requirements and intent of the Construction Documents and shall be in written or graphic form.

2.6.8 The Design Professional Project Representative shall review and verify the accuracy of Contractor-provided Punch Lists or other such information or representations required by the General Conditions or otherwise required for the successful completion of the Project.

2.6.9 EVALUATION OF THE WORK, REPORTS AND PROGRESS MEETINGS:

2.6.9.1 The Design Professional Project Representative shall submit to APS, for approval, a list of critical points, based upon the construction schedule furnished by the Contractor, when the Work should be evaluated for conformance with the Contract Documents. The Design Professional Project Representative shall make periodic visits to the site at such critical points and other times as appropriate during the progress of the Work for the purposes of notifying APS of the progress and condition of the Work. The Design Professional Project Representative shall use all reasonable



efforts to guard APS against defects and deficiencies in the construction. The results of all site visits shall be documented and supplied to APS. The results of all critical point site visits shall be documented in field reports and provided to APS within **five (5) days** of each such site visit.

2.6.9.2 The Design Professional Project Representative shall visit the site at intervals appropriate to the state of the Contractor's operations for review and evaluation of Work progress. Generally, these regular site visits shall be at intervals of one week coinciding with the Contractor's regular site meetings, and they may also coincide with the critical evaluation points identified in Subparagraph 2.6.9.1. Site visit intervals may be less often than once a week if established by agreement with APS, but may never be less often than is prudent to adequately review the progress of the Work.

2.6.9.3 Should the Design Professional Project Representative determine that any portion of the Work varies from the requirements of the Construction Documents; the Design Professional Project Representative shall immediately notify the Contractor and APS of the nature of the work requiring correction or modification.

2.6.9.4 Weekly, the Contractor shall host a job site progress meeting in accordance with the General Conditions of APS-Contractor Agreement. Meetings shall be in an open forum; shall be chaired by the Contractor, and shall include any Subcontractors doing work or anticipating work in the near future, APS, and any entities APS would like to attend, including the Design Professional Project Representative and any Consultant(s) to the Design Professional, as appropriate. The Contractor shall alert the Design Professional Project Representative as to which Consultants are requested to attend the next meeting and that request shall be included in the meeting minutes. Phone or web conferencing may be used if effective in the opinion of APS.

2.6.9.5 The Design Professional Project Representative shall, eleven (11) months after Substantial Completion, schedule a meeting with APS, Design Professional Project Representative, and Design Professional's Consultants to evaluate the Work and its operations; inspect architectural systems; and make all reasonable efforts to discover defects in materials, equipment, and workmanship. Based on the eleven (11) month walkthrough, the Design Professional Project Representative shall generate a list of Work requiring correction.

2.6.10 Modification: Modification or changes to the Work may be requested by any party through a written Modification / Change Request ("MCR"). No Work that could reasonably be expected to alter the contract price or time or materially alter the Project outcome shall be undertaken until APS has approved an MCR in



writing. APS reserves the right to seek remedy from the Design Professional for modification or changes to the Work or portions of the Work made necessary due to the Design Professional's errors and/or omissions.

2.6.11 Certificate of Payments:

2.6.11.1 The Design Professional Project Representative shall within **five (5) days** after receipt of the Contractor's Application for Payment either notify the Contractor of errors in the Application or make recommendations to APS for payment of the amounts owing to the Contractor. This shall be done in the form of a Certificate for Payment that shall be subject to APS's approval. Upon receipt of an Application for Payment, Design Professional shall immediately forward a copy to APS. Unless Design Professional has already notified Contractor of errors in the Application, within seven (7) days of receipt, APS may advise Contractor if an Application for Payment is improperly completed.

2.6.11.2 The Certificate for Payment shall be based on observations at the Site, evaluations of the Contractor's Applications for Payment, Contractor's Schedule, consultation with APS, and any other knowledge or information the Design Professional may have.

2.6.11.3 The Design Professional Project Representative shall either issue to APS a Certificate for Payment, with a copy to the Contractor, for such amount as the Design Professional Project Representative determines is properly due, or notify the Contractor and APS in writing of the Design Professional Project Representative's reasons for withholding certification in whole or in part as provided in the General Conditions of the Contract for Construction.

2.6.11.4 The issuance of a Certificate for Payment will constitute a representation by the Design Professional to APS, based on the Design Professional Project Representative's evaluation of the Work and the data comprising the Application for Payment, that:

1. To the best of the Design Professional's knowledge, information, and belief, the Work has progressed to the point indicated and the quality of the Work is in accordance with the Construction Documents subject to:
 - A. subsequent evaluation of the Work upon Substantial Completion;
 - B. subsequent evaluation of the Work upon Final Completion;
 - C. the results of any tests required by the Construction Documents or the Design Professional;
 - D. minor deviations from the Construction Documents correctable prior to completion;
 - E. any specific qualifications stated in the Certificate for Payment; and,



2. Contractor's as-built drawings have been reviewed by the Design Professional Project Representative and by the Design Professional's consultants and found, to the best of the Design Professional's knowledge, information, and belief, to accurately depict completed Work inclusive of, but not be limited to, actual locations and installed types, brand, model number and similar information for all Work, including ducts, pipes, conduit, equipment, walls and site utilities; and,

3. Payment certified is in accordance with the conditions set forth in the General Conditions of the contract between APS and the contractor.

