

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

|                                            |   |                                           |
|--------------------------------------------|---|-------------------------------------------|
| In re:                                     | ) | Chapter 11                                |
|                                            | ) |                                           |
| BUILDING MATERIALS HOLDING                 | ) | Case No. 09-12074 (KJC)                   |
| CORPORATION., <u>et al.</u> , <sup>1</sup> | ) | (Jointly Administered)                    |
|                                            | ) |                                           |
| Debtors.                                   | ) | Related to Docket Nos. 597 & 664          |
|                                            | ) |                                           |
|                                            | ) | Objection Deadline: 11/12/09 at 4:00 p.m. |
|                                            | ) | Hearing Date: 11/19/09 at 11:00 a.m.      |

**MOTION OF WEIS BUILDERS, INC. FOR ENTRY  
OF AN ORDER ENLARGING THE CLAIMS BAR DATE**

Weis Builders, Inc. (“Weis”), by and through its undersigned counsel, hereby moves (the “Motion to Enlarge”) this Court for entry of an order enlarging the claims bar date (the “Claims Bar Date”) previously established in the above-captioned case to allow Weis an extension to file its proof of claim (the “Claim”) so that it will be deemed timely. In support of the Motion to Enlarge, Weis respectfully states as follows:

**Jurisdiction and Venue**

1. This Court possesses jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue lies properly with this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2). The basis for the relief requested in this Motion is Bankruptcy Rule 9006(b).

**Preliminary Statement**

2. Rainbow Vision Santa Fe, LLC (“Rainbow” or the “Plaintiff”) entered into a contract with Weis for construction services for the purpose of development of a retirement community located at 500 Rodeo Road, Santa Fe, New Mexico (the “Project”). Rainbow later

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<sup>1</sup> The Debtors consist of the following 12 entities: Building Materials Holding Corporation, BMC West Corporation, SelectBuild Construction, Inc., SelectBuild Northern California, Inc., Illinois Framing, Inc., C Construction, Inc., TWF

filed an action for breach of contract in the District Court captioned *Rainbow Vision Santa Fe, LLC v. Weis Builders, Inc., et al*, Docket No. D-0101-CV-2007-00010 (the “State Court Action”).<sup>2</sup> Weis filed a third-party complaint against various subcontractors, including the Debtors alleging construction defects in work performed at the Project. The Debtors were served with a copy of the third-party complaint in September 2008. Since that time, counsel for the Debtors in the State Court Action and bankruptcy counsel have had numerous interactions with lead counsel for Weis in the State Court Action, Burch & Cracchiolo, P.A. (“B&C”). Despite the numerous exchanges between B&C and Debtors’ counsel both prior to and following the Petition Date (as defined below), Debtors did not provide B&C notice of the Claims Bar Date. Although Weis’s local counsel in the State Court Action received notice of the Claims Bar Date, the notice was inaccurate and misleading because it did not list Weis anywhere on the document and incorrectly listed the attorney and his law firm as potential creditors.

3. It has long been recognized under *Grand Union* that due process requires debtor’s counsel to provide a creditor’s attorneys notice of the claims bar date if the creditor’s counsel was specifically known by the Debtors and had a preexisting involvement with debtor’s counsel with respect to claims against the debtors. It is clear from the facts set forth below that B&C and Debtors’ counsel in both the State Court Action and the bankruptcy case had a preexisting involvement which included numerous emails, telephone conversations, letters, voicemails,

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Construction, Inc., H.N.R. Framing Systems, Inc., SelectBuild Southern California, Inc., SelectBuild Nevada, Inc., SelectBuild Arizona, LLC, and SelectBuild Illinois, LLC.

<sup>2</sup> The full caption of the State Court action is *Rainbow Vision Santa Fe, LLC v. Weis Builders, Inc.; PCI contractors, Inc.; and RLA, Inc. and Weis Builders, Inc. v. Rodgers Plumbing and Heating, Inc.; Eker Brothers, Inc.; TLC Company, EMCO, Inc.; Superior Contracting Corporation, d/b/a American National Insulation and Sealants; BMCW SouthCentral, L.P. d/b/a BMC Construction; BBD Construction, L.P., as successor in interest to or assignee of BMC Construction; Maverick Framing, Inc, as successor in interest to or assignee of BMC Construction, PCI Contractors, Inc.; Western Technologies, Inc.; Valley Fire Protection, Inc.; Storm Water Control, Inc.; Pinon Window & Door, Inc.; Michael Hunter Painting, Inc.; Mesa Erectors, Inc.; Lopez Roofing Service, Inc.; Koch Mechanical; Klein Enterprises, LLC; Hughes and Associates, Inc.; Geo-Test, Inc.; F&J Home Builders, Inc.; Dawson Surveys, Inc.; and Bohannah-Huston, Inc.*

and an in-person meeting. Accordingly, *Grand Union* dictates that notice of the Claims Bar Date be provided to B&C and Debtors' failure to do so renders notice of the Claims Bar Date to Weis insufficient.

#### **Statement of Facts**

4. Rainbow is a developer of full-service communities for diverse populations.

5. On or about April 28, 2004, Rainbow, as owner, and Weis, as contractor, entered into a contract for construction services for the purpose of development of the Project. A true and correct copy of the Standard Form of Agreement between Rainbow and Weis, dated April 28, 2004, (the "Agreement") is attached hereto as **Exhibit A**.

#### **State Court Action**

6. On February 6, 2007, Rainbow filed the State Court Action. The original action was focused primarily on construction delay and lien claims. A true and correct copy of the Complaint is attached hereto as **Exhibit B**.

7. Rainbow generally alleged that the Project was not completed in a workmanlike manner, which resulted in property damage. In addition, the Complaint alleged that the defective work was not remedied, that contract warranty obligations were not honored, and that substantial completion of the Project was not achieved within the time periods specified in the Agreement.

8. Rainbow and Weis entered into a settlement agreement (the "Settlement Agreement") on January 23, 2008, concluding all claims except those that were major or pervasive and identified subsequent to the Agreement.

9. Pursuant to the Settlement Agreement, Weis performed substantial work to remediate the balconies, foundation, insulation, sill plates, and grading and drainage of the Project. Weis is further on notice of additional claims related to fire stop installation, draft

barriers, framing, joist construction and installation, concrete flat work, penetration sealants, and waterproofing. As of September 2008, Weis incurred approximately \$700,000.00 in expenditures for completion of the items specified in the Settlement Agreement.

*Weis's Third-Party Complaint*

10. By virtue of a third-party complaint filed by Weis and several amendments, the State Court Action has become a construction defect dispute with specific claims against various subcontractors, including the Debtors.

11. On March 27, 2007, Weis filed a Third-Party Complaint against non-debtor third-party defendants (the "Third-Party Complaint"), a true and correct copy of which is attached hereto as **Exhibit C**.

12. On April 30, 2007, Weis filed the First Amended Third-Party Complaint against non-debtor subcontractors as third-party defendants (the "First Amended Third-Party Complaint"), a true and correct copy of which is attached hereto as **Exhibit D**.

13. On or about March 7, 2008, Weis filed the Second Amended Third-Party Complaint against the Debtors and others as third-party defendants (the "Second Amended Third-Party Complaint"), a true and correct copy of which is attached hereto as **Exhibit E**.

14. On or about March 7, 2008, Weis served the Debtors with the Second Amended Third-Party Complaint, thus, joining the Debtors in the State Court Action.<sup>3</sup> B&C is listed as

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<sup>3</sup> The Second Amended Third-Party Complaint was filed on March 7, 2008, along with issuance of a summons to BMCW SouthCentral, L.P. d/b/a BMC Construction, BBD Construction, L.P. as successor in interest to or assignee of BMC Construction, and Maverick Framing, Inc as successor in interest to or assignee of BMC Construction.

On July 8, 2008, Maverick Framing, Inc as successor in interest or assignee of BMC Construction was served through service on Lois Caroline Pedro National Registered Agents which represented said entity. On August 8, 2008, Mark Jarmie appeared on behalf of Maverick Framing Inc. On January 30, 2009, Maverick Framing, Inc filed an answer through its attorney, Mark Jarmie, stating that Maverick Framing, Inc was not a successor to BMC Construction and did not work on the Project.

On September 10, 2008, the summons and Second Amended Third-Party Complaint were also served on Tammy Cheshire in Collin County, Texas. Ms. Cheshire stated to the process server that Maverick Framing, Inc is no longer associated with the BMC Entities. Maureen E. Thomas, Esquire, an attorney for the Debtors, however, acknowledged in an email dated September 12, 2008 to Tonya MacBeth that she received service of the Second Amended Third-Party Complaint.



counsel for Weis on the Second Amended Third-Party Complaint. Counsel at B&C received an email on September 12, 2008 from Maureen E. Thomas, Esq., an attorney employed by the Debtors, with an email address of [mthomas@bmhc.com](mailto:mthomas@bmhc.com), copying Len Baumann, with an email address of [lbaumann@bmhc.com](mailto:lbaumann@bmhc.com), stating, “We have been served with the 3rd party complaint in this matter and are trying to confirm which carrier to tender to. I have attached the matrix you sent me before. We only framed the balconies on the 2 story buildings. Can you tell me which of the building on the attached matrix are the 2 story ones? Thanks.” (the “Thomas Email”). A true and correct copy of the Thomas Email is attached hereto as **Exhibit F**.

15. Thus, the Baumann and Diamond Declarations submitted in opposition to the Motion of Weis Builders, Inc. for Order Granting Modification of the Automatic Stay incorrectly assert that the Debtors were not joined as a party in the State Court Action until only a few months before the Petition Date (as defined below). The Thomas Email, however, clearly indicates that the Debtors were served in September 2008, approximately ten months before the Debtors filed for bankruptcy. *See also MacBeth Affidavit* at ¶ 12.

16. Tonya MacBeth at B&C spoke to and corresponded with Maureen Thomas, Esq., to request her participation in a June 2008 mediation, approximately one full year before the Debtors filed for bankruptcy. *Id.* at ¶ 13. During these conversations, counsel for the Debtors in the State Court Action was encouraged to participate in an onsite meeting with a mediator, paid for by Weis, to potentially resolve or narrow the claims against the Debtors and other parties to the State Court Action. *Id.* These conversations include telephonic and email exchanges. *Id.* The outcome of the communication was an email dated June 20, 2008 from Maureen Thomas to

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On November 14, 2008, Weis’s counsel in the State Court Action filed a return of service for service of the Second Amended Third-Party Complaint on BMCW SouthCentral, L.P. d/b/a BMC Construction and BBD Construction, L.P. as successor in interest to or assignee of BMC Construction.

Tonya MacBeth at B&C stating, “I believe that ACE is sending someone from the local Gallagher Bassett office to listen to the experts presentations. I will gather the info on the counter claim and get it to you but it will be late next week as I will be traveling.”. A true and correct copy of this email is attached hereto as **Exhibit G**. The meeting with the mediator was not held, due to other issues, and changed to a site inspection to identify the claims. *See MacBeth Affidavit* at ¶ 13. No representative from the Debtors attended the mediation, despite assurances from the Debtors’ insurance representative, Lee Gardner. A true and correct copy of the email from Lee Gardner is attached hereto as **Exhibit H**.

17. Lead counsel for Weis, B&C, served discovery in the State Court Action on the Debtors on November 20, 2008. A true and correct copy of the Notice of Service is attached hereto as **Exhibit I**.

18. On December 29, 2008, the Third Amended Third-Party Complaint, still containing claims against the Debtors and additional subcontractors, was filed as part of the ongoing State Court Action.<sup>4</sup> A true and correct copy of the Third Amended Third-Party Complaint is attached hereto as **Exhibit J**.

19. Debtors’ counsel, Martin Diamond, attended an on-site meeting regarding the allegations and potential resolution of the State Court Action on March 14, 2009.

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<sup>4</sup> On March 19, 2009, Weis’s counsel filed the return of summons on the Third Amended Third-Party Complaint which was served on BMCW South Central, L.P. d/b/a BMC Construction through its authorized agent, Len Baumann, which was served on March 4, 2009. Weis’s counsel was instructed by Maureen Thomas, counsel for the Debtors in the State Court Action, to serve Mr. Baumann.

Weis’s counsel in the State Court Action had previously attempted service by mail on Mr. Baumann, but he did not accept service by certified mail.

On April 10, 2009, attorney Martin Diamond filed an appearance on behalf of BMCW South Central, L.P. and BBD Construction, L.P. On April 24, 2009, Mr. Diamond filed an answer on behalf of BMCW South Central, L.P. and BBD Construction, L.P. alleging that those entities were misidentified in the Third Amended Third-Party Complaint and that the proper entity was BMC West Corporation.

20. In the Third-Party Complaint and amendments thereto, Weis generally alleges that the third-party defendants were the inspectors, subcontractors, engineers, and/or designers responsible for inspecting, constructing and/or designing the retirement community on Rainbow's property. Weis believes and alleges that each of the third-party defendants was negligent, careless, strictly liable, in breach of certain warranties, or was otherwise legally responsible for the events complained of in the Complaint and any resulting damages.

21. Weis specifically alleges a contribution and indemnity cause of action against all of the third-party defendants.

22. In its Third Amended Third-Party Complaint, Weis alleges that performance of the individual contractors, including the Debtors, contributed to the need for remediation.

23. Upon information and belief, the Debtors provided proof of insurance coverage to Weis before and during construction of the Project. As is standard in the industry, Weis required insurance coverage to be in place for its protection. Proof of coverage contained in three insurance certificates provide for insurance coverage beyond the claim for damages filed in the State Court Action by Weis, as alleged in the Second and Third Amended Third-Party Complaints. The November 6, 2006 Marsh Risk and Insurance Services Certificate of Insurance identifies the general liability policy (XSL62170250A), Deductible, \$1.9 Million per occurrence of \$100,000 self insured retention aggregate limit per project, and a general aggregate subject to a policy maximum of \$25,000,000. Weis is identified as an Additional Insured, providing coverage to Weis for property damage caused by the Debtors' acts or omissions. A true and correct copy of the November 6, 2006 Marsh Risk and Insurance Services Certificate of Insurance is attached hereto as **Exhibit K**. Additionally, there is also a policy for excess liability in the amount of \$25 Million, with a \$1 Million self insured retention.

The November 30, 2005 Marsh Risk and Insurance Services Certificate of Insurance identifies a general liability policy (HDOGN8072889), Deductible, \$2 Million per occur [occurrence]. Weis is identified as an Additional Insured, providing coverage to Weis for property damage caused by the Debtors' acts or omissions. A true and correct copy of the November 30, 2005 Marsh Risk and Insurance Services Certificate of Insurance is attached hereto as **Exhibit L**. Additionally, there is also a policy for excess liability in the amount of \$10 Million, with a \$2 Million self insured retention. The November 22, 2004 Marsh Risk and Insurance Services Certificate of Insurance identifies the general liability policy (GL5346010), Deductible, \$1 Million per occur [occurrence], with \$1 Million in coverage. Weis is identified as an Additional Insured, providing coverage to Weis for property damage caused by the Debtors' acts or omissions. A true and correct copy of the November 22, 2004 Marsh Risk and Insurance Services Certificate of Insurance is attached hereto as **Exhibit M**. Additionally, there is also a policy for excess liability in the amount of \$25 Million, with a \$1 Million dollar self insured retention.

24. The State Court Action is currently pending, and a Third Amended Scheduling Order was entered on July 29, 2009, providing at ¶17 that initial mediation was to be completed by August 31, 2009. A true and correct copy of the Third Amended Scheduling Order is attached hereto as **Exhibit N**.

25. During the period from September 2008 to the present, B&C has personally participated as lead counsel to Weis in all substantive discussions with Debtors' counsel in the State Court Action. *See MacBeth Affidavit* at ¶ 22. At no point during these conversations did counsel for the Debtors mention the Claims Bar Date or provide B&C with any notice thereof. *Id.*

26. All discovery and dispositive issues related to the State Court Action have been handled by B&C, including, but not limited to: Response to O'Connor Motion to Dismiss; Response to Walker Motion to Dismiss; Notice of Mediation; Mediation scheduling and discussions with counsel regarding demands and scope of mediation; all outgoing discovery; response to Motions to Compel Weis's response to discovery; all responses to Third-Party Defendant discovery served on Weis; and all substantive and a majority of procedural discussions with Third-Party Defendants. *Id.* at ¶ 23.

27. On or about June 16, 2009 (the "Petition Date"), the Debtors filed a voluntary petition for protection under Chapter 11 of the Bankruptcy Code. The Debtors have continued in the operation of their business and the possession of their property as debtors-in-possession under Sections 1107 and 1108 of the Bankruptcy Code.

28. The Debtors are represented by Martin Diamond in the State Court Action. Counsel at B&C has had significant conversations with Mr. Diamond regarding substantive and procedural issues both prior to and following the Petition Date. *See MacBeth Affidavit* at ¶ 27. Ms. MacBeth has engaged in repeated discussions with Mr. Diamond regarding the Debtors' position in the bankruptcy, his filing of the Notice of Bankruptcy, and the Debtors' position that the automatic stay applied to the entire State Court Action. *Id.* Ms. MacBeth was never informed by Mr. Diamond that a Notice of Claims Bar Date had been filed or that a Claims Bar Date existed. *Id.* Further, Ms. MacBeth discussed with Mr. Martin that Weis did not agree that the automatic stay applied to the entire State Court Action. *Id.* Mr. Diamond also informed Ms. MacBeth that his client would not participate in the August Mediation (initiated August 7, 2009) due to the fact that the Debtors had filed for bankruptcy. *Id.*

29. Tonya MacBeth at B&C has also received letters, direct voicemails, personally left voicemails, and engaged in direct discussions with the Debtors' bankruptcy counsel around the Petition Date. *See MacBeth Affidavit* at ¶ 28. During the week of August 10, 2009, Ms. MacBeth spoke with Debtors' Texas counsel in the bankruptcy case, Gibson, Dunn & Crutcher LLP. *Id.* During that call, Ms. MacBeth was advised that it was the Debtors' position that the automatic stay applied to the entire State Court Action due to the interrelatedness of the claims against all third-party defendants. *Id.* Ms. MacBeth advised Texas counsel that Weis disagreed with that position and was informed that she was risking facing sanctions for proceeding forward in the State Court Action. *Id.* Ms. MacBeth was advised that the Debtors planned to request a dismissal of the claims against them in the State Court Action. *Id.* Ms. MacBeth responded that Weis would seek to lift the automatic stay and for clarification of its impact on the other litigants in the State Court Action. *Id.* At no time did Texas counsel inform Ms. MacBeth that the Claims Bar Date Motion had been filed or that a Claims Bar Date had been set. *Id.*

30. On June 26, 2009, the Debtors filed the Motion to Establish the Claims Bar Date [D.I. 106] (the "Claims Bar Date Motion"). On July 16, 2009, the Court entered the Order Approving the Claims Bar Date Motion [D.I. 248]. On July 23, 2009, the Debtors filed the Notice of the Claims Bar Date [D.I. 296] (the "Claims Bar Date Notice"). The Claims Bar Date Notice was not sent to B&C notwithstanding the multitude of conversations between B&C and the Debtors' counsel in the State Court Action and bankruptcy counsel prior to and following the Petition Date.

#### **Relief Requested**

31. Weis seeks to enlarge the Claims Bar Date in order to allow Weis fourteen (14) days from the entry of the proposed form of order (the “Order”) to the Motion to Enlarge in order to file the Claim which will be considered timely filed.

**Basis for Requested Relief**

**I. The Time for Filing Weis’s Proof of Claim Should Be Enlarged Because Weis Did Not Receive Adequate Notice Of The Claims Bar Date**

32. Inadequate notice of the bar date is a ground upon which a late proof of claim is allowed to be filed. *In re The Grand Union Co.*, 204 B.R. 860, 870 (Bankr. D. Del. 1997). Due process requires that the notice be such that “it would reasonably inform the interested parties that the matter is pending and would reasonably allow the parties to ‘choose for [themselves] whether to appear or default, acquiesce or contest.’” *Id.* at 871, *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

33. The Debtors did not provide Weis with adequate notice because lead counsel of record in the State Court Action, B&C, never received notice of the Claims Bar Date. B&C is listed as counsel for Weis on both the Second Amended Third-Party Complaint and the Third Amended Third-Party Complaint that were served upon the Debtors. In fact, the only document that B&C received from the Debtors to date is the Notice of Second Supplemental List of Ordinary Course Professionals, attached hereto as **Exhibit O**, which incorrectly lists B&C as an ordinary course professional for the Debtors on the Second Supplemental OCP List.

34. B&C engaged in direct discussions with Debtors’ bankruptcy counsel after the Petition Date, prior to the filing of the Bar Date Motion in June 2009 and prior to the service of the Bar Date Notice in July 2009 regarding the automatic stay and the threat of sanctions against Weis. *See MacBeth Affidavit* at ¶ 28. Further, during the period from September 2008 to the present, B&C has personally participated as lead counsel to Weis in all substantive discussions

with Debtors' counsel in the State Court Action. *Id.* at ¶ 22. At no point during these conversations did counsel for the Debtors mention the Claims Bar Date or provide B&C with any notice thereof. *Id.* Moreover, all discovery and dispositive issues related to the State Court Action have been handled by B&C. *Id.* at 23. *See also Salmon Affidavit* at ¶ 9.

35. Weis acknowledges that local counsel in the State Court Action, William C. Salmon, received notice of the Claims Bar Date. The notice, however, was inaccurate and misleading because it listed William C. Salmon and his law firm, Rhodes and Salmon PC ("Rhodes and Salmon"), as the creditor on the attached proof of claim forms. *See Salmon Affidavit* at ¶ 10. Under the Additional Insured provision in the Debtors' Insurance Contract, Rhodes and Salmon would have a claim for attorneys' fees against the Debtors if Weis's claim is successful. *Id.* at ¶ 11. Accordingly, if the insurance carrier agreed to provide coverage under the policy provision, Rhodes and Salmon may seek reimbursement for their fees and expenses. *Id.* Thus, it is reasonable that Mr. Salmon did not respond to the Claims Bar Date notice because both he and his law firm were not owed any outstanding attorneys' fees or expenses from the Debtors. Importantly, the notice of the Claims Bar Date sent to Mr. Salmon did not list the name of the claimant, Weis Builders, Inc., anywhere on the document. *Id.* at ¶ 12.

36. Pursuant to *In re The Grand Union Company*, Weis asserts that its failure to file a proof of claim was due to inadequate notice. *See In re The Grand Union Company*, 204 B.R. 864, 870 (Bankr. D. Del. 1997) (stating, "the pre-petition involvement of the claimants' attorneys with [the Debtors'] agent [] raises an issue of adequacy of the bar date notice . . ."). In *Grand Union*, the Delaware Bankruptcy Court held that notice was inadequate when it was not sent directly to the claimants' counsel who was specifically known by the Debtors before they filed for bankruptcy. *Id.* at 872.



37. In this case, counsel for the Debtors was well aware that Weis was represented by B&C as lead counsel. In fact, counsel for the Debtors had spoken to B&C regarding this case and the State Court Action on several occasions. *See MacBeth Affidavit at ¶ 12, 13, 16, 22, & 23.* As previously stated, B&C also had discussions with Debtors' Bankruptcy Counsel. *Id.* at ¶ 28. Counsel for the Debtors in the State Court Action, Martin Diamond, was present at a meeting with William Salmon from Rhodes and Salmon. Mr. Salmon made it clear to Mr. Diamond that he could not start the meeting without the presence of Tonya MacBeth from B&C because "she would be running the meeting as lead counsel for Weis." *See Salmon Affidavit at ¶ 7.* It has long been recognized under *Grand Union* that due process requires debtor's counsel to provide a creditor's attorney notice of the claims bar date if the creditor's counsel had a preexisting relationship with debtor's counsel. It is clear in this case from the number interactions between B&C and Debtors' counsel in both the State Court Action and the bankruptcy case that the parties had a preexisting relationship. Accordingly, *Grand Union* dictates that notice of the Claims Bar Date was insufficient.

## **II. Weis's Proof of Claim Should Be Considered Timely Filed Because The Failure to Timely File Was Due To "Excusable Neglect"**

38. Weis contends that it has clearly met its burden to enlarge the Claims Bar Date under the *Grand Union* standard set forth above. Out of an abundance of caution, however, Weis also contends that its Motion to Enlarge could be granted under the 'excusable neglect' theory.

39. A Bankruptcy Court may extend the bar date for cause to permit the late filing of a proof of claim "if the movant's failure to comply with an earlier deadline 'was a result of excusable neglect.'" *Pioneer Inv. Services Co. v. Brunswick Associates*, 507 U.S. 380, 382 (1993) (*quoting* Federal Rules of Bankruptcy Procedure Rule 9006(b)(1)). The Bankruptcy

Court should review a creditor's reasons for filing a late claim with some flexibility because the analysis is rooted in equity. *United States v. Clark*, 51 F.3d 42, 44 (5th Cir. 1995).

40. Rule 3003(c)(3) of the Federal Rules of Bankruptcy Procedure, which sets forth the time for filing proofs of claim, provides, in relevant part, that "the court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." August 31, 2009 was the Claims Bar Date for filing proofs of claim in this case. Bankruptcy Rule 9006(b)(1) empowers this Court, however, to extend the time for filing a claim if the movant's failure to comply with the bar date "was a result of excusable neglect." In determining whether to extend the Claims Bar Date, Rule 3003(c)(3) and Rule 9006(b)(1) must be read together.

41. The term "excusable neglect," used in Bankruptcy Rule 9006(b)(1) was clarified by the Supreme Court in *Pioneer*. The Court found that, "by empowering the courts to accept late filings 'where the failure to act was a result of excusable neglect' . . . Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filing caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Pioneer*, 507 U.S. at 388. The Supreme Court stressed that the determination of whether a party's neglect of a deadline was excusable was "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395. The relevant circumstances, the Court noted, included analyzing:

- (1) the danger of prejudice to the debtor;
- (2) the length of delay and its potential impact on judicial proceedings;
- (3) the reason for the delay, including whether it was within the reasonable control of the movant; and
- (4) whether the movant acted in good faith.

*Id.* Each of these factors weighs in favor of Weis.

**Danger of Prejudice to the Debtor**

42. The Third Circuit Court of Appeals has recognized that the first factor, danger of prejudice, “is not an imagined or hypothetical harm; a finding of prejudice should be a conclusion based on facts in evidence.” *In re O’Brien Envtl. Energy, Inc.*, 188 F.3d 116, 127 (3d Cir. 1999). Under *O’Brien*, the relevant factors for analysis of prejudice include: whether the debtor was surprised or caught unaware of a claim that it had not anticipated; whether the payment of the claim would force the return of amounts already paid out under the confirmed plan or affect the distribution to creditors; whether payment of the claim would jeopardize the success of the debtor’s reorganization; the size of the claim sought to be considered as compared to the rest of the estate; whether allowance of the claim would adversely impact the debtor actually or legally; whether allowance of the claim would open the floodgates to future claims; and whether the plan was filed or confirmed with knowledge of the existence of the claim. *Id.* at 125-26.

43. Each of these factors militates in favor of extending the Claims Bar Date to allow Weis to file its Claim. First, the Debtors cannot claim that they were unaware or surprised by Weis’s assertion of its Claim. The Debtors had scheduled a contingent, unliquidated claim in this bankruptcy case related to Weis’s Claim in the State Court Action. Obj ¶ 8. Thus, the Debtors clearly were aware of Weis’s Claim well in advance of filing and seeking confirmation of the Plan, thus making prejudice absent to the Debtors in this case. *O’Brien*, 188 F.3d at 127-28 (finding absence of prejudice for purposes of excusable neglect analysis where debtor had scheduled claim at issue).

44. The ‘impact upon reorganization’ factor likewise reveals that no prejudice will result from granting the relief in this Motion to Enlarge. First, the Plan in this case has not yet been confirmed. The confirmation hearing is scheduled for December 10, 2009. [D.I. 768]. As a result, the Debtors would not have to return amounts already paid out under the Plan. Further, the Debtors are still litigating the value of many of the unsecured claims. This Court has held that when a debtor is still litigating the value of claims and does not yet know the value of each creditor’s recovery, the asserted claim will not affect the distribution to creditors. *See In re Inacom Corp.*, 2004 WL 2283599 at \*4-5 (Bankr. D. Del. 2004).

45. The next *O’Brien* factor, whether payment of the claim would jeopardize the success of the debtor’s reorganization also weighs in favor of Weis. The maximum exposure of the Debtors in the State Court Action is approximately \$700,000.00, an amount that will have an insignificant effect on the bankruptcy estate that is comprised of over \$261 million in assets and \$431 million in liabilities.<sup>5</sup> The total exposure represents less than one sixth of one percent of the total. It is therefore, impossible that the Claim, if ultimately allowed, would require the disgorgement of any funds that have or will be paid to any of the other creditors of the Debtors. Weis’s claim represents a mere drop in the bucket of the Debtors’ aggregate unsecured claims liability, and as such, consideration of Weis’s Claim creates no possibility that Debtors’ reorganization or distributions will be endangered or will require reconsideration. *In re Nat’l Spa & Pool Inst.*, 257 B.R. 784, 788-89 (Bankr. E.D. Va. 2001) (holding that the critical element with respect to the prejudice prong of excusable neglect analysis is whether the debtor can fully perform its confirmed plan if the out of time claim is allowed).

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<sup>5</sup> See Amended Schedules/Statements filed: Sch A, Sch B, Sch D, Sch E, Sch F, Sch G, Sch H, Sum of Schs, Decl Concerning Debtors Schs [D.I. 261].

46. The fourth *O'Brien* factor is whether allowance of the claim would adversely impact the debtor actually or legally. Weis contends that the impact to the Debtors if its Claim is allowed would be minimal. The Debtors have insurance certificates listing Weis as an additional insured that provide for coverage beyond the claim for damages filed in the State Court Action. Thus, any harm to the Debtors would be minimal.

47. The final *O'Brien* factor, whether allowance of the claim would open the floodgates to future claims also weighs in favor of Weis. There is no evidence that any other creditor has or plans to file a similar motion to enlarge the Claims Bar Date. In *Inacom*, the Delaware District Court disagreed with the Delaware Bankruptcy Court regarding whether allowance of a claim would open the floodgates of litigation. *In re Inacom Corp.*, 2004 WL at \*6. In that case, the District Court concluded that the Debtors failed to identify any other similarly situated creditor that had filed a motion to allow its claim.<sup>6</sup> Similar to the facts in this case, the Debtors have not identified any similarly situated creditor who filed or plans to file a motion to enlarge the Claims Bar Date. Because the facts in this case are analogous to those in *Inacom*, this Court should hold that this factor also weighs in favor of Weis.

#### **Length of Delay**

48. Approximately seven weeks have passed from the expiration of the Claims Bar Date and the filing of this Motion to Enlarge. This is a negligible delay that can easily be accommodated in the administration of the Debtors' pre-confirmation estates. Courts in this jurisdiction have permitted late filings based upon excusable neglect in cases where the delay at issue was much greater than present here. *See Chemetron Corp. v. Jones*, 72 F.3d 341, 350 (3d Cir. 1995) (fact that claim was filed four years after bar date and two years after plan was

confirmed did not mandate a conclusion that there was no excusable neglect); *Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg., Inc.)*, 62 F.3d 730, 739-40 (5th Cir. 1995) (finding excusable neglect though delay was six to eight months)); *see also O'Brien*, 188 F.3d at 130 (holding that a two month delay was within parameters in which excusable neglect could be found).

### **Reason for the Delay**

49. The reason for the delay in filing the Claim clearly falls in favor of Weis. Debtors' counsel failed to send notice of the Claims Bar Date to lead counsel and counsel of record for Weis. Debtors' counsel knew B&C represented Weis in the State Court Action and had multiple conversations and exchanges with B&C, both before and after the Debtors filed for bankruptcy. *See MacBeth Affidavit* at ¶ 12, 13, 14, 15, 16, 22, 23, 27, & 28. If B&C received notice of the Claims Bar Date, Weis would have filed a timely proof of claim. Further, the notice that was provided to local counsel in the State Court Action incorrectly listed the attorney and law firm as the creditor on the proof of claim forms. As stated above, Weis's name did not appear anywhere in the documents received by local counsel relating to the Bar Date motion. *See Salmon Affidavit* at ¶ 10. Because attorneys in construction litigation regularly seek recovery of their fees and expenses from insurance if their claim is successful, it was reasonable for local counsel to believe that the proof of claim form related solely to him and his firm, and not to Weis directly. *Id.*

### **Good Faith Analysis**

50. The final *Pioneer* factor is whether Weis acted in good faith. It is clear that Weis did not delay filing its Claim as a result of bad faith. Weis has acted in good faith and has

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<sup>6</sup> In *Inacom*, the claimant filed a motion to reconsider its claim, rather than a motion to enlarge

worked expeditiously to file this Motion to Enlarge as soon as reasonably possible after learning about the Claims Bar Date.

#### **IV. The Court Should Exercise Its Equitable Powers to Enlarge the Bar Date**

51. In the alternative, Weis submits that this Court should exercise its equitable powers to enlarge the Claims Bar Date and allow Weis to file its Claim. The Bankruptcy Court is a court of equity, and may use its equitable powers in the administration of a bankruptcy estate as long as the Court stays within the confines of the Bankruptcy Code. *Pioneer*, 507 U.S. at 389; *See also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1982). Bankruptcy Rule 9006(b)(1) grants the Bankruptcy Court discretionary power to enlarge the Claims Bar Date and to allow a claimant to file a late claim. Moreover, section 105(a) of the Bankruptcy Code authorizes the Court to “issue an order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

52. Weis has acted in good faith and its failure to file a timely proof of claim was not the result of any inadvertence, neglect, or mistake on Weis’s part. Weis took steps to enlarge the Claims Bar Date when it became aware of its need to file a proof of claim in this case. Furthermore, Weis’s failure to timely file its Claim was a result of the Debtors’ oversight in failing to provide B&C with proper notice. In the event that the Claims Bar Date is not expanded and the Claim is thereby deemed late filed, Weis will be unfairly prejudiced. Thus, Weis respectfully requests that this Court exercise its equitable powers to consider the Proof of Claim timely filed.

#### **CONCLUSION**

WHEREFORE, based on the foregoing, Weis respectfully requests this Court (a) grant

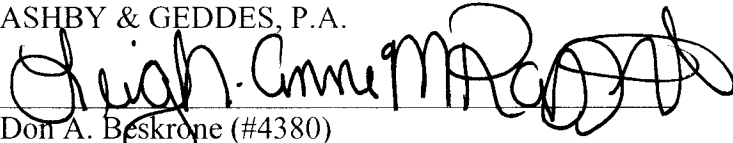
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the bar date.

the Motion, (b) grant Weis fourteen (14) days from the entry of the Order approving the Motion to Enlarge to file its Claim which will be deemed as timely filed; and (c) for such other and further relief as this Court deems just and proper.

Dated: October 30, 2009

ASHBY & GEDDES, P.A.

A handwritten signature in black ink, appearing to read "Leigh-Anne M. Raport", written over a horizontal line.

Don A. Beskrone (#4380)

Leigh-Anne M. Raport (#5055)

500 Delaware Avenue, 8<sup>th</sup> Floor

P.O. Box 1150

Wilmington, Delaware 19899

Tel: (302) 654-1888

*Attorneys for Weis Builders, Inc.*



**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

|                                                                      |                           |
|----------------------------------------------------------------------|---------------------------|
| In re:                                                               | ) Chapter 11              |
|                                                                      | )                         |
| BUILDING MATERIALS HOLDING CORPORATION, <u>et al.</u> , <sup>1</sup> | ) Case No. 09-12074 (KJC) |
|                                                                      | )                         |
|                                                                      | ) (Jointly Administered)  |
| <hr style="width:40%; margin-left:0;"/>                              |                           |
| Debtors.                                                             |                           |

**DECLARATION OF TONYA K. MACBETH  
IN SUPPORT OF THE MOTION OF WEIS BUILDERS, INC. FOR ENTRY  
OF AN ORDER ENLARGING THE CLAIMS BAR DATE**

I, Tonya K. MacBeth, hereby declare as follows:

1. I am an attorney at Burch & Cracchiolo, P.A. (“B&C”). B&C is lead counsel of record for Weis Builders, Inc. (“Weis”) in the action pending in the First Judicial District Court of the State of New Mexico for the County of Santa Fe (the “District Court”) captioned *Rainbow Vision Santa Fe, LLC v. Weis Builders, Inc., et al*, Docket No. D-0101-CV-2007-00010 (the “State Court Action”).<sup>2</sup> I submit this declaration in support of the motion (the “Motion to Enlarge”) filed by Weis for entry of an order enlarging the claims bar date (the “Claims Bar Date”).

2. Rainbow Vision Santa Fe, LLC (“Rainbow” or the “Plaintiff”) is a developer of full-service communities for diverse populations.

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<sup>1</sup> The Debtors consist of the following 12 entities: Building Materials Holding Corporation, BMC West Corporation, SelectBuild Construction, Inc., SelectBuild Northern California, Inc., Illinois Framing, Inc., C Construction, Inc., TWF Construction, Inc., H.N.R. Framing Systems, Inc., SelectBuild Southern California, Inc., SelectBuild Nevada, Inc., SelectBuild Arizona, LLC, and SelectBuild Illinois, LLC.