2.6.11.5 The issuance of a Certificate for Payment shall not be a representation that the Design Professional has made any examination to ascertain how and for what purpose the Contractor has used the money paid on account of the Contract Sum.

2.6.11.6 Prior to the issuance of a Certificate for Payment that approves final payment pursuant to a Certificate of Final Completion, the Design Professional shall ensure that all requirements for final completion as defined in the General Conditions of the Contract for Construction have been met, including the providing of Record Drawings. The Design Professional shall be responsible for recommendation of rejection or acceptance and final approval of the Record Drawings.

2.6.12 SUBMITTALS: The Design Professional shall within **seven (7) days**, or otherwise as agreed upon with Contractor, review and return to the Contractor the Contractor's submittals, such as shop drawings, product data, and samples. The Design Professional's review is limited to determining that the submittals are in for conformance with the design concept of the Work and with the information given in the Construction Documents. For each submittal, the Design Professional shall designate in writing that the Design Professional:

1. takes no exception; or,
2. rejects and requires the Contractor to re-submit as specified; or,
3. requires corrections or revisions as noted and then re-submission; or,
4. approves as corrected; or,
5. is returning with no action, to be included within the submittal package required by the Construction Documents.

2.6.13 MILESTONES

2.6.13.1 APPROVALS: The Design Professional shall obtain, review, approve or take other action on Contractor-submitted punch lists, operation and maintenance manuals, warranties and related documents required by the Construction Documents.

2.6.13.2 SUBSTANTIAL COMPLETION INSPECTION AND



RECOMMENDATION: Upon request by the Contractor and within **ten (10) days** of receipt of Contractor's punch list and request for determination of Substantial Completion, the Design Professional Project Representative shall conduct project inspections to determine Substantial Completion. Upon approval by APS, the Design Professional Project Representative shall issue a Certificate of Substantial Completion and upon acceptance of that certificate by all parties shall issue a Certificate for Payment appropriate to the Work completed. If the Design Professional determines that the Work is not substantially complete, the Design Professional shall so notify the Contractor in writing and shall specify the reasons that the Work is not substantially complete.

2.6.13.3 CLOSE-OUT: At the time of submitting a certificate of Substantial Completion, Contractor shall prepare and submit to Design Professional and APS a punch list and an estimate of costs necessary to complete the punch list. APS (or Design Professional Project Representative) shall have five (5) business days from receipt of said punch list to accept or reject the punch list. If APS or Design Professional Project Representative rejects the punch list, APS and Design Professional Project Representative shall provide detailed reasons for such rejection. Upon proper rejection of the punch list, Contractor may submit a revised punch list satisfying the detailed rejection provided by APS and Design Professional Project Representative. Contractor shall diligently pursue completion of the punch list and shall notify APS or Design Professional Project Representative in writing upon Contractor's determination that punch list Work is complete. At completion of punch list tasks and prior to Final Completion, the Contractor shall submit written notice to the Design Professional Project Representative requesting the Close-Out Meeting. The Design Professional shall schedule such meeting within **ten (10) days** of the request, or otherwise reply in writing to the Contractor stating why the request is premature. At the Close-Out Meeting, all requirements to achieve completion of all construction contract requirements will be verified, and if the Work is found to be complete, the Design Professional, with concurrence from APS, shall provide written approval of Contractor's completion of close-out requirements within **five (5) days** of the conclusion of the meeting.

2.6.13.4 FINAL COMPLETION: Following successful close-out, upon receipt of a Certificate of Final Completion and request for final payment from the Contractor, the Design Professional will make such inspection and, within five (5) business days of receipt of the Certificate of Final Completion, advise APS whether to accept or reject the Contractor's determination of final completion.

2.6.13.5 If the Design Professional finds that the Work is acceptable under the Contract Documents and the Construction Contract is fully



performed, the Design Professional will promptly, with APS's prior approval, accept the Certificate of Final Completion. Upon acceptance by all parties, the Design Professional will issue a final Certificate for Payment bearing the date of Final Completion and stating that to the best of the Design Professional's knowledge, information, and belief, and on the basis of the Design Professional's or Design Professional's Project Representative's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Construction Contract Documents.

2.6.13.6 If the Design Professional rejects Contractor's determination of final completion, it shall identify its reasons for rejection in detail sufficient for verification by the Contractor.

2.6.13.7 CORRECTION PERIOD 11-MONTH INSPECTION. The Design Professional Project Representative shall, eleven (11) months after Substantial Completion, schedule a meeting with APS, the Design Professional Project Representative, and Design Professional's Consultants to evaluate the Work and its operations; inspect architectural systems; and make all reasonable efforts to discovery defects in materials, equipment, and workmanship. Based on the eleven (11) month walkthrough, the Design Professional Project Representative shall generate a list of Work requiring correction.

2.6.14 AUTHORIZED WORK: The Design Professional agrees not to bind APS or the State of New Mexico to any obligation not assumed herein, unless the Design Professional has express written authority to do so, and then only within the strict limits of that authority. Should the Design Professional or Design Professional's staff or Consultants direct Work to be undertaken for which additional compensation or liability could reasonably be expected, and if such work is not:

1. an emergency endangering life and property; or
2. approved by Modification / Change Request or Change Order;

then, payment for such Work shall not be borne by APS and shall constitute adequate grounds for dismissal or other action against the Design Professional.