<sup>2</sup> The full caption of the State Court action is *Rainbow Vision Santa Fe, LLC v. Weis Builders, Inc.; PCI contractors, Inc.; and RLA, Inc. and Weis Builders, Inc. v. Rodgers Plumbing and Heating, Inc.; Eker Brothers, Inc.; TLC Company, EMCO, Inc.; Superior Contracting Corporation, d/b/a American National Insulation and Sealants; BMCW SouthCentral, L.P. d/b/a BMC Construction; BBD Construction, L.P., as successor in interest to or assignee of BMC Construction; Maverick Framing, Inc., as successor in interest to or assignee of BMC Construction, PCI Contractors, Inc.; Western Technologies, Inc.; Valley Fire Protection, Inc.; Storm Water Control, Inc.; Pinon Window & Door, Inc.; Michael Hunter Painting, Inc.; Mesa Erectors, Inc.; Lopez Roofing Service, Inc.; Koch Mechanical; Klein Enterprises, LLC; Hughes and Associates, Inc.; Geo-Test, Inc.; F&J Home Builders, Inc.; Dawson Surveys, Inc.; and Bohannah-Huston, Inc.*

3. On or about April 28, 2004, Rainbow, as owner, and Weis, as contractor, entered into a contract for construction services for the purpose of development of a retirement community located at 500 Rodeo Road, Santa Fe, New Mexico (the “Project”). A true and correct copy of the Standard Form of Agreement between Rainbow and Weis, dated April 28, 2004, (the “Agreement”) is attached to the Motion to Enlarge as **Exhibit A**.

State Court Action

4. On February 6, 2007, Rainbow filed the State Court Action for breach of contract. The original action was focused primarily on construction delay and lien claims. A true and correct copy of the Complaint is attached to the Motion to Enlarge as **Exhibit B**.

5. Rainbow generally alleged that the Project was not completed in a workmanlike manner, which resulted in property damage. In addition, the Complaint alleged that the defective work was not remedied, that contract warranty obligations were not honored, and that substantial completion of the Project was not achieved within the time periods specified in the Agreement.

6. Rainbow and Weis entered into a settlement agreement (the “Settlement Agreement”) on January 23, 2008, concluding all claims except those that were major or pervasive and identified subsequent to the Agreement.

7. Pursuant to the Settlement Agreement, Weis performed substantial work to remediate the balconies, foundation, insulation, sill plates, and grading and drainage of the Project. Weis is further on notice of additional claims related to fire stop installation, draft barriers, framing, joist construction and installation, concrete flat work, penetration sealants, and waterproofing. As of September 2008, Weis incurred approximately \$700,000.00 in expenditures for completion of the items specified in the Settlement Agreement.

Weis's Third-Party Complaint

8. By virtue of a third-party complaint filed by Weis and several amendments, the State Court Action has become a construction defect dispute with specific claims against various subcontractors, including the Debtors.

9. On March 27, 2007, Weis filed a Third-Party Complaint against non-debtor third-party defendants (the “Third-Party Complaint”), a true and correct copy of which is attached to the Motion to Enlarge as **Exhibit C**.

10. On April 30, 2007, Weis filed the First Amended Third-Party Complaint against non-debtor subcontractors as third-party defendants (the “First Amended Third-Party Complaint”), a true and correct copy of which is attached to the Motion to Enlarge as **Exhibit D**.

11. On or about March 7, 2008, Weis filed the Second Amended Third-Party Complaint against the Debtors and others as third-party defendants (the “Second Amended Third-Party Complaint”), a true and correct copy of which is attached to the Motion to Enlarge as **Exhibit E**.

12. On or about March 7, 2008, Weis served the Debtors with the Second Amended Third-Party Complaint, thus, joining the Debtors in the State Court Action.<sup>3</sup> B&C is listed as counsel for Weis on the Second Amended Complaint. I received an email on September 12,

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<sup>3</sup> The Second Amended Third-Party Complaint was filed on March 7, 2008, along with issuance of a summons to BMCW SouthCentral, L.P. d/b/a BMC Construction, BBD Construction, L.P. as successor in interest to or assignee of BMC Construction, and Maverick Framing, Inc as successor in interest to or assignee of BMC Construction.

On July 8, 2008, Maverick Framing, Inc as successor in interest or assignee of BMC Construction was served through service on Lois Caroline Pedro National Registered Agents which represented said entity. On August 8, 2008, Mark Jarmie appeared on behalf of Maverick Framing Inc. On January 30, 2009, Maverick Framing, Inc filed an answer through its attorney, Mark Jarmie, stating that Maverick Framing, Inc was not a successor to BMC Construction and did not work on the Project.

On September 10, 2008, the summons and Second Amended Third-Party Complaint were also served on Tammy Cheshire in Collin County, Texas. Ms. Cheshire stated to the process server that Maverick Framing, Inc is no longer associated with the BMC Entities. Maureen E. Thomas, Esquire, an attorney for the Debtors, however, acknowledged in an email dated September 12, 2008 to Tonya MacBeth that she received service of the Second Amended Third-Party Complaint.

On November 14, 2008, Weis’s counsel in the State Court Action filed a return of service for service of the Second Amended Third-Party Complaint on BMCW SouthCentral, L.P. d/b/a BMC Construction and BBD Construction, L.P. as successor in interest to or assignee of BMC Construction.

2008 from Maureen E. Thomas, Esq., an attorney employed by the Debtors, with an email address of [mthomas@bmhc.com](mailto:mthomas@bmhc.com), copying Len Baumann, with an email address of [lbaumann@bmhc.com](mailto:lbaumann@bmhc.com), stating, “We have been served with the 3rd party complaint in this matter and are trying to confirm which carrier to tender to. I have attached the matrix you sent me before. We only framed the balconies on the 2 story buildings. Can you tell me which of the building on the attached matrix are the 2 story ones? Thanks.” (the “Thomas Email”). A true and correct copy of the Thomas Email is attached to the Motion to Enlarge as **Exhibit F**.

13. I spoke to and corresponded with Maureen Thomas regarding the State Court Action to request her participation in a June 2008 mediation, approximately one full year before the Debtors filed for bankruptcy. During these conversations, counsel for the Debtors in the State Court Action was encouraged to participate in an onsite meeting with a mediator, paid for by Weis, to potentially resolve or narrow the claims against the Debtors and other parties to the State Court Action. These conversations include telephonic and email exchanges. The outcome of the communication was an email dated June 20, 2008 from Maureen Thomas to Tonya MacBeth stating, “I believe that ACE is sending someone from the local Gallagher Bassett office to listen to the experts presentations. I will gather the info on the counter claim and get it to you but it will be late next week as I will be traveling.”. A true and correct copy of this email is attached to the Motion to Enlarge as **Exhibit G**. The meeting with the mediator was not held, due to other issues, and changed to a site inspection to identify the claims. No representative from the Debtors attended the mediation, despite assurances from the Debtors’ insurance representative, Lee Gardner. A true and correct copy of the email from Lee Gardner is attached to the Motion to Enlarge as **Exhibit H**.

14. As lead counsel for Weis, B&C, served discovery on the Debtors in the State Court Action on November 20, 2008. A true and correct copy of the Notice of Service is attached to the Motion to Enlarge as **Exhibit I**.

15. On December 29, 2008, the Third Amended Third-Party Complaint, still containing claims against the Debtors and additional subcontractors, was filed as part of the ongoing State Court Action.<sup>4</sup> B&C is listed as counsel for Weis on the Third Amended Third-Party Complaint. A true and correct copy of the Third Amended Third-Party Complaint is attached to the Motion to Enlarge as **Exhibit J**.

16. Debtors' counsel, Martin Diamond, attended an on-site meeting regarding the allegations and potential resolution of the State Court Action on March 14, 2009.

17. In the Third-Party Complaint and amendments thereto, Weis generally alleges that the third-party defendants were the inspectors, subcontractors, engineers, and/or designers responsible for inspecting, constructing and/or designing the retirement community on Rainbow's property. Weis believes and alleges that each of the third-party defendants was negligent, careless, strictly liable, in breach of certain warranties, or was otherwise legally responsible for the events complained of in the Complaint and any resulting damages.

18. Weis specifically alleges a contribution and indemnity cause of action against all of the third-party defendants.

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<sup>4</sup> On March 19, 2009, Weis's counsel filed the return of summons on the Third Amended Third-Party Complaint which was served on BMCW South Central, L.P. d/b/a BMC Construction through its authorized agent, Len Baumann, which was served on March 4, 2009. Weis's counsel was instructed by Maureen Thomas, counsel for the Debtors in the State Court Action, to serve Mr. Baumann.

Weis's counsel in the State Court Action had previously attempted service by mail on Mr. Baumann, but he did not accept service by certified mail.

On April 10, 2009, attorney Martin Diamond filed an appearance on behalf of BMCW South Central, L.P. and BBD Construction, L.P. On April 24, 2009, Mr. Diamond filed an answer on behalf of BMCW South Central, L.P. and BBD Construction, L.P. alleging that those entities were misidentified in the Third Amended Third-Party Complaint and that the proper entity was BMC West Corporation.

19. In its Third Amended Third-Party Complaint, Weis alleges that performance of the individual contractors, including the Debtors, contributed to the need for remediation.

20. Upon information and belief, the Debtors provided proof of insurance coverage to Weis before and during construction of the Project. As is standard in the industry, Weis required insurance coverage to be in place for its protection. Proof of coverage contained in three insurance certificates provide for insurance coverage beyond the claim for damages filed in the State Court Action by Weis, as alleged in the Second and Third Amended Third-Party Complaints. The November 6, 2006 Marsh Risk and Insurance Services Certificate of Insurance identifies the general liability policy (XSL62170250A), Deductible, \$1.9 Million per occurrence of \$100,000 self insured retention aggregate limit per project, and a general aggregate subject to a policy maximum of \$25,000,000. Weis is identified as an Additional Insured, providing coverage to Weis for property damage caused by the Debtors' acts or omissions. A true and correct copy of the November 6, 2006 Marsh Risk and Insurance Services Certificate of Insurance is attached to the Motion to Enlarge as **Exhibit K**. Additionally, there is also a policy for excess liability in the amount of \$25 Million, with a \$1 Million self insured retention. The November 30, 2005 Marsh Risk and Insurance Services Certificate of Insurance identifies a general liability policy (HDOGN8072889), Deductible, \$2 Million per occurrence. Weis is identified as an Additional Insured, providing coverage to Weis for property damage caused by the Debtors' acts or omissions. A true and correct copy of the November 30, 2005 Marsh Risk and Insurance Services Certificate of Insurance is attached to the Motion to Enlarge as **Exhibit L**. Additionally, there is also a policy for excess liability in the amount of \$10 Million, with a \$2 Million self insured retention. The November 22, 2004 Marsh Risk and Insurance Services Certificate of Insurance identifies the general

liability policy (GL5346010), Deductible, \$1 Million per occur [occurrence], with \$1 Million in coverage. Weis is identified as an Additional Insured, providing coverage to Weis for property damage caused by the Debtors' acts or omissions. A true and correct copy of the November 22, 2004 Marsh Risk and Insurance Services Certificate of Insurance is attached to the Motion to Enlarge as **Exhibit M**. Additionally, there is also a policy for excess liability in the amount of \$25 Million, with a \$1 Million dollar self insured retention.

21. The State Court Action is currently pending, and a Third Amended Scheduling Order was entered on July 29, 2009, providing at ¶17 that initial mediation was to be completed by August 31, 2009. A true and correct copy of the Third Amended Scheduling Order is attached to the Motion to Enlarge as **Exhibit N**.

22. During the period from September 2008 to the present, B&C has personally participated as lead counsel to Weis in all substantive discussions with Debtors' counsel in the State Court Action. At no point during these conversations did counsel for the Debtors mention the Claims Bar Date or provide B&C with any notice thereof.

23. All discovery and dispositive issues related to the State Court Action have been handled by B&C, including, but not limited to: Response to O'Connor Motion to Dismiss; Response to Walker Motion to Dismiss; Notice of Mediation; Mediation scheduling and discussions with counsel regarding demands and scope of mediation; all outgoing discovery; response to Motions to Compel Weis's response to discovery; all responses to Third-Party Defendant discovery served on Weis; and all substantive and a majority of procedural discussions with Third-Party Defendants.

24. On or about June 16, 2009 (the "Petition Date"), the Debtors filed a voluntary petition for protection under Chapter 11 of the Bankruptcy Code. The Debtors have continued in

the operation of their business and the possession of their property as debtors-in-possession under Sections 1107 and 1108 of the Bankruptcy Code.

25. My law firm, B&C, did not receive notice of the Claims Bar Date despite being listed as counsel for Weis on both the Second Amended Complaint and the Third Amended Complaint that were served upon the Debtors—as well as ongoing communication with Debtors’ counsel in the State Court Action.

26. The only document that B&C received from the Debtors to date is the Notice of Second Supplemental List of Ordinary Course Professionals, attached to the Motion to Enlarge as **Exhibit O**, which incorrectly lists B&C as an ordinary course professional for the Debtors on the Second Supplemental OCP List.

27. The Debtors are represented by Martin Diamond in the State Court Action. I have had significant conversations with Mr. Diamond regarding substantive and procedural issues. I have engaged in repeated discussions with Mr. Diamond regarding the Debtors’ position in the bankruptcy, his filing of the Notice of Bankruptcy, and the Debtors’ position that the automatic stay applied to the entire State Court Action. I was never informed by Mr. Diamond that a Notice of Claims Bar Date had been filed or that a Claims Bar Date existed. He and I discussed that Weis did not agree that the automatic stay applied to the entire State Court Action, and the threat of personal sanctions was distressing. Mr. Diamond also informed me that his client would not participate in the August Mediation (initiated August 7, 2009) due to the fact that the Debtors had filed for bankruptcy. It is my opinion that Mr. Diamond was well aware of B&C’s position as lead counsel.

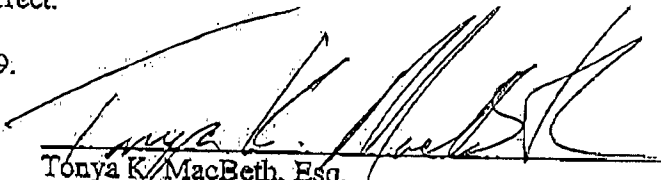
28. I received letters, direct voice mails, personally left voice mails and engaged in direct discussions with the Debtors’ bankruptcy counsel around the Petition Date. During the



week of August 10, 2009, I spoke with Debtors' Texas counsel in the bankruptcy case, Gibson, Dunn & Crutcher LLP. During that call, I was advised that it was the Debtors' position that the automatic stay applied to the entire State Court Action due to the interrelatedness of the claims against all third-party defendants. I advised Texas counsel that Weis disagreed with that position and was informed that I was risking facing sanctions for proceeding forward in the State Court Action. I was advised that the Debtors planned to request a dismissal of the claims against them in the State Court Action. I responded that Weis would seek to lift the automatic stay and for clarification of its impact on the other litigants in the State Court Action. At no time did Texas counsel state that the Claims Bar Date Motion had been filed or that a Claims Bar Date had been set. At no time was notice of the Claims Bar Date Motion provided to B&C.

29. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30<sup>th</sup> day of October, 2009.



Tonya K. MacBeth, Esq.  
Burch & Cracchiolo, P.A.

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

|                                                         |                           |
|---------------------------------------------------------|---------------------------|
| In re:                                                  | ) Chapter 11              |
|                                                         | )                         |
| BUILDING MATERIALS HOLDING CORPORATION, <u>et al.</u> , | ) Case No. 09-12074 (KJC) |
|                                                         | )                         |
|                                                         | ) (Jointly Administered)  |
| Debtors.                                                |                           |

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**DECLARATION OF WILLIAM C. SALMON  
IN SUPPORT OF THE MOTION OF WEIS BUILDERS, INC. FOR ENTRY  
OF AN ORDER ENLARGING THE CLAIMS BAR DATE**

I, William C. Salmon, hereby declare as follows:

1. I am an attorney at Rhodes and Salmon, P.C. ("R&S"). R&S is local counsel of record for Weis Builders, Inc. ("Weis") in the action pending in the First Judicial District Court of the State of New Mexico for the County of Santa Fe (the "District Court") captioned *Rainbow Vision Santa Fe, LLC v. Weis Builders, Inc., et al*, Docket No. D-0101-CV-2007-00010 (the "State Court Action").<sup>1</sup> I submit this declaration in support of the motion (the "Motion to Enlarge")<sup>2</sup> filed by Weis for entry of an order enlarging the claims bar date (the "Claims Bar Date").

2. I first became involved in the State Court Action on December 27, 2007, when I cosigned a Notice of Association of Counsel prepared by Burch & Cracchiolo, P.A. ("B&C").

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<sup>1</sup> The full caption of the State Court action is *Rainbow Vision Santa Fe, LLC v. Weis Builders, Inc.; PCI contractors, Inc.; and RLA, Inc. and Weis Builders, Inc. v. Rodgers Plumbing and Heating, Inc.; Eker Brothers, Inc.; TLC Company, EMCO, Inc.; Superior Contracting Corporation, d/b/a American National Insulation and Sealants; BMCW SouthCentral, L.P. d/b/a BMC Construction; BBD Construction, L.P., as successor in interest to or assignee of BMC Construction; Maverick Framing, Inc, as successor in interest to or assignee of BMC Construction, PCI Contractors, Inc.; Western Technologies, Inc.; Valley Fire Protection, Inc.; Storm Water Control, Inc.; Pinon Window & Door, Inc.; Michael Hunter Painting, Inc.; Mesa Erectors, Inc.; Lopez Roofing Service, Inc.; Koch Mechanical; Klein Enterprises, LLC; Hughes and Associates, Inc.; Geo-Test, Inc.; F&J Home Builders, Inc.; Dawson Surveys, Inc.; and Bohannah-Huston, Inc.*

<sup>2</sup> All capitalized terms used and not defined herein shall have the meaning ascribed to them in the Motion to Enlarge.

On February 14, 2008, R&S and B&C filed an Entry of Appearance for Weis listing R&S as New Mexico local counsel and B&C as pro hoc vice counsel.

3. On or about June 16, 2009 (the "Petition Date"), the Debtors filed a voluntary petition for protection under Chapter 11 of the Bankruptcy Code. The Debtors have continued in the operation of their business and the possession of their property as debtors-in-possession under Sections 1107 and 1108 of the Bankruptcy Code.

4. My role in the State Court Action is to serve as local New Mexico counsel to lead counsel, B&C. My role in the State Court Action has been minimal. I have not engaged in direct discussions with Debtors' counsel regarding substantive matters in the State Court Action or the bankruptcy case. In the event that I am contacted by Debtors' counsel, I refer said counsel to lead counsel, B&C.

5. B&C has handled all substantive discussions with Debtors' counsel in both the State Court Action and the bankruptcy case. I expressly informed counsel for the Debtors' in the State Court Action, Martin Diamond, at the time he first contacted me during telephone conversations on March 27, 2009 and April 15, 2009, that B&C was lead counsel on the State Court Action and that my role was limited to local counsel work in this matter and that any substantive questions about the Project or the case or discovery matters should be directed to Tonya MacBeth at B&C. I informed Mr. Diamond that I could only respond to routine matters such as granting an extension of time to file an answer.

6. On April 1, 2009, Tonya MacBeth of B&C emailed all counsel of record including Debtors' counsel, Mr. Diamond, and informed them that she was scheduling a meeting at the Project in Santa Fe on April 14, 2009 at 10:00 a.m. to allow counsel for subcontractors to

inspect the property and to give subcontractors' counsel an opportunity to speak with Weis's experts regarding the allegations in the Third Amended Third-Party Complaint.

7. On April 1, 2009, Ms. MacBeth also informed all counsel by email of a planned telephone conference on April 2, 2009.

8. The April 14, 2009 meeting at the property was attended by attorneys for various subcontractors including Mr. Diamond, myself, and Tonya MacBeth of B&C. The meeting started late due to the late arrival of Ms. MacBeth. I explained to the attorneys present, which included Debtors' counsel in the State Court Action, Mr. Diamond, that Ms. MacBeth was on her way but that she would be running the meeting as lead counsel for Weis and that I could not start the meeting without her.

9. The State Court Action is complex and involves technical issues regarding construction defects. From the outset, it was agreed that the role of R&S would be limited to issues related to compliance with local procedural rules, arranging for service of process, and issues involving New Mexico law. B&C has handled all issues related to the retention of expert witnesses, reclamation and repairs of defects, and agreements to dismiss certain Third Party Defendants.

10. Furthermore, all discovery and dispositive issues related to the State Court Action have been handled by B&C. R&S has played no role in preparing discovery responses or in responding to motions related to discovery or dispositive issues except for advising B&C on local procedural rules or New Mexico law.

11. My law firm, R&S, received notice of the Claims Bar Date (the "Notice"). The Notice listed my name and my law firm, R&S, as the creditor on the attached proof of claim

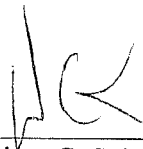
forms. The Notice of the Claims Bar Date did not list the name of Weis anywhere on the document.

12. Under the Additional Insured provision in the Debtors' Insurance Contract, attached to the Motion to Enlarge as **Exhibit K, L, & M**, R&S would have a claim for attorneys' fees against the Debtors if Weis's claim is successful in the State Court Action. Accordingly, if the insurance carrier agreed to provide coverage under the policy provision, R&S may seek reimbursement for its fees and expenses. Attorneys in construction litigation regularly seek recovery of their fees and expenses from insurance providers if their client's claim is successful.

13. I did not respond to the Claims Bar Date Notice because neither my law firm nor I were owed any outstanding attorneys' fees or expenses from the Debtors. Because Weis was not listed on the proof of claim forms and my law firm and I were, I did not think that the Notice related to claims that Weis may have against the Debtors. I never received a proof of claim listing Weis as a creditor.

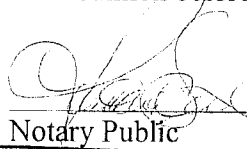
14. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30 day of October, 2009.

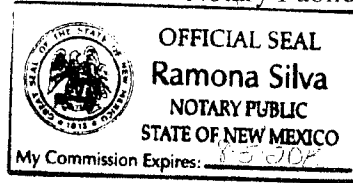
  
\_\_\_\_\_  
William C. Salmon, Esq.  
Rhodes & Salmon, P.C.

STATE OF NEW MEXICO       )  
                                                  ) ss.  
COUNTY OF BERNALILLO    )

Subscribed to and sworn to by William C. Salmon before me, the undersigned notary public this 30<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:  
August 5, 2013



# EXHIBIT A

RV  
# C8

 **AIA** Document A121™CMc – 2003 and AGC Document 565

**Standard Form of Agreement Between Owner and Construction Manager**  
where the Construction Manager is Also the Constructor

AGREEMENT  
made as of the Twenty Eighth day of April in the year of Two Thousand and Four  
*(In words, indicate day, month and year)*

**BETWEEN the Owner:**  
*(Name and address)*

RainbowVision Santa Fe LLC  
4001 Office Court Road,  
Suite 403  
Santa Fe, NM 87505

**and the Construction Manager:**  
*(Name and address)*

Weis Builders, Inc.  
7645 Lyndale Avenue South  
Minneapolis, MN 55423

**The Project is:**  
*(Name, address and brief description)*

RainbowVision Santa Fe Retirement Community  
500 Rodeo Road at Antigua  
Santa Fe, NM 87505

**The Architect is:**  
*(Name and address)*

Lloyd & Associates Architects  
301 N. Guadalupe Suite 104  
Santa Fe, NM 87501

The Owner and Construction Manager agree as set forth below:

**ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The 1997 Edition of AIA® Document A201™, General Conditions of the Contract for Construction, is referred to herein. This Agreement requires modification if other general conditions are utilized.





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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 RELATIONSHIP OF PARTIES

The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services and use the Construction Manager's best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Construction Manager and other persons or entities employed by the Owner for the Project.

### § 1.2 GENERAL CONDITIONS

For the Construction Phase, the General Conditions of the contract shall be the AIA® Document A201™-1997, General Conditions of the Contract for Construction, which is incorporated herein by reference. For the Preconstruction Phase, or in the event that the Preconstruction and Construction Phases proceed concurrently, A201™-1997 shall apply to the Preconstruction Phase only as specifically provided in this Agreement. The term "Contractor" as used in A201™-1997 shall mean the Construction Manager.

## ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager shall perform the services described in this Article. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction Phase services. If the Owner and Construction Manager agree, after consultation with the Architect, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

### § 2.1 PRECONSTRUCTION PHASE

#### § 2.1.1 PRELIMINARY EVALUATION

The Construction Manager shall provide a preliminary evaluation of the Owner's program and Project budget requirements, each in terms of the other.

#### § 2.1.2 CONSULTATION

The Construction Manager with the Architect shall jointly schedule and attend regular meetings with the Owner. The Construction Manager shall consult with the Owner and Architect regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.

#### § 2.1.3 PRELIMINARY PROJECT SCHEDULE

When Project requirements described in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare, and periodically update, a preliminary Project schedule for the Architect's review and the Owner's approval. The Construction Manager shall obtain the Architect's approval of the portion of the preliminary Project schedule relating to the performance of the Architect's services. The Construction Manager shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect and Construction Manager. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed date of Substantial Completion. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

#### § 2.1.4 PHASED CONSTRUCTION

The Construction Manager shall make recommendations to the Owner and Architect regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economics, time of performance, availability of labor and materials, and provisions for temporary facilities.

#### **§ 2.1.5 PRELIMINARY COST ESTIMATES**

§ 2.1.5.1 When the Owner has sufficiently identified the Project requirements and the Architect has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a preliminary cost estimate utilizing area, volume or similar conceptual estimating techniques.

§ 2.1.5.2 When Schematic Design Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the Design Development Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

§ 2.1.5.3 When Design Development Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare a detailed estimate with supporting data for review by the Architect and approval by the Owner. During the preparation of the Construction Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

§ 2.1.5.4 If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

#### **§ 2.1.6 SUBCONTRACTORS AND SUPPLIERS**

The Construction Manager shall seek to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors, including suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner know of any objection to such subcontractor or supplier. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the Owner or Architect later to object to or reject any proposed subcontractor or supplier.

#### **§ 2.1.7 LONG-LEAD-TIME ITEMS**

The Construction Manager shall recommend to the Owner and Architect a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager. The Construction Manager shall expedite the delivery of long-lead-time items.

#### **§ 2.1.8 EXTENT OF RESPONSIBILITY**

The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Owner and the Owner's professional consultants. It is not the Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Drawings and Specifications are at variance therewith, the Construction Manager shall promptly notify the Architect and Owner in writing.

#### **§ 2.1.9 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION**

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

#### **§ 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL AND CONTRACT TIME**

§ 2.2.1 When the Drawings and Specifications are sufficiently complete, the Construction Manager shall propose a Guaranteed Maximum Price, which shall be the sum of the estimated Cost of the Work and the Construction Manager's Fee.

§ 2.2.2 As the Drawings and Specifications may not be finished at the time the Guaranteed Maximum Price proposal is prepared, the Construction Manager shall provide in the Guaranteed Maximum Price for further development of

the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The estimated Cost of the Work shall include the Construction Manager's contingency, a sum established by the Construction Manager for the Construction Manager's exclusive use to cover costs arising under Section 2.2.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order.

#### § 2.2.4 BASIS OF GUARANTEED MAXIMUM PRICE

The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include:

1. A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Guaranteed Maximum Price proposal.
2. A list of allowances and a statement of their basis.
3. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
4. The proposed Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the Fee that comprise the Guaranteed Maximum Price.
5. The Date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents Issuance dates upon which the date of Substantial Completion is based.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by the Construction Manager.

§ 2.2.7 Prior to the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing.

§ 2.2.8 Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis shall be set forth in Amendment No. 1. The Guaranteed Maximum Price shall be subject to additions and deductions by a change in the Work as provided in the Contract Documents, and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 2.2.9 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in Amendment No. 1. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

§ 2.2.10 The Guaranteed Maximum Price shall include in the Cost of the Work only those taxes which are enacted at the time the Guaranteed Maximum Price is established.

#### § 2.3 CONSTRUCTION PHASE

##### § 2.3.1 GENERAL

§ 2.3.1.1 The Construction Phase shall commence on the earlier of:

- (1) the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, or
- (2) the Owner's first authorization to the Construction Manager to:
  - (a) award a subcontract, or
  - (b) undertake construction Work with the Construction Manager's own forces, or
  - (c) issue a purchase order for materials or equipment required for the Work.

#### § 2.3.2 ADMINISTRATION

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated to a special design for the Work from the list previously reviewed and, after analyzing such bids, shall deliver such bids to the Owner and Architect. The Owner will then determine, with the advice of the Construction Manager and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the Construction Manager shall obtain bids; however, if the Guaranteed Maximum Price has been established, the Owner may not prohibit the Construction Manager from obtaining bids from other qualified bidders. ~~The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.~~

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Construction Manager to the Owner and Architect (1) is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of Sections 7.1.8 and 7.1.9 and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.3.2.4 The Construction Manager shall schedule and conduct meetings at which the Owner, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

§ 2.3.2.5 Promptly after the Owner's acceptance of the Guaranteed Maximum Price proposal, the Construction Manager shall prepare a schedule in accordance with Section 3.10 of A201™-1997, including the Owner's occupancy requirements.

§ 2.3.2.6 The Construction Manager shall provide monthly written reports to the Owner and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.3.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals.

#### § 2.4 PROFESSIONAL SERVICES

Section 3.12.10 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### § 2.5 HAZARDOUS MATERIALS

Section 10.3 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

### ARTICLE 3 OWNER'S RESPONSIBILITIES

#### § 3.1 INFORMATION AND SERVICES

§ 3.1.1 The Owner shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Owner's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

§ 3.1.2 The Owner shall, at the written request of the Construction Manager prior to commencement of the Construction Phase and thereafter, furnish to the Construction Manager reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.3 The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies for changes in the Work and other costs which are the responsibility of the Owner.

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#### § 3.1.4 STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS

In the Preconstruction Phase, the Owner shall furnish the following with reasonable promptness and at the Owner's expense. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely upon the accuracy of any such information, reports, surveys, drawings and tests described in Sections 3.1.4.1 through 3.1.4.4 but shall exercise customary precautions relating to the performance of the Work.

§ 3.1.4.1 Reports, surveys, drawings and tests concerning the conditions of the site which are required by law.

§ 3.1.4.2 Surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a project benchmark.

§ 3.1.4.3 The services of a geotechnical engineer when such services are requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials; ground corrosion and resistivity tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate professional recommendations.

§ 3.1.4.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.

§ 3.1.4.5 The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.

#### § 3.2 OWNER'S DESIGNATED REPRESENTATIVE

The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. This representative shall have the authority to make decisions on behalf of the Owner concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201™-1997, the Architect does not have such authority.

#### § 3.3 ARCHITECT

The Owner shall retain an Architect to provide Basic Services, including normal structural, mechanical and electrical engineering services, other than cost estimating services. The Owner shall authorize and cause the Architect to provide Additional Services, requested by the Construction Manager which must necessarily be provided by the Architect for the Preconstruction and Construction Phases of the Work. Such services shall be

provided in accordance with time schedules agreed to by the Owner, Architect and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect, from which compensation provisions may be deleted.

#### § 3.4 LEGAL REQUIREMENTS

The Owner shall determine and advise the Architect and Construction Manager of any special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project. The Owner shall furnish such legal services as are necessary to provide the information and services required under Section 3.1.

#### ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

The Owner shall compensate and make payments to the Construction Manager for Preconstruction Phase services as follows:

##### § 4.1 COMPENSATION

§ 4.1.1 For the services described in Sections 2.1 and 2.2, the Construction Manager's compensation shall be calculated as follows:

The Construction Manager's fee for Preconstruction Phase Services shall be Seven Thousand Dollars (\$7,000), in accordance with Weis's 1/22/03 letter of intent.

*(State basis of compensation, whether a stipulated sum, multiple of Direct Personnel Expense, actual cost, etc. Include a statement of reimbursable cost items as applicable.)*

§ 4.1.2 Compensation for Preconstruction Phase Services shall be equitably adjusted if such services extend beyond April 1, 2004 in accordance with Weis's 12/22/03 letter of intent.

§ 4.1.3 If compensation is based on a multiple of Direct Personnel Expense, Direct Personnel Expense is defined as the direct salaries of the Construction Manager's personnel engaged in the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

##### § 4.2 PAYMENTS

§ 4.2.1 Payments shall be made monthly following presentation of the Construction Manager's invoice and, where applicable, shall be in proportion to services performed.

§ 4.2.2 Payments are due and payable Thirty ( 30 ) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear interest at the rate entered below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon.)*

Interest rate shall be 4% above US Bancorp Prime Rate.

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

#### ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

The Owner shall compensate the Construction Manager for Construction Phase services as follows:

### § 5.1 COMPENSATION

§ 5.1.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager in current funds the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Construction Manager's Fee determined as follows:

Base Fee will be Three percent (3.0%) of the Cost of the Work as defined in Article 6. For changes in the Work not associated with any "Resident Upgrade Packages" that are to be offered on a unit-by-unit basis, the fee for additive changes will be 3.0% and for deductive changes the fee will be 0.0%.

#### 5.1.2

In addition to the basic fees in 4.1.1 and 5.1.1 above, the Owner shall pay the Construction Manager a Resident Upgrade Fee equal to 15% of the cost of the work, together with such reasonable administrative costs that the Construction Manager will incur directly related to the performance of such work, associated with the Resident Upgrade Packages that the Owner is planning to offer. It is the intent that a limited number of such Upgrade packages will be offered by the Owner, and that once the scope and cost for the upgrades being considered is established, the Owner and Construction Manager will incorporate by Amendment to this Contract the terms and conditions pursuant to which the Construction Manager shall perform such work. It is intended that the Construction Manager will establish a lump sum price per unit type for each Upgrade Package to be offered, and that said lump sum price shall include the fee and administrative costs described above, as well as define the date for each unit by which the Owner must direct the Construction Manager to proceed with the Upgrade. Unit upgrades for which direction to proceed is given after the agreed upon date, or which reflect a deviation in scope from the defined Upgrade Packages will be evaluated separately, and a cost and time adjustment proposed, by the Construction Manager.

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

### § 5.2 GUARANTEED MAXIMUM PRICE

§ 5.2.1 The sum of the Cost of the Work and the Construction Manager's Fee are guaranteed by the Construction Manager not to exceed the amount provided in Amendment No. 1, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum as adjusted by approved changes in the Work is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner. At time of Final Completion, any costs savings shall be returned 100% to the Owner and 0% to the Construction Manager.

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

### § 5.3 CHANGES IN THE WORK

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of Amendment No. 1 may be determined by any of the methods listed in Section 7.3.3 of A201™-1997.

§ 5.3.2 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of A201™-1997 and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Section 7.3.6 of A201™-1997 shall have the meanings assigned to them in that document and shall not be modified by this Article 5. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.3 In calculating adjustments to the Contract, the terms "cost" and "costs" as used in the above-referenced provisions of A201™-1997 shall mean the Cost of the Work as defined in Article 6 of this Agreement, and the term "and a reasonable allowance for overhead and profit" shall mean the Construction Manager's Fee as defined in Section 5.1.1 of this Agreement.



§ 5.3.4 If no specific provision is made in Section 5.1.1 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.1 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

"Article 5.4: Commencement and Completion has been added. See Exhibit A."

#### ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

##### § 6.1 COSTS TO BE REIMBURSED

§ 6.1.1 The term "Cost of the Work" shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 6.

##### § 6.1.2 LABOR COSTS

- .1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's agreement, at off-site workshops.
- .2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's agreement. To the extent that some of the Construction Manager's supervisory and administrative personnel located at the Construction Manager's main office provide service to the project, a portion of their wages and salaries will be included in the cost of work and will be reimbursed in accordance with Exhibit C.

Classification

Name

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal office or offices other than the site office shall be included in the Cost of the Work, such personnel shall be identified below.)*

- .3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.
- .4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Cost of the Work under Sections 6.1.2.1 through 6.1.2.3.

##### § 6.1.3 SUBCONTRACT COSTS

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

##### § 6.1.4 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

- .1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.
- .2 Costs of materials described in the preceding Section 6.1.4.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

##### § 6.1.5 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

- .1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed.

whether sold to others or retained by the Construction Manager. Cost for items previously used by the Construction Manager shall mean fair market value.

- 2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval.
- 3 Costs of removal of debris from the site.
- 4 Reproduction costs, costs of telegrams, facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephone at the site and reasonable petty cash expenses of the site office.
- 5 That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while traveling in discharge of duties connected with the Work.

#### § 6.1.6 MISCELLANEOUS COSTS

- 1 That portion directly attributable to this Contract of premiums for insurance and bonds.  
*(If charges for self-insurance are to be included, specify the basis of reimbursement.)*
- 2 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.
- 3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.
- 4 Fees of testing laboratories for tests required by the Contract Documents, except those related to nonconforming Work other than that for which payment is permitted by Section 6.1.8.2.
- 5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the Guaranteed Maximum Price and provided that such royalties, fees and costs are not excluded by the last sentence of Section 3.17.1 of A201™-1997 or other provisions of the Contract Documents.
- 6 Data processing costs related to the Work.
- 7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.
- 8 Legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld.
- 9 Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
- 10 All premiums (without markup) and deductibles associated with Builder's Risk Insurance provided by the Construction Manager at the Owner's request.
- 11 All premiums (without markup) and deductibles associated with providing professional liability insurance for the mechanical and electrical design services for the condominiums and IL units.