2.6.15 RECORD DRAWINGS: As part of Basic Services, the Design Professional shall provide APS with one (1) set of film reproducibles, two (2) sets of blueline prints, and one (1) copy of electronic CAD (version 3.1, U.S. National CAD standard) files, all clearly identified as "Record Drawings" and showing all significant changes of record to the Construction Drawings, including supplemental changes and change orders during the construction phase. The Design Professional shall rely on information provided by the Contractor and the Design Professional's own files in preparation of the Record Drawings. The



Design Professional will not be responsible for any errors or omissions that have been incorporated into these documents as a result of reliance upon the Contractor's record of, or installation of, such changes. Electronic data shall conform to the requirements of section 10.20

2.6.16 MEANS AND METHODS: The Design Professional shall not have control or charge of, and shall not be responsible for, construction means, methods, techniques, sequences, or procedures; safety precautions and programs in connection with the Work; the acts or omissions of the Contractor, Subcontractors, or any other persons performing any of the Work; or the failure of any of them to carry out the Work in accordance with the Construction Documents.

2.6.17 JOBSITE SAFETY: Should the Design Professional or representative thereof observe any condition while on Site believed possibly to be unsafe, the Design Professional will immediately notify the Contractor's Superintendent and APS's Representative and shall document the event in writing to APS and the Contractor. The Design Professional does not have stop-work authority and the Design Professional shall not be liable for such action made in good faith. A decision to stop the work due to a potentially unsafe situation will reside totally with the Contractor. This paragraph shall not be deemed to create a duty on the part of the Design Professional or APS to monitor, or be responsible in any way for, jobsite safety.

2.7 PROJECT REPRESENTATION BEYOND BASIC SERVICES

2.7.1 If APS and the Design Professional agree that more extensive representation is required for inspection of the Project than that described in Subparagraph 2.6.9, the Design Professional shall, upon written authorization of APS, provide one or more Project Representatives to assist the Design Professional Project Representative in carrying out such responsibilities at the Site.

2.7.2 Subject to APS's approval, a Design Professional's Project Representative shall be selected, employed, and directed by the Design Professional. The Design Professional shall be compensated as mutually agreed between APS and the Design Professional, and as set forth in an approved amendment to this Agreement. That amendment shall, in addition, describe the duties, responsibilities, and limitations of authority of such Design Professional's Project Representative(s).

2.7.3 APS reserves the right to employ an independent entity as a Peer Review Design Professional to provide value and cost services on the Project. If a Peer Review Design Professional is retained, an amendment to this Agreement will be required, including, but not limited to, the duties and limits of authority of the Peer Review Design Professional. The Design Professional shall cooperate with the



Peer Review Design Professional in the performance of the Peer Review Design Professional's duties.

2.8 ADDITIONAL SERVICES

Additional Services to those included in Basic Services may, at APS's election, be provided upon written authorization by APS, and as offered by the Design Professional and included as Exhibit D attached herewith. Additional Services may include, but are not limited to:

1. assessment, other than that required under Basic Services, of the financial feasibility of the project, any of the project's components or other special studies;
2. CAD documentation of existing facilities, planning surveys, site evaluations, environmental impact studies, or comparative studies of prospective sites other than those services required under Basic Services to provide a complete and operable facility;
3. providing services related to future facilities, systems, and equipment, which are not intended to be constructed during the Construction Phase;
4. making revisions in drawings, specifications, or other documents when such revisions are inconsistent with written approvals or instructions previously given, and are due to causes beyond the control or responsibility of the Design Professional;

Exception: Revisions necessary for APS approval, compliance with state adopted codes, regulations or similar during Programming, Schematic Design, Design Development and Bid Documents phases, or otherwise necessary to fulfill the intent of this Agreement shall be considered Basic Services and not Additional Services.

5. drawings, specifications, or any other supporting information, direction or services necessary in connection with an MCR or Change Order, provided that such modification or change to the Work is not due to errors or omissions of the Design Professional;
6. investigations, surveys, valuations, inventories, or detailed appraisals of existing facilities when such work is not covered by this Agreement;
7. inordinate re-reviews of Work done by Contractor, exceeding two, due to Contractor's non-compliance with the General Conditions of the Contract for Construction;
8. exhaustive or continuous on-site inspections to check the quality or quantity of the Contractor's Work;
9. excessive time and effort in completing lists of incomplete and non-compliant Contractor Work not included in Contractor's punch list or otherwise due to Contractor's neglect of responsibilities; and
10. consultation concerning replacement of any Work damaged by fire or other cause during construction, and furnishing services as may be required in connection with the replacement of such Work.

2.9 TIME



2.9.1 The Design Professional shall perform Basic and Additional Services as expeditiously as is consistent with professional skill and care and the orderly progress of the Work.

2.9.2 The Design Professional agrees that services will be performed diligently and without interruption at the rate of progress required in order to comply with achieving the bid date as scheduled (see Exhibit A, Time Schedule for Project Phases). It is expressly understood and agreed, by and between the Design Professional and APS, that Exhibit A is a reasonable schedule inclusive of required approval and advertising times. The schedule shall not be modified except for reasonable cause outside of the Design Professional's control and unless agreed upon by APS. The Design Professional shall notify APS in writing if the Design Professional feels APS is causing a delay, such as failure to timely provide required information or approvals. Failure of the Design Professional to perform within this schedule, except through authorized extensions, shall constitute a basis for termination or withholding of payment until schedule compliance is achieved by the Design Professional. If liquidated damages are included in Part A, Other Conditions or Services, of this Agreement, and if the Design Professional neglects, fails or refuses to complete the Construction Documents by the scheduled bid date, or by any proper extension granted by APS, or if the Design Professional fails to submit the Record Drawings by the scheduled date, the Design Professional agrees to pay APS the amount stated in Part A for each calendar day late, not as penalty, but as liquidated damages.