#### § 6.1.7 OTHER COSTS

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

#### § 6.1.8 EMERGENCIES AND REPAIRS TO DAMAGED OR NONCONFORMING WORK

The Cost of the Work shall also include costs described in Section 6.1.1 which are incurred by the Construction Manager except, however, where conditions requiring such action were caused by or are the result of the Construction Manager's negligence.

- 1 In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.6 of A201™-1997.
- 2 In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this agreement of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, Subcontractors or suppliers.

§ 6.1.9 The costs described in Sections 6.1.1 through 6.1.8 shall be included in the Cost of the Work notwithstanding any provision of AIA or A201™-1997 other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.2.

#### § 6.2 COSTS NOT TO BE REIMBURSED

§ 6.2.1 The Cost of the Work shall not include:

- 1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Sections 6.1.2.2 and 6.1.2.3.
- 2 Expenses of the Construction Manager's principal office and offices other than the site office, except as specifically provided in Section 6.1.
- 3 Overhead and general expenses, except as may be expressly included in Section 6.1.
- 4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
- 5 Rental costs of machinery and equipment, except as specifically provided in Section 6.1.5.2.
- 6 Except as provided in Section 6.1.8.2, costs due to the negligence of the Construction Manager or to the failure of the Construction Manager to fulfill a specific responsibility to the Owner set forth in this Agreement.
- 7 Costs incurred in the performance of Preconstruction Phase Services.
- 8 Except as provided in Section 6.1.7.1, any cost not specifically and expressly described in Section 6.1.
- 9 Costs which would cause the Guaranteed Maximum Price to be exceeded.

#### § 6.3 DISCOUNTS, REBATES AND REFUNDS

§ 6.3.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be secured.

§ 6.3.2 Amounts which accrue to the Owner in accordance with the provisions of Section 6.3.1 shall be credited to the Owner as a deduction from the Cost of the Work.

#### § 6.4 ACCOUNTING RECORDS

§ 6.4.1 See Exhibit A for revised Accounting Records requirements.

#### ARTICLE 7 CONSTRUCTION PHASE

##### § 7.1 PROGRESS PAYMENTS

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

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

§ 7.1.3 Provided an Application for Payment is received by the Architect not later than the 30<sup>th</sup> day of a month, the Owner shall make payment to the Construction Manager not later than the 30<sup>th</sup> day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than Thirty ( 30 ) days after the Architect receives the Application for Payment.

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager; less (2) that portion of those payments attributable to the Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

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

1. Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.8 of A201™-1997, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
2. Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing.
3. Add the Construction Manager's Fee, less retainer of Five percent ( 5.00% ). The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the two preceding Sections bears to a reasonable estimate of the probable Cost of the Work upon its completion.
4. Subtract the aggregate of previous payments made by the Owner.
5. Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation.
6. Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of A201™-1997.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than Five percent ( 5.00% ). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts.

7.1.8.1 As an alternative means of achieving the 5% retainage described in 7.1.7 and 7.1.8 above, the Construction Manager and the Subcontractors may allocate a portion of their respective contract amounts to a "Final Completion" line item within each firm's schedule of values. The portions of each contract so allocated shall be equal to the 5% retainage stipulated. Billing against any such "final completion" line item in a schedule of values will be allowed only under the same circumstances as otherwise defined in the contract documents for the reduction or release of retainage.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data, that the Architect has made exhaustive or continuous on-site inspections or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

#### § 7.2 FINAL PAYMENT

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager when (1) the Contract has been fully performed by the Construction Manager except for the Construction Manager's responsibility to correct nonconforming Work, as provided in Section 12.2.2 of A201™-1997, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Owner's accountants; and (3) a final Certificate for Payment has then been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The amount of the final payment shall be calculated as follows:

- 1 Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price.
- 2 Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of A201™-1997 or other provisions of the Contract Documents.
- 3 Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.

§ 7.2.3 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of A201™-1997. The time periods stated in this Section 7.2 supersede those stated in Section 9.4.1 of A201™-1997.

§ 7.2.4 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without a further decision of the Architect. Unless agreed to otherwise, a demand for mediation or arbitration of the disputed amount shall be made by the Construction Manager within 60 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Owner's

accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.5 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1 and not excluded by Section 6.2 (1) to correct nonconforming Work or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee, if any, related thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

#### ARTICLE 8 INSURANCE AND BONDS

##### § 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in Section 11.1 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance shall be as follows:

(Paragraph deleted)

None

§ 8.1.2 Insurance provided will be per the construction Manager's standard policy. The Construction Manager will provide the Owner with a statement of the additional premium cost (if any) associated with other insurance coverage as the Owner may want to consider. If the Owner elects to require the Construction Manager to provide other coverage or limits, then the contract will be adjusted accordingly.

##### § 8.1.3

(Paragraph deleted)

§ 8.1.4 Other coverage:

*(If Umbrella Excess Liability coverage is required over the primary insurance or retention, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be attained by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)*

##### § 8.2 INSURANCE REQUIRED OF THE OWNER

During both phases of the Project, the Owner shall purchase and maintain liability and property insurance, including waivers of subrogation, as set forth in Sections 11.2 and 11.4 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

##### § 8.2.1 Property Insurance:

\$10,000 Deductible Per Occurrence

(Paragraph deleted)

### § 8.3 PERFORMANCE BOND AND PAYMENT BOND

§ 8.3.1 The Construction Manager shall (insert "shall" or "shall not") furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work. The amount of each bond shall be equal to One hundred percent ( 100.00% ) of the Contract Sum.

§ 8.3.2 The Construction Manager shall deliver the required bonds to the Owner after the contract is executed and three days before the commencement of any Work at the Project site. Further, Construction Manager shall deliver a binding commitment for the issuance of such bonds at least two weeks prior to the estimated date for the closing on Project financing. In the event of any early start as identified in paragraph 4.2.1.1 Owner may require Construction Manager to provide such bonds. Owner shall provide Construction Manager with 10 days notice of such requirement and stipulate in such notice the time for providing same, and the amount of coverage required by owner.

## ARTICLE 9 MISCELLANEOUS PROVISIONS

### § 9.1 DISPUTE RESOLUTION

§ 9.1.1 During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201™-1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

### § 9.2 OTHER PROVISIONS

§ 9.2.1 Unless otherwise noted, the terms used in this Agreement shall have the same meaning as those in A201™-1997, *General Conditions of the Contract for Construction*.

### § 9.2.2 EXTENT OF CONTRACT

This Contract, which includes this Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and Construction Manager. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

### § 9.2.3 OWNERSHIP AND USE OF DOCUMENTS

Article 1.6 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

### § 9.2.4 GOVERNING LAW

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

### § 9.2.5 ASSIGNMENT

The Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 13.2.2 of A201™-1997, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

## ARTICLE 10 TERMINATION OR SUSPENSION

### § 10.1 TERMINATION PRIOR TO ESTABLISHING GUARANTEED MAXIMUM PRICE

§ 10.1.1 Prior to execution by both parties of Amendment No. 1 establishing the Guaranteed Maximum Price, the Owner may terminate this Contract at any time without cause, and the Construction Manager may terminate this Contract for any of the reasons described in Section 14.1.1 of A201™-1997.

§ 10.1.2 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 prior to commencement of the Construction Phase, the Construction Manager shall be equitably compensated for

Preconstruction Phase Services performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Section 4.1.1.

§ 10.1.3 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 after commencement of the Construction Phase, the Construction Manager shall, in addition to the compensation provided in Section 10.1.2, be paid an amount calculated as follows:

- 1 Take the Cost of the Work incurred by the Construction Manager.
- 2 Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.
- 3 Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders.

Subcontracts, purchase orders and rental agreements entered into by the Construction Manager with the Owner's written approval prior to the execution of Amendment No. 1 shall contain provisions permitting assignment to the Owner as described above. If the Owner accepts such assignment, the Owner shall reimburse or indemnify the Construction Manager with respect to all costs arising under the subcontract, purchase order or rental agreement except those which would not have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner elects not to accept the assignment of any subcontract, purchase order or rental agreement which would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager shall terminate such subcontract, purchase order or rental agreement and the Owner shall pay the Construction Manager the costs necessarily incurred by the Construction Manager by reason of such termination.

#### § 10.2 TERMINATION SUBSEQUENT TO ESTABLISHING GUARANTEED MAXIMUM PRICE

Subsequent to execution by both parties of Amendment No. 1, the Contract may be terminated as provided in Article 14 of A201™-1997.

§ 10.2.1 In the event of such termination by the Owner, the amount payable to the Construction Manager pursuant to Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 In the event of such termination by the Construction Manager, the amount to be paid to the Construction Manager under Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, including a reasonable estimate of the Cost of the Work for Work not actually completed.

#### § 10.3 SUSPENSION

The Work may be suspended by the Owner as provided in Article 14 of A201™-1997; in such case, the Guaranteed Maximum Price, if established, shall be increased as provided in Section 14.3.2 of A201™-1997 except that the term "cost of performance of the Contract" in that Section shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1.1 and 5.3.4 of this Agreement.

### ARTICLE 11 OTHER CONDITIONS AND SERVICES



11.1 thru 11.4  
See Exhibit A

11.5

It is understood and agreed that the GMP is for the total cost of the work and that cost over-runs from one line item can be offset by cost savings from another line item.

11.6

All personnel listed in Exhibit C as a "Reimbursable as a cost of the work" shall be included in the cost of the work per Article 7.2, subject to the GMP per Article 6.12.2.

11.7

The following procedure is agreed to by Owner and or Owner's lender and Title Company in the event of a lien being filed by one of the Construction Manager's Vendors and/or Vendor's Vendor(s): At the Construction Manager's sole discretion either 1. Construction Managers shall make a cash deposit equal to 150% of each lien amount in separate escrow account held by Owner's Title Company on behalf of the Construction Manager or 2. The Construction Manager may provide a lien transfer bond for the amount of the lien. Upon said deposit being made or lien bond being provided by Construction Manager, Owner and or Owner's Lender, and Title Company shall immediately disburse to Construction Manager any monies owed to Construction Manager under the terms of this contract.

11.8

Owner and Construction Manager agree to the following punch list procedure for each phase of the project:

1. Prior to issuance of temporary or Full Certificate of Occupancy by City, Owner and/or Owner's designated representative(s) shall prepare one original interior and exterior punch list.
2. Within 7 calendar days after completion punch list work by Construction Manager, Owner and/or Owner's representative(s) will re-inspect to confirm original punch list items are complete.
3. New items will not be added to the original punch list at any time except for items which are substantial (i.e. no hot water) and thus were obviously missed during original punch list items.
4. Any item(s) not included in original punch list shall be considered warranty item(s).
5. Warranty items shall not be considered outstanding punch list items and thus shall not be subject to withholding of final payments.

11.9

If a discrepancy occurs within this Agreement and/or between this Agreement and other contract documents, it is understood and agreed that Article 11 of this Agreement, the balance of this Agreement, and Exhibits "A", "B", "C" and "D" (in that order) shall govern.

11.10

If interest costs occur per Paragraph 4.2, the cost shall be reimbursed by issuance of an Owner Change Order.

11.11

Architect shall return all submittals (i.e. shop drawings) to Contractor within 10 working days of date received from Contractor.

11.12

Modification and/or extension of project completion date due to "weather days" shall be as outlined in Exhibit "D" attached hereto.

11.13

The following Exhibits, attached hereto, form part of the Contract Documents:

Exhibit A: Modifications to the AIA C191

Exhibit B: Supplementary Conditions

Exhibit C: Personnel Billing Rates and Matrix

- Exhibit D: Definition of Weather Days.
- Exhibit E: Project Scope and Budget Summary
- Exhibit F: Preliminary Divisional Cost Breakdown
- Exhibit G: Pre-Construction Phase Schedule
- Exhibit H: Preliminary Construction Phase Schedule

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

OWNER

*[Signature]*  
 (Signature)  
DOE SILVER, PRES  
 (Printed name and title)  
April 30, 2004  
 Date

ATTEST

CONSTRUCTION MANAGER

*[Signature]*  
 (Signature)  
PETER WASHINGTON, VICE PRESIDENT  
 (Printed name and title)  
April 28, 2004  
 Date

ATTEST

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit A**  
**Additional Provisions/Modifications based on the AIA A121CMC (2003 Edition)**

**5.4 COMMENCEMENT AND COMPLETION**

Add the following paragraphs:

5.4.1 The date of commencement is the date from which the Contract Time of subparagraph 5.4.2 is measured; it shall be the date of the giving of the Notice to Proceed (the "Commencement Date"). The Owner shall issue the Notice to Proceed within ten calendar days of the last to occur of all of the following (the "Conditions to Commencement"): (i) closing of financing acceptable to Owner, sufficient in an amount to satisfy the Owner's financial obligations hereunder, and (ii) receipt of all permits and approvals necessary to allow commencement and continuation of construction. In no event shall the Construction Manager commence any work on site by placing materials at the site or by conducting other work at the site until a Notice to proceed has been given.

The immediately aforementioned notwithstanding, Construction Manager and Owner acknowledge that prior to receiving a Notice to Proceed the Construction Manager may be required to enter into certain other subcontracts, issue purchase orders, or make similar commitments which, if the Project were not to proceed would result in the incurrence, by Construction Manager of certain costs, financial penalties, or other like or similar expenses. Owner agrees to reimburse Construction Manager all such costs, penalties, or similar expenses, so long as, and only to the extent that Construction Manager has received Owner's written approval prior to the incurrence of such costs, and/or the entering into such subcontracts, authorization of such purchase orders or making such similar commitments. Any activity conducted hereunder shall in no way effect the dates established for substantial completion for each phase as shall be provided for in Amendment No. 1 hereto.

5.4.2 It is anticipated that the Work is to be completed in phases so as to permit residents of the Project to move in on a phased basis (each of which shall be referred to as a "Phase").

1 Substantial Completion of each Phase is to occur on or before an agreed date. The agreed dates for each Phase shall be established by Amendment No. 1 to this Agreement at the time the GMP is established, which shall be an agreed upon number of calendar days from the Commencement Date. Once established each of these days shall be measured from the Commencement Date and may only be extended in accordance with the Contract Documents.

2 Each date by which Substantial Completion of a Phase must occur pursuant to the Contract Documents shall be referred to as a "Phase Completion Deadline". The period of time from the Commencement Date to the applicable Phase Completion Deadline shall be referred to as the "Phase Contract Time".

3 The Owner and the Construction Manager acknowledge that if the Construction Manager fails to achieve substantial completion of a Phase before the applicable Phase Completion Deadline, the Owner will suffer damages which are difficult to ascertain. However, the Owner and the Construction Manager agree that the degree to which the Owner will be damaged by the Construction Manager's failure to substantially complete a particular Phase of the Project within the Phase Contract Time generally will decrease as the overall Project nears Substantial Completion. Accordingly, the Construction Manager agrees to pay the Owner as liquidated damages with respect to each particular Phase, and not as a penalty, for each calendar day that passes after the Phase Completion Deadline has expired for the particular Phase of the Project, until the date that the Construction Manager achieves Substantial Completion of that particular Phase, an amount equal to the portion of the GMP allocable to that particular Phase times the construction financing daily interest for Project (the "Stipulated Damage

Amount"). Any liquidated damages payable by the Construction Manager as to a particular Phase shall then be determined by multiplying the Stipulated Damage amount by each day of delay. The Stipulated Damage Amounts for each phase shall be established by an amendment hereto at the closing for financing on the Project.

.4 For purposes of determining that portion of the GMP allocable to a particular Phase, the following method of calculating same will be utilized:

(i) Reasonably determine that amount of the total GMP which generally applies to construction of the Project (as a whole) by adding the sum of the following amounts contained within the GMP: (Specific amounts to be determined when GMP is established by Amendment to the Contract.)

|                            |          |
|----------------------------|----------|
| Site Development           | \$ _____ |
| General Conditions         | \$ _____ |
| Construction Manager's Fee | \$ _____ |
| Other                      | \$ _____ |
| Total                      | \$ _____ |

(ii) Subtract total in (i) above from the total GMP to determine the "remaining GMP".

(iii) Utilize the approved Schedule of Values and construction costing information to calculate the percentage of the cost of a particular Phase to the "remaining GMP" amount as determined in (ii) above.

(iv) Apply the percentage from (iii) above for the particular Phase(s) to the GMP.

.5 The Stipulated Damage amount for each Phase is intended to be cumulative of the other Phases. Accordingly, if the Phase Completion Deadline for more than one (1) Phase shall have elapsed without the applicable Phases having been substantially completed, then the Stipulated Damage Amount for each Phase not so substantially complete shall be due and owing by the Construction Manager to the Owner. The Owner may collect the Stipulated Damage Amounts by withholding them from payments due the Construction Manager or by separate demand. The Stipulated Damage Amounts provided herein shall be in lieu of all other claims, costs, losses, damages and/or expenses that the Owner might otherwise have against the Construction Manager by reason of its failure to achieve Substantial Completion before the relevant Phase completion Deadline; whether arising from contract or tort, or actual, direct, indirect or consequential damages, and the Owner hereby releases the Construction Manager therefrom.

.6

.1 The Construction Manager agrees that final completion of each Phase of the Work shall occur as soon as possible after Substantial Completion of the Phase, but no later than thirty (30) calendar days after the date on which Substantial Completion of that Phase has occurred, as evidenced by the Architect's Certificate of Substantial Completion. Final payment as to a Phase shall be due upon final completion of such Phase.

.2 Owner acknowledges that there may be certain items which may be on order that, through no fault of the Construction Manager, may not arrive and/or otherwise be available for incorporation into the Work within said thirty (30) day period. To the extent that Owner, in Owner's sole discretion, accepts a Phase as having achieved final completion, even though such items remain outstanding, Owner may, (a) acknowledge such acceptance, and (b) withhold up to one and one half (1.5) times the total cost (as determined by the Construction Manager) for each Phase, or \$5000 for each Phase (whichever is greater), of such Work which remains incomplete or unincorporated.

3 Further, it is the intent that outstanding items described in 5.4.2.6.2 are to be secured and installed as quickly as possible -- preferably within five (5) days after the Construction Manager receives those items. It is acknowledged that some items may be more significant than others in terms of the operation or marketability of the project. It is also acknowledged that unless determined otherwise, the costs incurred by the Construction Manager for procuring, expediting and installing the items covered by 5.4.2.6.2 are reimbursable costs as defined under Article 6 of the Contract. Accordingly, it may be less costly for the Owner, and less disruptive to the operation of the facility, to have several items accumulated and installed at one time rather than have each item installed as it is delivered. Therefore, for each item outstanding as of Substantial Completion, within five (5) days the Construction Manager shall provide the Owner, in writing, with a proposed plan indicating the expected delivery date and proposed installation date for each item. The Owner and Construction Manager will jointly review (and revise as needed) said plan and reach an agreement on the plan. The Construction Manager will report to the Owner on a weekly basis of the status of the items remaining to be installed, and immediately notify the Owner of any change in delivery date or installation date due to unforeseen procurement or delivery problems. ~~If after receiving an outstanding item the Construction Manager fails to commence the Work within five (5) days after agreed upon commencement date, or subsequently fails to complete the Work in accordance with the agreed upon schedule, the Owner may exercise its right to carry out the work as provided in section 2.4 of the A201 General Conditions~~

4 The provision stated above for withholding 1.5 times the cost of items outstanding at the time of Substantial Completion does not apply to any Upgrade Options initiated by the Owner subsequent to the decision date established by the Construction Manager for each upgrade option proposed for a given residential unit.