2.9.3 TIME IS OF THE ESSENCE: All time limits stated in this Agreement are of the essence in the performance of this Agreement. The Design Professional will promptly inform APS in writing of any conditions beyond the control of the Design Professional that might adversely affect the Project.

ARTICLE 3 **APS'S RESPONSIBILITIES**

3.1 APS shall designate in writing an APS Representative who shall have express authority to bind APS with respect to all matters requiring APS's approval or authorization except as otherwise provided herein. The Design Professional does not have such authority.

3.2 APS shall provide information to the Design Professional as requested regarding the requirements for the development of the Project's Program Statement.

3.3 If required for construction of the Project, APS shall furnish a legal description and a certified land survey of the Site, giving, as applicable, grades and lines of streets, alleys, pavements, and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries, and contours of the Site; locations, dimensions, and complete data pertaining to existing buildings and other improvements, including landscaping; full information concerning available service and



utility lines, both public and private, above and below grade, including inverts and depths; and to furnish soil tests, test borings, material tests, environmental management plans and other special data as may be mutually agreed upon by APS and Design Professional, to the best of APS's capabilities.

3.4 APS shall examine documents submitted by the Design Professional and shall render decisions promptly to avoid unreasonable delay in the progress of the Design Professional's services.

3.5 If APS observes or otherwise becomes aware of any fault or defect in the Project or nonconformance with the Construction Documents, prompt written notice thereof shall be given by APS to the Design Professional.

3.6 APS shall provide all Central Purchasing functions and shall be responsible for associated costs, such as the cost of advertising the Project and Construction Document reproduction costs in accordance with this Agreement.

ARTICLE 4 **CONSTRUCTION COST**

4.1 Evaluations of APS's Project Budget, statements of Probable Construction Cost, and detailed estimates of construction cost prepared by the Design Professional represent the Design Professional's best judgment as a professional familiar with the construction industry. Notwithstanding the requirements of Paragraphs 4.4 and 4.5, it is recognized that the Design Professional does not have control over the cost of labor, materials, or equipment; over the Contractor's methods of determining bid prices; or over competitive bidding, market, or negotiating conditions.

4.2 The MACC is established as a limit of Construction Cost for design and bidding purposes. APS may, in its own discretion, increase or decrease the MACC. The Design Professional shall be permitted to determine, with APS approval, what materials, equipment, component systems, and types of construction are to be included in the Construction Documents to bring the Construction Cost within the MACC. With the written consent of APS, which consent shall not be unreasonably withheld, the Design Professional may also include in the Construction Documents either additive or deductive alternate bids to adjust the Construction Cost to the fixed limit.

4.3 If bidding or negotiations with potential contractors have not commenced within **sixty (60) days** of the Design Professional submitting Construction Documents to APS, the Project Budget or MACC may be adjusted to reflect any change in the general level of prices in the construction industry between the date of submission of the Construction Documents to APS and the date on which proposals are sought.

4.4 When the MACC is exceeded by the lowest bona fide bid, APS may:



1. pending fund availability, give written approval of an increase in the MACC; or
2. authorize re-bidding the Project within a reasonable time; and
3. cooperate with the Design Professional in revising the Project scope to reduce costs.

If APS elects to revise the Project scope to reduce costs, APS shall cooperate with the Design Professional in revising the quality and scope of the Project; and the Design Professional, without additional charge for services, shall modify the drawings and specifications as necessary to bring the construction cost within the MACC and assist APS through the re-bidding process. Provided, however, that nothing in this paragraph requires APS to reduce the scope of the project, and the Design Professional shall continue to design the Project on the basis of the then-current scope of the Project until advised otherwise by APS.

4.5 If during the development of the Construction Documents estimates indicate that the cost of the Project will exceed the MACC, the provisions of Paragraphs 4.1 through 4.4 shall apply.

ARTICLE 5

REIMBURSABLE EXPENSES

5.1 Reimbursable Expenses are limited by this Agreement and are those expenses above and beyond Basic Services compensation. They are the actual expenditures made by the Design Professional in the interest of the Project. Reimbursable Expenses shall be limited to expenses for:

1. surveying, hazardous material testing or abatement, geotechnical testing, off-site civil engineering or any other Project-related expenses not included in Basic Services and authorized by APS;
2. transportation when traveling outside the APS school district. Such expenses are limited to per diem and mileage rates as set forth in the Per Diem and Mileage Act, NMSA 1978, § 10-8-1 *et seq.*, and DFA Rule 95-1 as amended, except that such travel must be authorized in advance by APS;
3. fees paid for securing approvals from authorities having jurisdiction over the Project;
4. reproduction costs for APS reviews and initial bidding, provided there is written prior APS approval of estimated costs, and
5. reproduction costs during the Construction Phase, provided there is prior written APS approval of estimated costs. All other reproduction costs as may be required for office use of the Design Professional and the Design Professional's consultants shall be a part of the Design Professional's Basic Compensation.

5.2 Construction Documents and specifications may, at APS's election, be printed under the terms of a contract between APS and a current vendor on contract.



5.3 Any applicable gross receipts tax (“GRT”) on reimbursable expenses or payments for Additional Services received by the Design Professional under the provisions of this Contract shall be paid by the Design Professional. The Design Professional shall use and require the use of Tax Exempt Certificates by Consultants and Suppliers whenever allowed by law. In any event, the Design Professional shall not include taxes paid as a part of the base dollar amount upon which taxes are calculated.

5.4 Applicable gross receipts tax shall be charged at the current rate at the time of the billing.

5.5 Design Professional shall obtain written APS approval prior to incurring any Reimbursable Expense.

ARTICLE 6

PAYMENTS TO THE DESIGN PROFESSIONAL

6.1 PAYMENTS FOR BASIC SERVICES

6.1.1 Payment for Basic Services shall be in proportion to services performed within each phase of services, as provided by this Agreement. The base fee shall not be changed because of increase or decrease in the MACC or actual construction cost, but may be adjusted in the event of a change in the Scope of Work.

6.1.2 When portions of the Project are deleted or otherwise not constructed, compensation for such portions of the Project shall be payable to the extent services have already been performed on such portions, but the base fee may be reduced to account for work not needed and not already performed.

6.2 PAYMENT FOR SERVICES AND COSTS

6.2.1 The Design Professional shall submit monthly a fully completed request for payment for all completed services and costs on the form provided as Exhibit E to this Agreement. **Request for Payment shall be submitted to APS for approval on or about the 1st of the month for the previous month’s work.** APS shall pay all undisputed amounts to Design Professional within thirty (30) days after receipt of the Request for Payment. If any portion of the Request for Payment is disputed, APS shall notify Design Professional in writing of the reason for disputing the payment, and said notice shall be provided to Design Professional within thirty (30) days after receipt of the Request for Payment.

6.2.2 The Design Professional shall submit, with billings at the completion of the Project, certification that payment has been made to all consultants, suppliers, and others for materials and services required by this Agreement.

6.3 PAYMENTS WITHHELD: No deductions or withholdings shall be made from the Design Professional’s compensation on account of penalty, liquidated damages, or



other sums withheld from payments to Contractors, or on account of the cost of modification to the Work other than those modifications for which the Design Professional may be liable in accordance with this Agreement.

6.4 PROJECT SUSPENSION OR TERMINATION - OTHER PARTIES: In the event of termination or suspension of the Project due to the fault of parties other than the Design Professional, the Design Professional shall be compensated for services performed up to the termination or suspension date in accordance with **Article 9**.

ARTICLE 7

DESIGN PROFESSIONAL'S RECORDS AND AUDIT

7.1 Records of expenses by the Design Professional and Consultants pertaining to this Agreement shall be kept on the basis of generally accepted accounting principles and shall be available at mutually convenient times to APS or APS's authorized representative. APS shall have the right to audit all such records and billings both before and after payment. Payment under this Agreement shall not foreclose the right of APS to recover excessive or illegal payments.

7.2 Records shall be subject to inspection by APS, the Department of Finance and Administration and the State Auditor, and shall be maintained for inspection of a period of three (3) years following completion of the Project or any disputes related to the Project, or until all applicable statutes of limitations have run, but not less than six (6) years, whichever period is longest. This provision shall survive and continue beyond the termination of other terms of this Agreement.

ARTICLE 8

OWNERSHIP AND USE OF DOCUMENTS

8.1 Original construction document drawings, designs, specifications, notes, project manuals, and related documents of Work developed in the performance of this Agreement by the Design Professional shall become the sole property of APS whether the Project for which they are made is constructed or not. These documents shall be kept on file by APS unless, by written request, APS elects that the Design Professional maintain the originals. The Design Professional shall, regardless of location of originals, maintain a complete digital set of any and all recorded documents developed under this Agreement. Prior to Bidding, the Design Professional shall provide to APS a digital set of the Bid Documents, in accordance with Paragraph 10.20.

8.2 Documents, including drawings and specifications prepared by the Design Professional pursuant to this Agreement, are not intended or represented to be suitable for reuse by APS on any other project. The Design Professional shall not be liable should APS use the documents, in whole or in part, in the future when the Design Professional's services are not retained.

8.3 The original drawings may be marked by APS or the Design Professional to designate the restrictions of use of these documents as set forth in Paragraph 8.2.



8.4 COPYRIGHT: No reports, maps, drawings, or other documents produced in whole or in part under this Agreement shall be the subject of an application for copyright by or on behalf of the Design Professional. All drawings, specifications and other documents and electronic data furnished by Design-Builder to Owner under this Agreement and any copyrights therein (“Work Product”) are deemed to be the property of Owner and shall be considered a work made for hire.

ARTICLE 9

TERMINATION OF AGREEMENT

9.1 If either party should fail to fulfill in a timely and appropriate manner any material obligations under this Agreement, or if either party should violate any of the material covenants, agreements, or stipulations of this Agreement, the non-breaching party, in addition to other remedies available under the terms of this Agreement, shall thereupon have the right to terminate this Agreement by:

1. giving written notice to the other party of such default;
2. specifying steps necessary to cure the default; and
3. providing written notice designating the date of termination at least **ten (10) days** before the effective date of such termination. If the default has not been cured by the specified date of termination, it shall be effective without further notice.

9.1.1 Failure of the Design Professional to maintain the schedule is cause for termination.

9.2 This Agreement may be terminated by APS without cause upon written notice delivered to the Design Professional at least **ten (10) days** prior to the intended date of termination. Neither party may rely on such termination to nullify obligations already incurred for performance or failure to perform prior to the date of termination.