7 Except for the portions of the project which the Owner has requested completion and occupancy prior to the completion of the Commons Areas in the El Centro building, it is the intent that when developing the Phase Completion Deadlines described in 5.4.2.1 and 5.4.2.2 above, for the purposes of determining what, if any, stipulated damage amount may be owed by Construction Manager, no phase shall be deemed to have achieved Substantial Completion until such time as (1) the common areas (as defined in Amendment No. 1) portion of the Project shall have achieved Substantial Completion or (2) the Owner agrees to deem the phase Substantially Complete or (3) the Owner takes beneficial occupancy of all or part of the phase. Further and accordingly, when establishing the completion dates for each phase as provided for herein by amendment hereto, such amendment shall also provide that no phase shall be deemed complete for the purposes hereof unless (1) and/or until the commons area portion of the Project shall have attained substantial completion, (2) the Owner has agreed to deem the phase Substantially Complete, or (3) the Owner takes beneficial occupancy of all or part of the phase.

#### 8.4 ACCOUNTING RECORDS

6.4.1 The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to the Owner and Owner's lender. The Owner and the Owner's accountants and the lender and lender's accountant or consultants shall be afforded reasonable access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement and the Project, (collectively "the records") and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law. All Records shall be maintained in accordance with generally accepted accounting principles, consistently applied. There shall be an "open book" policy, in effect at all times with regard to all Records relative to the project

maintained by either the Construction Manager or the Owner, or anyone on their behalf, and each party shall have full and complete access to said Records maintained by the other at all reasonable times. The Construction Manager shall require all Subcontractors and Sub-Subcontractors retained on a cost-plus basis to retain Records and permit the same access by Owner as is required of the Construction Manager under this Article 6.4.

6.4.1.1 If the Owner, Owner's accountants, Lender or Lender's accountants elect to perform an audit of "the records" maintained by Construction Manager, said audit shall be performed within six (6) months of the Final Completion of the project. This stipulation does not affect the Construction Manager's obligation to maintain "the records" for the time period noted in 6.4.1.

6.4.2 If, at any time during construction, any inspection by the Owner or the Lender of the Construction Manager's Records or any other data relating to the contract documents reveals an overcharge or undercharge by the Construction Manager as confirmed by an independent auditor, the next Application for Payment shall be appropriately adjusted by the amount of such overcharge or undercharge and related Fee.

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## **ARTICLE 7 CONSTRUCTION PHASE**

### **7.1 PROGRESS PAYMENTS**

Add the following:

7.1.11 To the extent of payments received by the Construction Manager from the Owner, the Construction Manager warrants the real property on which the Project is located will remain free of any legitimate and proper claims of lien arising from the Work performed by or through the Construction Manager. If any such liens are properly recorded, the Construction Manager shall have fifteen (15) business days from its receipt of written notice by the Owner or Owner's agent (including Title company) of such recording within which to discharge or secure by cash deposit or by construction lien transfer bond any such claims of lien. If the Construction Manager fails to discharge or otherwise secure such claim of lien within said time period, the Owner shall be entitled to satisfy the lien or take whatever action it deems appropriate to remove the lien from its property. All reasonable expenses and costs, including reasonable attorney's fees, incurred by the Owner after the abovementioned fifteen (15) day period to effect the discharge, securing and/or removal of any such claims of lien shall be promptly reimbursed to the Owner by the Construction Manager.

7.1.12 Concurrently with each Application for Payment, Construction Manager will deliver to Owner lien waivers (which may be conditioned upon payment) waiving all lien rights in respect of the Project, executed by Construction Manager, and executed by Subcontractors and suppliers covering amounts paid on their account or to be paid with funds received from such Application for Payment. All lien waivers shall be in form and substance satisfactory to Owner and the Owners Lender(s). Additionally, the Construction Manager shall provide further evidence regarding application of each progress payment to payment of all Subcontractors and suppliers providing services or material in respect of the Project, and shall comply with such other reasonable requirements as the Owners Lender(s) may impose with respect to obtaining advances of funds be applied to each Application for Payment."

**ARTICLE 9**  
**MISCELLANEOUS PROVISIONS**

**9.1 DISPUTE RESOLUTION**

Add the following the following subparagraphs to 9.1.1:

.1 Claims between the parties to this Agreement shall be resolved as set forth below. At all times, the parties shall approach the dispute resolution process in good faith.

.2 In the event of a Claim between the parties, the parties shall promptly meet in good faith to resolve the Claim informally before invoking the dispute resolution procedures outlined elsewhere in the Contract Documents, including the ~~A201 General Conditions and Supplementary Conditions~~, and below. If the parties are not able to quickly resolve the claim, either party may request participation by the Architect. Both parties shall promptly submit a written summary of its position to the Architect. Upon receipt of both summaries, the Architect shall immediately convene a formal meeting with the parties to further discuss the Claim. If the Claim is not resolved within three business days after the commencement of such meeting, either party may then commence the dispute resolution process defined in the Contract Documents.

.3 If the informal dispute resolution efforts outlined in 9.1.1.2 are not successful, then the dispute resolution procedures outlined in the balance of the Contract Documents. Any mediation conducted pursuant to this Paragraph 9.1 shall be held in Santa Fe, unless the parties mutually agree otherwise.

.4 Intentionally omitted

.5 Intentionally omitted

.6 Consent to arbitration involving an additional person or entity shall not constitute agreement to arbitration of a dispute not described in such consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

.7 Intentionally omitted

.8 The arbitration shall be held in Santa Fe.

.9 Notwithstanding anything herein to the contrary, if (1) the Claims involve a proposed, net aggregate payment or reimbursement in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose, an "interested person or entity" means any person or entity if (a) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (b) the interested person or entity is so situated that the disposition of the claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law.

**ARTICLE 11**  
**OTHER CONDITIONS AND SERVICES**

11.1 The Construction Manager recognizes that any Lender involved in financing the Project will have requirements pertaining to this Agreement. The Construction Manager agrees to cooperate with and assist the Owner and the Architect in amending and supplementing the Contract Documents to conform to reasonable and customary requirements of any Lender (to the extent such requirements are acceptable to the Owner). However, the Construction Manager shall not be responsible for actually preparing amendments or supplements to the Contract Documents for any reason at any time. Such amendments or supplements may include, without limitation, provisions:

- A. Naming any Lender as an additional insured on the Construction Manager's bonds and insurance policies and providing notice to any Lender of termination, cancellation or material modification of such policies.
- B. Requiring approval of Applications for Payment by a consultant designated by a Lender prior to payment.
- C. Agreeing not to amend Contract Documents without the reasonable and timely consent of the Lender.
- D. Requiring approval of Change Orders by the Lender, provide that Lender approval will be provided on a timely basis and the Owner will use its best efforts to secure such timely approval.
- E. Requiring notice of the Owner's default to the Lender, with a Lender having the right to cure, and requiring continued performance by the Construction Manager, provided that the Lender assumes all contract obligations of the Owner.
- F. Subordinating any lien rights of the Construction Manager to rights of the Lender.
- G. Requiring copies of all written notices to be sent to the Lender.
- H. Granting the Lender the right to inspect the work and to examine records pertaining thereto.
- I. Recognizing the pledge of the Owner's rights under Contract Documents to the Lender.
- J. Requiring the Construction Manager to acknowledge, on the Lender's request, whether or not the Owner is in default of its obligations under the Contract.
- K. Requiring the Construction Manager to assist the Owner in preparing and submitting reports and information concerning the Work as may be reasonably required by the Lender.

11.2 Nothing contained in Paragraph 11.2 or Paragraph 11.3 is intended to derogate from any other rights to terminate this Contract that may be granted the Construction Manager elsewhere in this Contract, including, but not limited to, the provisions of Article 2 and Article 14 of the General Conditions and Article 10 of this Agreement.

11.3 The Construction Manager may perform all or any part of the Work with its own forces, or through an Affiliate, provided that (1) the Construction Manager secures at least two competitive bids with respect to the work Construction Manager intends to perform (2) the Owner consents thereto in writing, which consent shall not be unreasonably withheld, after full disclosure by the Construction Manager to the Owner of the affiliation or relationship of the Affiliate to the Construction Manager and (3) any Work performed by an Affiliate shall be covered in a separate agreement between the Construction Manager



and the Affiliate, which shall satisfy all of the requirements for subcontracts as set forth in Paragraph 5.3 of the General Conditions and which shall be approved by the Owner in writing.

11.4 Any amounts payable hereunder which are not paid when due shall thereafter accrue interest at Wall Street Journal "prime" plus one percent (1%) per annum or at the highest rate allowed under the law of the state where the Project is located, whichever is less.

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**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit B**  
**Supplementary Conditions to the AIA A201 General Conditions (1997 Edition)**

1. The following Supplementary Conditions shall apply to that certain Standard Form of Agreement Between Owner and Construction Manager (the "Agreement") dated
2. For purposes of these Supplementary Conditions, capitalized terms shall have the meaning given to them in the Contract Documents (as such term is defined in Article 1 of the Agreement), unless otherwise defined in these Supplementary Conditions.

~~3. The following paragraphs supplement, modify, or amend that certain Contract Document entitled "General Conditions of the Contract for Construction," AIA Document A201, Fifteenth Edition, 1997, Articles 1 through 14 inclusive (the "General Conditions"). Where only a portion of any provision of the General Conditions is supplemented, modified, or amended, the remaining portions of that provision shall remain unaltered and in effect. In the event of any inconsistency between the General Conditions and these Supplementary Conditions, the terms of these Supplementary Conditions shall apply. Hereinafter, all references to the General Conditions shall mean the General Conditions as amended by these Supplementary Conditions.~~

A. INTENTIONALLY OMITTED

B. PARAGRAPH 1.2.4 "Correlation and Intent of the Contract Documents" is hereby added as follows:

1.2.4 Where no explicit quality or standards for materials or workmanship are established for Work, such Work is to be of good quality for the intended use and consistent with quality of the surrounding Work and of the construction of the Project generally.

C. PARAGRAPH 1.2.5 "Correlation and Intent of the Contract Documents" is hereby added as follows:

1.2.5 All indications or notations which apply to one of a number of similar situations, materials or processes shall be deemed to apply to all such situations, materials or processes wherever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

D. INTENTIONALLY OMITTED

E. SUBPARAGRAPH 1.5.1, add at the end of the first sentence: ", unless otherwise identified and incorporated by reference in Agreement."

F. SUBPARAGRAPH 2.2.5 Modify Subparagraph 2.2.5 as follows:

"In addition to the sets the Construction Manager used for bidding, the Owner will furnish a to be agreed upon number of sets of black and white prints of the Drawings and copies of the Project Manual free of charge for execution of the Work. Additional sets may be purchased from the Office of the Architect."

- G. SUBPARAGRAPH 3.2.3, delete the second sentence, and add at the end: "If the Construction Manager performs Work knowing it involves such error, inconsistency, omission or difference without such notice to the Architect, the Construction Manager shall assume appropriate responsibility for such Work and shall bear the costs attributed to correction."
- H. PARAGRAPH 3.3 "SUPERVISION AND CONSTRUCTION PROCEDURES" is hereby supplemented by the addition of the following sub-paragraphs:
- 3.3.4. The Construction Manager shall carefully check its own work and that of Subcontractors as the Work is being performed. The Construction Manager shall ensure that incorrect or faulty Work is corrected as soon as possible but in any event in a timely manner so as not to impact the project schedule.
- 3.3.5. During the finishing stages of the project, the Construction Manager shall make frequent inspections of the Work in the presence of the Architect or the Owners Representative and the applicable Subcontractor(s) involved, if any, and the Architect shall identify incorrect and faulty Work. The Construction Manager shall ensure that incorrect or faulty Work is corrected in accordance with 3.3.4.
- I. PARAGRAPH 3.4 "LABOR AND MATERIALS" is hereby supplemented by addition of the following Subparagraphs 3.4.3 and 3.4.4:
- 3.4.4. Should the Owner make reasonable objection, based upon qualifications, fitness, behavior or temperament, to the presence of any personnel of Construction Manager or any subcontractor, such person shall not perform services on the Project site, or otherwise in connection with the Project, without written consent of the Owner.
- 3.4.5. The Construction Manager shall not change or replace the assigned Project Manager or Superintendent without prior written consent by the Owner.
- J. SUBPARAGRAPH 3.5.1, Add to the end: "Construction Manager's warranties shall commence upon Substantial Completion of the Work for each Phase and continue for a period of one year thereafter."
- K. PARAGRAPH 3.5 "WARRANTY" is hereby supplemented by the addition of the following sub-paragraphs:
- 3.5.2. In the event of a claim by the Owner against the Construction Manager under Paragraph 3.5.1. of these General Conditions (or under any other express written warranty-made by the Construction Manager) for any item of Work performed under the Contract Documents, the Owner shall give notice (a "Warranty Notice") of the claim to the Architect and the Construction Manager and thereafter, the Architect or Architects authorized representative and the Construction Manager shall inspect the item(s) of Work in question. If following its inspection the Architect determines that any such item is included within the Construction Manager's warranty under the Contract Documents, then:
- (a) Upon formal notification from the Architect, the Construction Manager shall have thirty (30) days, notwithstanding any other time period specified in the Contract Documents, to either (1) complete the cure for the item or, for a Longer Cure Item, commence the cure and thereafter diligently proceed to complete the cure, or (2) if the Construction Manager disputes the warranty coverage of the item, commence the

dispute resolution procedures described in Section 4.3 of the General Conditions.

- (b) if upon the expiration of the thirty (30) day period the Construction Manager has failed to satisfy the provisions of either clause (a) (1) or clause (a) (2) immediately above, then the Owner shall have the right to engage a third party Construction Manager of the Owner's sole selection to cure or complete the cure of the warranty item at the Construction Manager's expense.
- (c) If the Construction Manager fails to cure an item within the required time and if the item is finally determined by arbitration or, when permitted, judicial proceedings to be covered by any Construction Manager's warranty under the Contract Documents, then the Construction Manager shall be liable for all expenses incurred by the Owner in enforcing its warranty claim including legal and Architectural fees and expenses, an administrative charge of a percentage equal to Construction Manager's fee times the cost to cure the warranty item to cover the Owner's administrative costs to enforce the warranty claim, and, when a third party Construction Manager has been engaged by the Owner under this Paragraph 3.5.2, the costs and expenses of the third party Construction Manager.

L. INTENTIONALLY OMITTED

M. ARTICLE 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES is supplemented by the following replacement language for Subparagraph 3.12.4

3.12.4 Shop Drawings, Product Data, Samples and similar submittals which are required by the Contract Documents to be submitted for Architect's review shall become Contract Documents upon Architect's review and approval. Submittals which are not required by the Contract Documents to be submitted for Architect's review are not Contract Documents.

N. ARTICLE 3.16 "ACCESS TO WORK" is hereby supplemented by addition of the following Subparagraph:

"3.16.2 Representatives of the State Agencies shall have access at all reasonable times to the Work wherever it is in preparation or progress, and the Construction Manager shall provide proper facilities for such access and inspection."

O. PARAGRAPH 4.2.4 "COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION" is hereby supplemented by the additions of the following subparagraphs: Nothing contained herein shall prohibit the Owner's Representative from communicating directly with the Construction Manager for the purpose of receiving information and/or providing the Construction Manager with clarification as to Owner's position with regard to any matters affecting or concerning the Work.

4.2.4.1 The following definitions shall apply to construction communications:

4.2.4.1.1 Contract Document Clarifications: An answer from the Architect, in response to an inquiry from the Construction Manager, intended to make some

requirement(s) of the Drawings or plans clearly understood. Drawing/plan clarifications may be sketches, drawings, or in a narrative form and are not intended to change any requirements of the Contract Documents. Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.2 Non-Conformance Notice:** A Notice issued by the Architect documenting that the Work or some portion thereof has not been performed in accordance with the requirements of the Contract Documents. Payment shall not be made on any portion of the Work for which a Non-Conformance Notice has been issued and the Work not corrected to the satisfaction of the Architect.

Upon receipt of a Non-Conformance Notice the Construction Manager shall provide a written Response to the Non-Conformance Notice within five (5) working days after receipt of the Notice. The Construction Manager's response shall state either (a) the basis of Construction Manager's determination that the Work was performed in accordance with the Contract Documents or (b) the corrective action Construction Manager intends to take, at its sole expense, to correct the non-conforming work

If the Construction Manager disputes issuance of the Notice the Architect has five (5) working days in which to respond by either (a) withdrawing the Notice of Non-Conformance or (b) directing the Construction Manager to correct the Work.

If directed to correct the Work, the Construction Manager shall do so within five (5) working days after receipt of such direction from the Architect, or such other time as may be agreed to with the Architect, without loss of rights for claim recovery or dispute resolution as may be available by the Contract.

**4.2.4.1.3 Requests for Information:** A written request from the Construction Manager or one of its subcontractors, to the Architect, seeking an interpretation or a clarification of some requirement of the Contract Documents. The Construction Manager shall clearly and concisely set forth the issue for which it seeks clarification or interpretation and why a response is needed from the Architect.

Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.4 Substitution/Or-Equal Submittals:** A written request from the Construction Manager to substitute a material, article, device, product, fixture, form, type of construction, or process called for in the Contract Documents with another item that shall substantially equal in all respects to that so indicated or supplied. Each such request shall specifically set forth any manner in which the proposed change does not conform to the Contract Documents and Construction Manager (and any subcontractor initiating the request) warrants that the proposed substitute conforms in all respects with the contract documents except as specifically identified as non-conforming in the request.

**4.2.4.1.5 Submittals/Shop Drawings:** When required by any technical specification included in these Contract Documents, the Construction Manager shall transmit to the Architect technical submittals, shop drawings, or samples, including supporting catalog cuts, manufacturer's literature, sketches or drawings, calculations, and other pertinent, in sufficient detail to enable the Architect to review the information and determine that the Construction Manager clearly understands the requirements of the Contract Documents. Construction Manager (and any subcontractor initiating a submittal) warrants that all Work and materials depicted in technical submittals, shop drawings and samples shall conform in all respects to the requirements of the Contract Documents, except as otherwise specifically identified as non-conforming.

4.2.4.1.6 Schedule Submittals: When required by the Construction Schedule Specification of these Contract Documents, the Construction Manager shall submit required schedules, schedule updates, schedule revisions, time impact analysis, etc. for review.