9.3 In the event of termination, all finished or unfinished documents, data, sketches, calculations, estimates, records, schedules, studies, surveys, drawings, maps, models, photographs, reports, and such other information and data accumulated in the performance of services under this Agreement, whether complete or in progress, prepared by the Design Professional under this Agreement shall become APS’s property and shall be delivered to APS. If the Agreement is terminated for reasons other than the fault of the Design Professional, the Design Professional shall be entitled, as its sole and exclusive remedy, to receive compensation for actual work satisfactorily completed hereunder, up to the effective date of termination, including reimbursable expenses authorized by APS which are then due. The portion of the Base Fee owed to the Design Professional shall be proportional to the amount of work completed compared to the amount of Work which would have been performed had the Project been completed.

ARTICLE 10



GENERAL AND SPECIAL PROVISIONS

10.1 LAW: This Agreement shall be governed exclusively by the provisions hereof and by the laws of the State of New Mexico as the same from time to time exist.

10.2 LIABILITY AND CLAIMS

10.2.1 APS and the Design Professional waive all rights against each other and against the contractors, consultants, agents, and employees of the other for damages covered and paid by any property insurance during construction, as set forth in the Conditions of the Contract for Construction and as provided as a part of Exhibit F of this Agreement. APS and the Design Professional each shall require appropriate similar waivers from their contractors, consultants, and agents.

10.2.2 The Design Professional shall indemnify and hold harmless APS, including its Board Members, officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that: i) for those claims based on professional liability, the liability, damages, losses or costs are caused by, or arise out of, the negligent acts or omissions of Design Professional or its officers, employees or agents; or ii) for those claims other than those based on professional liability, the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of Design Professional or its officers, employees or agents. The liability of APS, the PSFA and the State of New Mexico shall be subject in all cases to the immunities and limitations of the New Mexico Tort Claims Act, NMSA 1978, § 41-4-1 *et seq.*, as amended.

10.3 DISPUTE RESOLUTION: If the Parties are unable to resolve any dispute within fifteen (15) calendar days of the occurrence of the event or circumstances giving rise to the dispute, then the dispute shall be resolved by binding arbitration. Such arbitration shall be governed by the New Mexico Uniform Arbitration Act, NMSA 1978, § 44-7A-1, *et seq.*, as amended. A Party submitting a dispute to arbitration shall serve on the other Party a timely written Demand for Arbitration (in accordance with the Notice provisions of this Agreement) and such Demand for Arbitration shall describe the nature of the dispute and the amount in controversy. The Parties shall then jointly select a single arbitrator and, failing such mutual agreement, the arbitrator shall be appointed by a District Court Judge from Bernalillo County, New Mexico. The arbitration shall be held in Albuquerque, New Mexico. Discovery shall be by agreement of the Parties or as ordered by the arbitrator, it being understood that larger cases justify more extensive discovery. At least thirty (30) days prior to the arbitration hearing, the Parties shall exchange an exhibit list, copies of all exhibits to be used at the arbitration, a list of witnesses and a brief summary of the matters as to which each witness is expected to testify. The Parties shall split the fees and costs of the arbitrator equally. The arbitrator may in his or her discretion award other costs to the prevailing party. The arbitrator may award attorney fees to a party only if there is a legal basis for the award of attorney fees. The arbitrator's decision shall be final, and this Agreement to Arbitrate shall be



specifically enforceable under the prevailing arbitration law of the State of New Mexico. Indemnity claims involving personal injury or wrongful death are not subject to mandatory arbitration. Nothing in this Agreement to Arbitrate shall be construed to include a “disabling civil dispute clause” as defined by the N.M. Uniform Arbitration Act.

10.3.1 Claims and Timely Assertion of Claims. The party serving a Demand for Arbitration must assert in the Demand all claims then known to that party on which arbitration is permitted to be demanded. In no event shall the Demand for Arbitration be served after the time for institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

10.3.2 Except for indemnity claims involving personal injury or wrongful death, Arbitration proceedings under this Agreement may be consolidated or joined with arbitration proceedings pending between other parties if the arbitration proceedings arise out of the same transaction or relate to the same subject matter. Consolidation will be by order of the arbitrator, and the arbitrator’s decision regarding joinder will be final. Inclusive to this Subparagraph are APS, the Design Professional, the contractor, all tiers of subcontractors, materials suppliers, equipment suppliers, engineers, designers, consultants, lenders, sureties, and all other parties concerned with the construction of the Project, all of which are bound to each other by this Subparagraph, provided such party has signed this Agreement or has signed an agreement which incorporates this agreement by reference or signs any other agreement to be bound by a joint arbitration clause on this Project.

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

10.4 EFFECTIVE AGREEMENT: This Agreement shall not become effective until: (1) approved by APS for compliance with the financial requirements of the legislation or funding source authorizing the Project in whole or in part; and (2) signed by all parties required to sign this Agreement.

10.5 WRITTEN NOTICE: Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by Registered or Certified Mail, Federal Express, or similar service with proof of delivery to the last business address known to the party giving notice. Notices may also be served on a party’s attorney in any reasonable manner including regular mail. The address to which notices shall be mailed are as provided on the first page of this Agreement, unless notice of a change in any party’s address has been provided by written notice given by such party to the others as herein above provided, in which case notice shall be delivered to the changed address. Nothing in this provision prohibits the use of fax, e mail and regular mail for general communications between the parties.



10.6 CONFLICT OF INTEREST: The Design Professional affirms that it currently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement. The Design Professional further covenants that, in the performance of this Agreement, no person having any such interest shall be employed by the Design Professional. The Design Professional also agrees that, unless APS provides prior written approval, neither the Design Professional nor any employee of same shall have an interest, direct or indirect, in any company hired for the Project as contractor, any tier subcontractors, or any suppliers, except when the Project is a design-build project. Design Professional agrees to submit to APS the campaign contribution disclosure form from the New Mexico Department of Finance and Administration, in order to comply with the campaign contribution provisions of the New Mexico Procurement Code.

10.7 BRIBES: Pursuant to NMSA 1978, § 13-1-191, reference is hereby made to the Criminal Laws of New Mexico (including NMSA 1978, §§ 30-24-1, 30-24-2, and 30-41-1 through 3), which prohibit bribes, kickbacks, and gratuities, violation of which constitutes a felony. Further, the Procurement Code (NMSA 1978, § 13-1-28 *et seq.*) imposes civil and criminal penalties for its violation.

10.8 CODE COMPLIANCE: The Design Professional affirms that the design shall be in compliance with Federal and State codes, regulations and laws applicable to the Work, including, but not limited to, the New Mexico Building Code and New Mexico Fire Code, and the statewide adequacy standards adopted pursuant to the Public School Capital Outlay Act. In all cases, the New Mexico Building Code shall govern in the event of any conflict. The Design Professional's responsibility shall not extend to unwritten policies or interpretations of officials that are not clearly defined by the Codes, Regulations or Laws.

10.9 EQUAL OPPORTUNITY COMPLIANCE: The Design Professional agrees to abide by Federal and State laws, rules and regulations and executive orders of the Governor of New Mexico pertaining to equal employment opportunity. Design Professional shall not deny any person, on the grounds of race, color, religion, national origin, sex, sexual preference, age or disability, participation in or the benefits of any activity performed under this Agreement. Design Professional pursuant to any activity performed under this agreement shall not otherwise subject to discrimination any person on the grounds of race, color, religion, national origin, sex, sexual preference, age or disability. If the Design Professional or any Design Professional consultant is found not to be in compliance with these requirements during the term of this Agreement, the Design Professional agrees to take appropriate steps to correct this noncompliance.

10.10 PROFESSIONAL LIABILITY INSURANCE: The Design Professional shall provide and maintain Professional Liability Insurance with a minimum one million dollar limit (\$1,000,000) and a maximum deductible of Fifty Thousand Dollars (\$50,000) unless as otherwise provided in Other Conditions or Services (Part A of Agreement) and provide a Certificate of Coverage on the form designated herein as Exhibit B. Such



insurance coverage shall be maintained in full force and effect at all times during the performance of Project services and for a period thereafter of not less than three (3) years following Substantial Completion of the Work. The coverage provided herein shall contain an endorsement providing **thirty (30) days** notice to APS prior to any cancellation of said coverage. Said coverage shall be written by an insurer licensed to do business in the State of New Mexico and acceptable to APS. For each year insurance is required, it shall be the Design Professional's obligation to provide evidence of compliance with this Paragraph. Provision of insurance does not limit the liability of the Design Professional under this Agreement.

10.11 CONSULTANT RELATIONS: By appropriate agreement, written where legally required for validity, the Design Professional shall require each Consultant providing services for this Project, to the extent of the Services to be performed by the Consultant, to be bound to the Design Professional by the terms of this Agreement, and to assume toward the Design Professional all the obligations and responsibilities, including performance, that the Design Professional assumes toward APS. Each Consultant agreement shall preserve and protect the rights of APS under this Agreement with respect to the services to be performed. Where appropriate, the Design Professional shall require each of its Consultants to enter into similar agreements with their consultants. The Design Professional shall make available to each proposed Consultant, prior to execution of an agreement related to this Project, copies of this Agreement to which the Consultant will be bound. Nothing contained in this Paragraph or elsewhere in this Agreement shall create any contractual relationship with or cause of action in favor of a third party against APS. Consultants shall be identified on Exhibit C.

10.12 ASSIGNMENT: The Design Professional shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written consent of APS.

10.13 MERGERS, DISSOLUTION, SUCCESSORS, AND ASSIGNS: The Design Professional agrees that during the term hereof it will maintain its existing business structure. The terms and provisions hereof shall extend to, be binding upon, and inure to the benefit of the successors and assigns of the respective parties hereto. The Design Professional agrees the business structure will not dissolve or otherwise dispose of all or substantially all of its assets, and will not consolidate with or merge into another business structure or permit one or more other business structures to consolidate or merge into it, unless the surviving, resulting, or transferred business structure, as the case may be:

1. assumes, is capable of, and agrees in writing to perform all of the obligations of the Design Professional hereunder;
2. qualifies to do business in the State of New Mexico, including providing a legal resident, registered architect or engineer of New Mexico as Project Design Professional;
3. has the written approval of APS for such change in business structure, unless the Project Design Professional remains the same; if not, prior written approval



must be obtained from APS naming a new Project Design Professional.

10.14 RELEASE: The Design Professional, upon final payment of the amounts due under this Agreement, releases APS and its Board Members, officers and employees from any and all claims, liabilities and obligations arising from or under this Agreement, including, but not limited to, all damages, losses, costs, liability, expenses, attorney's fees and costs of litigation that the Design Professional may incur.