P. INTENTIONALLY OMITTED

Q. SUBPARAGRAPH 4.3.7.2 is hereby revised (and paragraphs 4.3.7.3 and 4.3.7.4 are added) to read as follows:

4.3.7.2 Weather days: Construction Manager confirms that the Contract Time, Phased Contract Time and the agreed upon dates for same as set forth in Amendment No. 1 to this Agreement are reasonable periods to perform The Work. ~~Construction Manager has included in the work schedule ordinary and normally anticipated lost days due to adverse weather ("weather days") and therefore Construction Manager shall not be entitled to an extension of the Contract Time or Phased Contract Time as a result of weather conditions normally experienced in the greater Santa Fe area unless (1) the Construction Manager is unable to make up for the weather delay by scheduling work for a Saturday in accordance with in 4.3.7.2 below, and (2) the number of weather days lost (and not made up by Saturday work) in that calendar month exceeds the number of weather days provided for in the Contract Time.~~

4.3.7.3 The Construction Manager's work schedule is based upon a regular five-day work week per calendar week. It is mutually agreed that in the event of a weather day the Construction Manager, before requesting a time extension the Construction Manager will first try to make up that weather day on the next Saturday available during the following 30 calendar days. A Saturday will be considered to be "available" only if all of the following conditions are met: (1) no work has already been scheduled for that day that would interfere with the work being rescheduled, (2) it is not a national holiday, (3) working on that Saturday is allowed by local ordinance, and (4) materials and workforce equivalent to what was scheduled for the lost weekday are available on that Saturday. The Construction Manager will only be required to utilize a Saturday if either (a) the Construction Manager incurs no additional cost in rescheduling work for that Saturday, or (b) the Owner agrees to compensate the Construction Manager (by Change Order) for any additional costs (such as for labor rate differential) the Construction Manager may incur.

4.3.7.4 The requirement stated above for the Construction Manager to utilize a Saturday to make up for a weather delay only applies the number of weather days included in each calendar month as indicated in the following list of Anticipated Lost Days. For every weather day beyond the number included below, the Construction Manager shall be entitled to an equivalent number of days extension to the Contract Time. The Construction Manager may (at the CM's sole discretion) attempt to mitigate the delay utilizing additional Saturdays as outlined in 4.3.7.3, but has no obligation to do so.

For the purposes of this Paragraph the table provided below setting forth the norms/anticipated lost weather days shall be utilized by the parties in determining lost weather days:

| <u>Month</u> | <u>Anticipated Lost Days<br/>Due to Adverse Weather</u> |
|--------------|---------------------------------------------------------|
| January      | 1                                                       |
| February     | 1                                                       |
| March        | 0                                                       |
| April        | 1                                                       |
| May          | 0                                                       |
| June         | 0                                                       |
| July         | 1                                                       |
| August       | 1                                                       |
| September    | 2                                                       |
| October      | 2                                                       |
| November     | 1                                                       |
| December     | 0                                                       |

See the Exhibit D "Weather Delays" - attached to the Contract.

R. INTENTIONALLY OMITTED

S. SUBPARAGRAPH 4.6.8, add as new subparagraph :

"4.6.8 Limitations of Arbitration. Notwithstanding anything in the Contract Documents to the contrary, if (1) the Claims involve a proposed, net aggregate payment to owner or Construction Manager in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose an "interested person or entity" means any person or entity if (3) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (4) the interested person or entity is so situated that the disposition of the Claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law."

T. SUBPARAGRAPH 5.2.1, change "promptly" to "within 10 days" in lines 5 and 7.

U. PARAGRAPH 7.3 "CONSTRUCTION CHANGE DIRECTIVES"

Subparagraph 7.3.3.3 is hereby changed to read as follows:

7.3.3.3 The following fees apply to Changes to the Work;

7.3.3.3.1 INTENTIONALLY OMITTED

7.3.3.3.2 The same markup applied by the subcontractor in the subcontractors base subcontract, which shall be defined in said subcontract and subject to Owner's approval, to the cost of work performed by any subcontractor.

V. INTENTIONALLY OMITTED

W. INTENTIONALLY OMITTED

X. PARAGRAPH 9.8.1. of the General Conditions is hereby deleted in its entirety and the following is substituted in lieu thereof:

9.8.1 "Substantial Completion" of the Project shall be deemed to occur when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use and, in addition, all requirements of the Contract Documents for Substantial Completion, including the following conditions, have been fulfilled as follows:

a. A Temporary of Final Certificate of Occupancy has been issued and all construction related approvals, licenses and requirements have been obtained or satisfied for the Project such that the Project may be operated for its intended use.

b. INTENTIONALLY OMITTED

Y. PARAGRAPH 9.8.2. of the General Conditions is hereby deleted in its entirety and the following Paragraphs 9.8.2.1. through 9.8.2.6. are substituted in lieu thereof:

9.8.2.1. When the Construction Manager considers that the Work, or portion thereof which the Owner agrees to accept separately, is substantially complete, the Construction Manager shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Construction Manager shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents. Following receipt of the Construction Manager's list, the Architect will make an inspection (the "Initial Punch List Inspection") to determine whether the Work or designated portion thereof is Substantially Complete. Upon completion of its Initial Punch List Inspection, the Architect shall prepare and submit to the Construction Manager and the Owner the Architect's list (the "Punch List") of items to be completed or corrected. For the items on the Punch List, the Architect shall specify:

- a. a date (a "Punch Item Date") by which such items shall be completed, which Punch Item Date shall be no more than forty-five (45) days from the date of the Punch List unless the Architect determines that reasonable cause exists for a later completion date; and
- b. the cost to complete or correct the items as reasonably determined by the Architect.

The Architect shall expressly state on the Punch List what the Construction Manager must do to achieve Substantial Completion under Paragraph 9.8.1 of the General. If as a result of the Initial Punch List Inspection the Architect determines that Substantial Completion has occurred, the Architect shall prepare a Certificate of Substantial Completion pursuant to Paragraph 9.8.2.5 below.



9.8.2.2 If the Construction Manager has not given notice that the Work is substantially complete and requested inspection thereof on or before the date for Substantial Completion set by the parties in the Contract Documents, then the Owner may request the Architect to make an Initial Punch List inspection of the Work to (x) prepare the Punch List pursuant to the provisions of Paragraph 9.8.2.1. above and (y) determine if Substantial Completion has occurred.

9.8.2.3. Upon the request of the Construction Manager prior to the expiration of the relevant Punch Item Date(s) and for good cause shown, the Architect may extend any Punch Item Date(s) for a reasonable period. Following receipt of the Punch List and the Construction Manager's compliance with the requirements of Paragraph 9.8.1. above, the Construction Manager may submit a request for another inspection by the Architect, if necessary, to determine whether Substantial Completion of the Work has been achieved.

9.8.2.4. If the Construction Manager fails to satisfactorily complete any item(s) on the Punch List by the applicable Punch Item Date(s), then the Owner has the right to take over the work in accordance with Section 2.4 of the General Conditions.

9.8.2.5. When the requirements of Paragraph 9.8.1. above have been met and upon the request of either the Owner or the Construction Manager, the Architect shall prepare a Certificate of Substantial Completion, in the form set out in Paragraph 9.8.3 below, which shall establish the date of Substantial Completion and shall establish responsibilities of the Owner and the Construction Manager for security, maintenance, heat, utilities, damage to the Work, and insurance. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise specifically stated in the Contract Documents or in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Construction Manager for their written acceptance of responsibilities assigned to them in such certificate.

**Z. INTENTIONALLY OMITTED**

**AA.** In addition to the provisions of Paragraph 9.10 Final Completion shall not have been deemed to have occurred until the date upon which all of the following have occurred:

**a. INTENTIONALLY OMITTED**

**b.** Delivery of conditional or unconditional lien waivers from each person who performed work at or provide or fabricated materials in connection with the Work (including all subcontracts executed in connection therewith), other than from those persons whose claims are being contested by Construction Manager in good faith and for which Construction Manager has provided to Owner a bond or security in an amount reasonably acceptable to Owner, and

**c.** Issuance and obtaining of a final, unconditional certificate of occupancy and all construction-related approvals, licenses, and requirements for the Project enabling it to be occupied and operated for its intended use.

**BB.** SUBPARAGRAPH 9.10.4.1, after "Claims" add: "previously made in writing and identified by Owner as unsettled at the time of final payment."

**CC.** Paragraph 10.1.1 add the following: "Construction Manager shall prepare and submit to Owner for Owner's approval a comprehensive safety program. Further, Construction Manager shall provide written verification and certification in a form satisfactory to the

Owner, that all subcontractors have familiarized themselves with the safety program and agreed to abide by said program and training regimen thereunder.

- DD. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." In the first line of Subparagraph 11.1.1, following the work "companies," insert the following:

", acceptable to the Owner,."

- EE. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." Add the following to subparagraph 11.1.3:

"Certificates called for herein shall be furnished in duplicate and shall specifically set forth evidence of all coverage required by 11.1.2 and the Construction Manager shall furnish to the Architect copies of all endorsements that are subsequently issued amending coverage or limits."

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- FF. SUBPARAGRAPH 13.4.3, add as a new subparagraph:

"In the event of any litigation between the parties, the prevailing party shall be entitled to reimbursements for all reasonable attorneys' fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party to the extent allowed by law."

- GG. PARAGRAPH 13.5 "TESTS AND INSPECTIONS" is hereby supplemented by the addition of the following subparagraph:

"13.5.7 When work has been installed contrary to any Contract requirements and the Construction Manager requests the privilege of testing in lieu of removal, such testing shall be at the Construction Manager's expense."

- HH. INTENTIONALLY OMITTED

- II. Add the following new Article:

#### ARTICLE 15: REQUESTS FOR INFORMATION

15.1.1 In the event that the Construction Manager or its subcontractor, at any tier, determines that some portion of the Drawings, Specifications, or other Contract Documents requires clarification or interpretation by the Architect, the Construction Manager shall submit a Request for Information in writing to the Architect. Requests for information may only be submitted by the Construction Manager and shall be only submitted on the Request for Information Forms provided by the Architect. The Construction Manager shall clearly and concisely set forth the issue for which clarification and interpretation is sought and why a response is needed from the Architect. If the Request for Information is being used to request confirmation of an interpretation or understanding of a requirement, the Construction Manager shall set forth that interpretation or understanding of the requirement along with reasons why such an understanding was reached.

15.1.2 The Architect will review all Requests for Information to determine whether they are Requests for Information within the meaning of this term. If the Architect determines

that the document is not a Request for Information, it will be returned to the Construction Manager, unreviewed as to content, for resubmittal on the proper form and in the proper manner. In either case, the Architect must reply to RFI in writing within the time requested by the Construction Manager, or three (3) working days, whichever is earlier.

15.1.3 Responses from the Architect are not intended to change any requirement of the Contract Documents. In the event the Construction Manager believes that a response to a Request for Information will cause a change to the requirements of the Contract Document, the Construction Manager shall immediately give written notice to the Architect in accordance with Section 4 of the General Conditions stating that the Construction Manager considers the response to be a change in the scope of work or a change to the project schedule..

**END OF SUPPLEMENTARY CONDITIONS**

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**RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit "C"**

**Weather Delays**

1. A "Work Day" is defined at Monday thru Friday, 7:30 am- 4:400 pm.
2. The occurrence of one or more of the following will constitute a weather delay as indicated:
  - a. 0.25" of rain during the workday constitutes one lost workday
  - b. 2.0" of snow during the workday constitutes one lost workday
  - c. 12" of snow in a 24-hour period constitutes two lost workdays.
  - d. Temperature of 5 degrees below zero (Fahrenheit) constitutes one lost workday.
  - e. Any drying time required for soil stabilization (as directed by the geotechnical engineer) due to rain or snow will constitute lost work day(s).
3. Weather days will be included in the final schedule approved as part of the GMP proposal to be incorporated into the contract by amendment. The number of weather days included will be in accordance with Section 3.P of Exhibit B. Adjustments to the contract completion dates due to adverse weather will be made in accordance with Section 3.P of Exhibit B.

**RainbowVision Santa Fe/Weis Contract Agreement**  
**Exhibit "D"**  
**Personnel Billing Rates**

| <u>Position</u>                               | <u>Reimbursable<br/>as a Cost of<br/>the Work<br/>(w/in GMP)</u> | <u>Included<br/>In Fee</u> | <u>Notes</u> | <u>Expected<br/>to be<br/>Full or Part<br/>Time</u> | <u>Billing<br/>Rate<br/>(\$/hr)</u> |
|-----------------------------------------------|------------------------------------------------------------------|----------------------------|--------------|-----------------------------------------------------|-------------------------------------|
| <b><u>Field Staff Stationed on Site</u></b>   |                                                                  |                            |              |                                                     |                                     |
| Superintendent                                | X                                                                |                            | 1            | Full                                                | \$70                                |
| Project Engineer, QA/QC                       | X                                                                |                            | 1            | Full                                                | \$60                                |
| Carpenter                                     | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| Laborer                                       | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| <b><u>Personnel Not Stationed on Site</u></b> |                                                                  |                            |              |                                                     |                                     |
| Vice President                                |                                                                  | X                          |              |                                                     |                                     |
| CFO                                           |                                                                  | X                          |              |                                                     |                                     |
| Project Manager                               | X                                                                |                            | 3            | Part                                                | \$75                                |
| General Superintendent                        | X                                                                |                            | 3            | Part                                                | \$75                                |
| Project Coordinator                           |                                                                  | X                          |              |                                                     |                                     |
| Safety Director                               | X                                                                |                            | 3            | Part                                                | \$50                                |
| Project Accountant                            |                                                                  | X                          |              |                                                     |                                     |
| <b><u>Pre-Construction Personnel</u></b>      |                                                                  |                            |              |                                                     |                                     |
| Senior Estimator/Pre-Con Services M           | X                                                                |                            | 4            | Part                                                | \$90                                |
| Assistant Estimator                           | X                                                                |                            | 4            | Part                                                | \$80                                |

**Notes:**

- 1 Field staff on project site.
- 2 It is expected that all trade work will be subcontracted. Trade labor rates shown only if need for Gen Conditions.
- 3 Billed only for time spent on site and traveling to project
- 4 Billed only for time during pre-construction phase, subject to Pre-construction services billing cap (see Exhibit F).

**RainbowVision Santa Fe/Weis Contract Agreement**  
**Exhibit E**  
**Project Scope & Budget Summary**

- The Scope of the project includes:
  - 40 Single-story Condominium living units
  - 80 Single-level Independent Living units built in a series of two-story buildings
  - 26 Assisted Living apartments (and related support spaces) constructed on the 2<sup>nd</sup> level of the central services building
  - Central services building (El Centro) containing commercial kitchen, dining spaces, activity spaces, administrative and marketing offices, retail spaces, and a spa/wellness center.
  - ~~○ 13 acres of site development, with some off-site, public improvements~~
  - Total building area is approximately 183,000 sf.
- Based on a preliminary site plan and building design commissioned by the Owner, the Construction Manager prepared a detailed, preliminary cost report and presented that report to the Owner on February 1, 2004. Based on that scope and cost report, the Owner has established a construction budget of \$20,540,000, based on the Preliminary Divisional Cost Breakdown shown in Exhibit F.
- The Owner has contracted with the Architect to complete the design of the project in accordance with the budget stated above. The completion of the design, and related activities is proceeding in accordance with the Preconstruction Phase Schedule prepared and updated regularly by the Construction Manager. See Exhibit G.
- The Construction Manager has also prepared a Preliminary Construction Schedule. See Exhibit H. A final Construction Schedule will be included in the GMP report and made part of the contract by amendment.
- The Owner, Architect and Construction Manager are working together to monitor the completion of the design to ensure meeting the Construction Budget.
- Upon receipt of the Design Development documents, the Construction Manager will, in accordance with contract Section 2.2 prepare a GMP report that will include all of the elements outlined in Section 2.2.4. Prior to submitting the final GMP report, the Construction Manager will review the preliminary cost estimates with the Owner and Architect to determine if any adjustments to scope are required in order to achieve the construction budget stated above. Upon approval by the Owner, the GMP will be incorporated into the contract by amendment, in accordance with Section 2.2.
- During the completion of the design The Construction Manager will continue to meet regularly with the Owner and Architect, and will regularly review the Architect's work in progress to monitor the design as a means to ensure conformance to the construction budget.

# **RainbowVision Santa Fe/Weis Contract Agreement**

## **EXHIBIT F**

### **Preliminary Divisional Cost Breakdown**

| <b>C.S.I. SYSTEMS BREAKDOWN</b>            | <b>Total<br/>Costs</b> | <b>%</b>            |
|--------------------------------------------|------------------------|---------------------|
| Division 1 - General Conditions            | \$1,047,401            | 5.9%                |
| Division 1 - Building Permit Allowance     | \$184,620              | 1.0%                |
| Division 2 - Site Construction             | \$1,534,319            | 8.7%                |
| Division 3 - Concrete                      | \$965,149              | 5.5%                |
| Division 4 - Masonry                       | \$488,508              | 2.8%                |
| Division 5 - Metals                        | \$439,822              | 2.5%                |
| Division 6 - Woods & Plastics              | \$2,609,476            | 14.8%               |
| Division 7 - Thermal & Moisture Protection | \$969,353              | 5.5%                |
| Division 8 - Doors & Windows               | \$771,105              | 4.4%                |
| Division 9 - Finishes                      | \$3,286,198            | 18.6%               |
| Division 10 - Specialties                  | \$592,969              | 3.4%                |
| Division 11 - Equipment (See Note 1)       | \$445,320              | 2.5%                |
| Division 12 - Furnishings (See Note 2)     | \$49,196               | 0.3%                |
| Division 14 - Conveying                    | \$230,919              | 1.3%                |
| Division 15 - Mechanical                   | \$2,410,820            | 13.7%               |
| Division 16 - Electrical                   | \$1,636,100            | 9.3%                |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    | <b>100%</b>         |
| Escalation - For 2004                      | 0.0%                   |                     |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    |                     |
| Est./Const Contingency - El Centro         | 5.0%                   | \$243,521           |
| Est./Const Contingency - Balance           | 3.0%                   | \$383,726           |
| <b>Sub-Total</b>                           | <b>\$18,288,523</b>    |                     |
| Builders Risk Insurance                    | 0.8%                   | \$146,308           |
| Liability Insurance                        | 0.85%                  | \$158,696           |
|                                            |                        | <b>\$18,591,527</b> |
| Construction Manager Fee                   | 3.00%                  | \$557,748           |
| <b>Sub-Total</b>                           | <b>\$19,149,273</b>    |                     |
| Performance and Payment Bond               |                        | \$106,393           |
| NM Gross Receipts Tax                      |                        | \$1,284,062         |
| <b>Project Totals</b>                      |                        | <b>\$20,539,728</b> |

**Notes:**

1. "Equipment" includes residential appliances, commercial kitchen and laundry equipment.
2. "Furnishings" does not include FF&E - which is being designed and purchased by the Owner under a separate contract.