10.15 CAPTIONS AND SECTION HEADINGS: The captions and section headings contained in this Agreement are for convenience of reference only, and in no way limit, define, or enlarge the terms, scope, and conditions of this Agreement.

10.16 CONFORMITY WITH LAW AND SEVERABILITY: Each and every provision of law and clause required by law to be inserted in this Contract shall be read and enforced as though it were included herein; and if through error or otherwise any such provision is not inserted, or is not correctly inserted, then upon the written application of any party the Contract shall be amended without cost to make such insertion or correction, and the remainder of this Agreement shall remain in effect and not be affected thereby. In the event that any provision of this Agreement shall be held invalid or unenforceable by a court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision thereof.

10.17 EXHIBITS AND ATTACHMENTS INCORPORATED BY REFERENCE: All exhibits, attachments, riders, and addenda referred to in this Agreement, including but not limited to the exhibits referred to herein this Agreement, are hereby incorporated into this Agreement by reference and made a part hereof as though set forth in full in this Agreement to the extent they are consistent with its conditions and terms.

The following exhibits are attached to and made a part of this Agreement:

Exhibit A - Time Schedule for Project Phases

Exhibit B - Architect's or Engineer's Errors and Omissions Insurance Certificate

Exhibit C - List of Consultants and Consultants' Agreements

Exhibit D - Design Professional Additional Services Proposal/Amendment Form

Exhibit E - Design Professional Pay Request Form

Exhibit F - Boilerplate Procurement Documents and Conditions of the Contract for Construction

Exhibit G - Additional PSFA Procedures

10.18 WAIVER: No provision of this Agreement shall be deemed to have been waived by either party unless such waiver be in writing signed by the party making the waiver, and addressed to the other party(ies); nor shall any custom or practice which may evolve between the parties in the administration of the terms hereof be construed to waive or lessen the right of either party to insist upon performance by the other party in strict accordance with the terms hereof. Further, the waiver by any party of a breach by the other party or any term, covenant, or condition hereof shall not operate as a waiver



of any subsequent breach of the same or any other term, covenant, or condition thereof.

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

10.20 ELECTRONIC DATA: APS requires that Bid Documents, in their original form, be electronic files and that a set of such documents in electronic format shall be provided to APS prior to Bidding. As part of basic services, the construction drawings shall be produced in accordance with version 3.1 of the U.S. National CAD standard. All other Specifications and Project Manual documents shall be Microsoft Word (.doc) or alternately Rich Text (.rtf) files with the exception that the Submittals List shall be Microsoft Excel (.xls) in APS-specified format.

10.21 NO UNSUPERVISED ACCESS: Neither Design Professional nor its Consultants nor its employees shall have unsupervised access to students. Design Professional, at its expense, agrees to comply with APS's policies and procedures for background checks of employees and contractors, as required by NMSA 1978, § 22-10A-5, as amended.

ARTICLE 11

OPERATION AND MAINTENANCE

11.1 Ease of operation and maintenance and the ability to easily replace expendable building components such as lamps or filters and to repair, adjust or replace equipment are essential to the Project. To ensure that these services can be adequately performed after the Project is accepted by APS, the Design Professional shall:

1. provide for easy access to building components or equipment that require frequent replacement or adjustment, such as lamps, filters, motors, pumps or dampers;
2. provide Construction Documents that accurately depict the installation locations for proper function and include all required sequencing or operating logic for intended functions;
3. provide that all equipment systems be appropriately identified and labeled to describe the capacities, flows, and other pertinent information related to their maintenance and safe operation;
4. specify only equipment that can be readily maintained by the APS or other qualified commercial repairmen who are proximate to the location of the Project;
5. provide adequate janitorial and maintenance storage space needs; and
6. at the completion of the Schematic, Design Development, and Construction



Document Phases, brief APS on the rationale for the selection of the major mechanical, electrical, and lighting systems to be specified in the Construction Documents, together with their probable life-cycle costs if required by Other Conditions or Services (Part A of this Agreement).

ARTICLE 12 **COMPENSATION**

12.1 APS shall compensate the Design Professional for Services in accordance with Article 6, Payments to the Design Professional, and other Terms and Conditions of this Agreement.

12.2 Payments for Basic Services as described in Paragraph 2.0, and any other services included in Other Conditions or Services (Part A of Agreement) as part of Basic Services, shall be made monthly in proportion to services performed so that the compensation at the completion of each phase shall be as provided by this Agreement.

12.3 ADDITIONAL SERVICES: Additional services, excluding the services of consultants, shall be computed at the rate included in this Agreement. GRT will be added as a separate item in the payment request.

12.4 ADDITIONAL SERVICES OF CONSULTANTS: Additional services of consultants required beyond Basic Services, including but not limited to additional structural, civil, landscape, interior design, mechanical, and electrical services, shall be computed by applying a multiple not to exceed 1.10 times the amounts billed to the Design Professional for such services. The Design Professional shall provide to APS for approval hourly rates for Consultants and their employees detailed by professional levels prior to incurring any liability for Additional Services. GRT will be added as a separate item in the payment request.

12.5 REIMBURSABLE EXPENSES: Reimbursable Expenses, if allowed by this Agreement, shall be compensated at direct cost not to exceed the allowance defined in Part A of this Agreement, unless modified otherwise by written agreement. Reimbursable Expenses shall not include GRT that will be added in the Payment Request.