**RainbowVision Santa Fe/Wets Contract Agreement**  
**Exhibit G**  
**Preconstruction Phase Schedule**

Refer to the "Preconstruction Schedule" dated \_\_\_\_\_ (filename: RVSF007), attached separately but made a part of this Exhibit by reference.

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**RainbowVision Santa Fe/Weis Contract Agreement**  
**Exhibit H**  
**Preliminary Construction Phase Schedule**

Refer to the "Preliminary Construction Schedule" dated \_\_\_\_\_ (filename: \_\_\_\_\_),  
attached separately but made a part of this Exhibit by reference.

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Amendment No. 1  
(Revised December 15, 2004)  
To Contract Agreement Between  
RainbowVision Santa Fé, LLC and Wels Builders, Inc

In accordance with article 2.2.9 of the Contract Agreement, the Guaranteed Maximum Price (GMP) and Project Schedule are hereby modified to reflect the following:

- The Guaranteed Maximum Price will be Twenty-One Million Five Hundred Thirty Nine Thousand, Seven Hundred Twenty-Eight Dollars (\$21,539,728).

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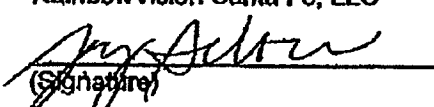
- The Construction Start date will be January 3, 2005. Based on that start date:
- The Substantial Completion date for Buildings 16, 17, 18, 19, and 20 will be October 28, 2005.
- The Substantial Completion date for the balance of the project will be April 26, 2006.

Accordingly, the GMP Divisional Cost Breakdown (Exhibit F) shall be modified as per the attached revision, dated September 30, 2004. The revised GMP is based on the following:

- Weis September 15, 2004 "Confirmation of GMP" letter (with attachments)
- Weis September 30, 2004 "Summary of Approved Enhancements"

The Construction Schedule (Exhibit H) shall be as shown in the attached update, dated December 15, 2004.

For:  
RainbowVision Santa Fe, LLC

  
(Signature)

JAY SILVER, PRESIDENT  
(Printed Name and Title)  
RAINBOWVISION PROPERTIES, INC  
MANAGING MEMBER  
(Date)

For:  
Wels Builders Inc.

  
(Signature)

PETER WORTHINGTON, VICE PRESIDENT  
(Printed Name and Title)  
DEC-15, 2004  
(Date)

| Act ID                                            | Description                            | Dur | Early Start | Early Finish |
|---------------------------------------------------|----------------------------------------|-----|-------------|--------------|
| <b>Records Management</b>                         |                                        |     |             |              |
| 1060                                              | Receive Utilities Permit               | 0   | 05AUG04 A   |              |
| 1120                                              | Receive Grading Permit                 | 0   | 05AUG04 A   |              |
| 1080                                              | Receive Bid Package #2 Building Permit | 0   | 02NOV04 A   |              |
| 1000                                              | Loan Closing                           | 0   | 22DEC04     |              |
| 1005                                              | Notice to Proceed                      | 0   | 22DEC04     |              |
| 1100                                              | Receive Bid Package #3 Building Permit | 0   | 22DEC04     |              |
| 1010                                              | Site Construction Start                | 0   | 03MAY05     |              |
| 1020                                              | Building Construction Start            | 0   | 03MAY05     |              |
| <b>Structure</b>                                  |                                        |     |             |              |
|                                                   |                                        | 285 | 05JAN05     | 06FEB06      |
| <b>Condominium Buildings Group 1 - South East</b> |                                        |     |             |              |
| <b>+ Condominium Building 20</b>                  |                                        |     |             |              |
|                                                   |                                        | 117 | 18JAN05     | 29JUN05      |
| <b>+ Condominium Building 18</b>                  |                                        |     |             |              |
|                                                   |                                        | 130 | 28JAN05     | 28JUL05      |
| <b>+ Condominium Building 19</b>                  |                                        |     |             |              |
|                                                   |                                        | 144 | 09FEB05     | 30AUG05      |
| <b>+ Condominium Building 17</b>                  |                                        |     |             |              |
|                                                   |                                        | 158 | 21FEB05     | 28SEP05      |
| <b>+ Condominium Building 16</b>                  |                                        |     |             |              |
|                                                   |                                        | 171 | 09MAR05     | 28OCT05      |
| <b>+ Closeout/Turnover Group 1 Condominiums</b>   |                                        |     |             |              |
|                                                   |                                        | 0   | 28OCT05     | 28OCT05      |
| <b>- 3 Carport</b>                                |                                        |     |             |              |
|                                                   |                                        | 276 | 2AJAN05     | 20FEB06      |
| <b>Buildings Group 2 - South East</b>             |                                        |     |             |              |
| <b>+ Independent Living Building 1 - 8 Units</b>  |                                        |     |             |              |
|                                                   |                                        | 180 | 03FEB05     | 13OCT05      |
| <b>+ Independent Living Building 2 - 4 Units</b>  |                                        |     |             |              |
|                                                   |                                        | 198 | 08FEB05     | 14NOV05      |
| <b>+ Condominium Building 3</b>                   |                                        |     |             |              |
|                                                   |                                        | 147 | 21FEB05     | 14SEP05      |
| <b>+ Condominium Building 4</b>                   |                                        |     |             |              |
|                                                   |                                        | 158 | 09MAR05     | 12OCT05      |
| <b>+ Independent Living Building 5 - 4 Units</b>  |                                        |     |             |              |
|                                                   |                                        | 201 | 06MAR05     | 14DEC05      |
| <b>Buildings Group 3 - South West</b>             |                                        |     |             |              |

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

Bid Package #2 Building Permit  
 \* Loan Closing  
 \* Notice to Proceed  
 \* Receive Bid Package #3 Building Permit  
 \* Site Construction Start  
 \* Building Construction Start

Rebow Vision Retirement Community  
 Santa Fe, New Mexico  
 Wells Builders, Inc.

| Act | ID | Description                               | Dur | Start | Early Finish | 2001    | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC | JAN | FEB | MAR | APR |
|-----|----|-------------------------------------------|-----|-------|--------------|---------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
|     |    | Independent Living Building 6 - 14 Units  |     | 267   | 09FEB05      | 20JAN08 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 7 - 10 Units  |     | 242   | 09FEB05      | 19JAN08 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 8 - 8 Units   |     | 255   | 20FEB06      | 20FEB08 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 9 - 14 Units  |     | 299   | 22DEC04      | 14FEB08 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 10 - 10 Units |     | 272   | 04MAR05      | 27MAR08 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 11 - 4 Units  |     | 225   | 18MAR05      | 18APR08 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 12            |     | 182   | 20MAR05      | 09DEC05 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 13            |     | 189   | 18MAR05      | 10NOV05 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 14            |     | 182   | 20MAR05      | 09DEC05 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 15            |     | 225   | 18MAR05      | 18APR08 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 16            |     | 346   | 22DEC04      | 24APR08 |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 17            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 18            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 19            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 20            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 21            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 22            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 23            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 24            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 25            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 26            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 27            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 28            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 29            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 30            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 31            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 32            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 33            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 34            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 35            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 36            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 37            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 38            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 39            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 40            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 41            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 42            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 43            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 44            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 45            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 46            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 47            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 48            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 49            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 50            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 51            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 52            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 53            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 54            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 55            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 56            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 57            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 58            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 59            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 60            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 61            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 62            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 63            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 64            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 65            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 66            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 67            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 68            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 69            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 70            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 71            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 72            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 73            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 74            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 75            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 76            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 77            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 78            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 79            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 80            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 81            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 82            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 83            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 84            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 85            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 86            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 87            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 88            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 89            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 90            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 91            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 92            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 93            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 94            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 95            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 96            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 97            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 98            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 99            |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|     |    | Independent Living Building 100           |     |       |              |         |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |

Rainbow Vision Retirement Community  
Santa Fe, New Mexico  
West Builders, Inc.

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# EXHIBIT B

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

NO. D-0101-CV 02007-000010

RAINBOWVISION SANTA FE, LLC,

Plaintiff,

vs.

WEIS BUILDERS, INC.,  
PCI CONTRACTORS, INC. and RLA, INC.  
Defendants.

**FIRST AMENDED PETITION TO CANCEL LIENS AND  
COMPLAINT TO RECOVER DAMAGES**

The plaintiff RainbowVision Santa Fe, LLC ("RainbowVision"), by and through its undersigned attorneys, states its First Amended Petition to Cancel Liens and Complaint to Recover Damages as follows:

**GENERAL ALLEGATIONS**

1. RainbowVision is a New Mexico limited liability company with its principal place of business located in Santa Fe, New Mexico.
2. The defendant Weis Builders, Inc. ("Weiss"), is, upon information and belief, a Minnesota corporation.
3. The defendant PCI Contractors, Inc. ("PCI"), is a New Mexico corporation with its principal place of business located in Santa Fe, New Mexico.
4. The defendant RLA, Inc. ("RLA"), is a New Mexico corporation with its principal place of business located in Bernalillo County, New Mexico.
5. The real property which is the subject of this action is a 12.7 acre tract located at 500 Rodeo Road in Santa Fe County, New Mexico (the "Property"). The Property is a

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First Judicial District Court

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Santa Fe, The Attorney &  
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Santa Fe, NM 87504-2288

condominium created pursuant to the provision of the New Mexico Condominium Act.

6. On April 28, 2004, RainbowVision and Weiss entered into a contract ("Contract") under which Weis agreed to construct certain improvements upon the Property, including residential condominium units, residential assisted living units and various related structures and improvements. A true and correct copy of the Contract, marked as Exhibit A, is being served with this pleading pursuant to Rule 1-009(I) NMRA.

7. Coincident with the execution of the Contract, Weiss, as bond obligor, and Federal Insurance Company ("Federal"), as surety, executed and delivered a Payment Bond to RainbowVision. Pursuant to the terms of the Payment Bond, Weiss and Federal agreed, among other things, to indemnify and hold RainbowVision harmless from any claims of lien for the payment for labor and materials furnished in the performance of the Contract. A true and correct copy of the Payment Bond, marked as Exhibit B, is being served with this pleading pursuant to Rule 1-009(I) NMRA.

8. Upon information and belief, Weiss entered into a subcontract with PCI under which PCI agreed to furnish certain labor and materials in connection with the work which Weis agreed to perform under the Contract.

9. Upon information and belief, Weis entered into a subcontract with RLA under which RLA agreed to furnish certain labor and materials in connection with the work which Weiss agreed to perform under the Contract.

10. Pursuant to the Contract and the New Mexico Retainage Act, an escrow account was established at Los Alamos National Bank into which funds retained from payments to Weis under the Contract are held pending completion of the work required under the Contract, and compliance with the terms and conditions of the Contract. The balance of the escrow account as

of December 31, 2006, were approximately \$1,143,458.00.

**COUNT I**  
**PETITION TO CANCEL PCI'S CLAIM OF LIEN**

11. RainbowVision incorporates the General Allegations by reference as though set forth herein.

12. On December 12, 2006, PCI recorded a Claim of Lien upon the Property. As stated in PCI's Claim of Lien, PCI claims it is owed \$73,843.00 for work performed on the Property pursuant to its subcontract with Weis. A true and correct copy of the PCI's Claim of Lien, marked as Exhibit C, is being served with this pleading pursuant to Rule 1-009(I) NMRA.

13. Upon information and belief, the amounts claimed by PCI consist of retainage withheld by Weiss from payments previously made to PCI.

14. Pursuant to NMSA § 48-2-9(B) (1978), RainbowVision requests that the Court examine the Claim of Lien filed by PCI and determine an amount to satisfy the recorded demand and any other damages, court costs or attorney's fees which may be recovered by PCI. RainbowVision believes that amount is no greater than one-hundred fifty percent of the recorded demand of \$73,840.00.

15. Pursuant to NMSA § 48-2-9(B) (1978), RainbowVision requests the Court approve security consisting of the Payment Bond and the \$73,840.00 of the retainage amount.

WHEREFORE, RainbowVision requests the Court enter an Order canceling PCI's Claim of Lien pursuant to NMSA § 48-2-9(B) (1978), and that the Court grant such other and further relief as is just and proper.

**COUNT II**  
**PETITION TO CANCEL RLA'S CLAIM OF LIEN**

16. RainbowVision incorporates the General Allegations by reference as though set



forth herein.

17. On November 14, 2006, RLA recorded a Claim of Lien upon the Property. As stated in RLA's Claim of Lien, RLA claims it is owed \$36,952.43 for work performed on the Property pursuant to its subcontract with Weis. A true and correct copy of the RLA's Claim of Lien, marked as Exhibit D, is being served with this pleading pursuant to Rule 1-009(I) NMRA.

18. Upon information and belief, RainbowVision has paid Weiss the amounts claimed by RLA.

19. Pursuant to NMSA § 48-2-9(B) (1978), RainbowVision requests that the Court examine the Claim of Lien filed by RLA and determine an amount to satisfy the recorded demand and any other damages, court costs or attorney's fees which may be recovered by RLA. RainbowVision believes that amount is no greater than one-hundred fifty percent of the recorded demand of \$36,952.43.

20. Pursuant to NMSA § 48-2-9(B) (1978), RainbowVision requests the Court approve security consisting of the Payment Bond and the \$36,952.43 of the retainage amount.

WHEREFORE, RainbowVision requests the Court enter an Order canceling RLA's Claim of Lien pursuant to NMSA § 48-2-9(B) (1978), and that the Court grant such other and further relief as is just and proper.

**COUNT III**  
**PETITION TO CANCEL WEIS'S CLAIM OF LIEN**

21. RainbowVision incorporates the General Allegations by reference as though set forth herein.

22. On February 2, 2007, Weis recorded a Claim of Lien upon the Property, or some portion thereof. As stated in Weis's Claim of Lien, Weis claims it is owed \$1,522,319.00 for

work performed on the Property pursuant to the Contract. A true and correct copy of Weis's Claim of Lien, marked as Exhibit E, is being served with this pleading pursuant to Rule 1-009(I) NMRA.

23. Weis's Claim of Lien is defective because, among other things, it is untimely and does not accurately state the amount of the claim after deducting all just credits and offsets due to Rainbow Vision.

24. Pursuant to NMSA § 48-2-9(B) (1978), RainbowVision requests that the Court examine Weis's Claim of Lien, and determine an amount to satisfy the recorded demand and any other damages, court costs or attorney's fees which may be recovered by Weis.

25. Pursuant to NMSA § 48-2-9(B) (1978), RainbowVision requests the Court approve security consisting of the amount of retainage in the escrow account at Los Alamos National Bank to serve as security for the payment of Weis's Claim of Lien.

WHEREFORE, RainbowVision requests the Court enter an Order canceling Weis's Claim of Lien pursuant to NMSA § 48-2-9(B) (1978), and that the Court grant such other and further relief as is just and proper.

#### **COUNT IV** **BREACH OF CONTRACT**

26. RainbowVision incorporates the General Allegations, and the allegations of Counts I, II and III, by reference as though set forth herein.

27. Weis has breached the Contract in numerous respects, including, but not limited to, the following:

A. Failing to achieve substantial completion of the Contract within the times specified in the Contract.

- B. Failing to complete the work required under the Contract in a workmanlike manner.
- C. Failing to manage and supervise the work under the Contract in an appropriate manner;
- D. Refusing to remedy defective work, and failing to honor its warranty obligations under the Contract;
- E. Failing to promptly discharge liens filed by third-parties upon the Property; and
- F. Billing RainbowVision for items not properly billed under the Contract.

27. As a direct and proximate result of Weis's numerous breaches of the Contract, RainbowVision has suffered damages, including, but not limited to, increased construction administration costs, the costs to remedy defective work, the costs to secure the release of liens upon the Property, including attorneys' fees, and liquidated damages as provided in the Contract.

28. Pursuant to the terms of the Contract Weis is liable for reasonable attorneys' fees and costs incurred by RainbowVision in connection with this lawsuit.

29. RainbowVision has satisfied all conditions precedent to maintaining this action.

WHEREFORE, RainbowVision requests an award of compensatory damages in an amount to be determined at trial, an award of liquidated damages pursuant to the terms of the Contract, its attorneys' fees and costs incurred in connection with this matter, and such other and further relief as the Court deems proper.

**COUNT V**  
**MISREPRESENTATION**

30. RainbowVision incorporates the General Allegations, and the allegations of

Counts I through IV, by reference as though set forth in detail here.

31. Weis purchased Subcontractor Default Insurance from Universal International Reinsurance Company Limited under which Weis is the insured.

32. Weis submitted pay applications to RainbowVision's architect which included premium charges for the Subcontractor Default Insurance, without disclosing those charges.

33. Weis either negligently or intentionally failed to disclose to RainbowVision that its pay applications included premium charges for Subcontractor Default Insurance.

34. RainbowVision approved pay applications, which included premium charges for Subcontractor Default Insurance.

35. RainbowVision has no obligation under the Contract to pay premium charges for Subcontractor Default Insurance, and would not have approved pay applications containing such charges had Weis properly disclosed that the pay applications included those charges.

36. As a direct and proximate result of Weis's failure to disclose that its pay applications included premium charges for Subcontractor Default Insurance, RainbowVision has suffered damages, including the amount of those premium charges paid to date.

WHEREFORE, RainbowVision requests an award of compensatory damages in an amount to be determined at trial, an award of punitive damages if the failure to disclose was intentional, and such other and further relief as the Court deems proper.

#### **COUNT VI** **UNFAIR PRACTICES**

37. RainbowVision incorporates the General Allegations, and the allegations of Counts I through V, by reference as though set forth in detail here.

38. Weis knowingly submitted pay applications to RainbowVision, in connection

with its provision of goods and services to RainbowVision, which included premium charges for Subcontractor Default Insurance.

39. Weis's failure to disclose that its pay applications included premium charges for Subcontractor Default Insurance deceived or tended to deceive RainbowVision, and constituted an unfair practice under the New Mexico Unfair Practices Act.

40. As a direct and proximate result of Weis's failure to disclose that its pay applications included premium charges for Subcontractor Default Insurance, RainbowVision has suffered damages, including the amount of those premium charges paid to date.

WHEREFORE, RainbowVision requests an award of compensatory damages in an amount to be proven at trial, an appropriate award of treble damages pursuant to Section 57-12-10(B) NMSA 1978, an award of attorneys' fees pursuant to Section 57-12-10(C) NMSA 1978, and such other and further relief as the court deems appropriate.

#### **COUNT VII** **DECLARATORY JUDGMENT**

41. RainbowVision incorporates the General Allegations, and the allegations of Counts I through VI, by reference as though set forth herein.

42. Pursuant to paragraph 5.4.2 of Exhibit A to the Contract, Weis is obligated to achieve substantial completion of each phase of the work under the Contract by the dates specified in Amendment No. 1 to the Contract.

43. Pursuant to paragraph 5.4.2 of Exhibit A to the Contract, Weis is obligated to pay liquidated damages to RainbowVision for each date beyond the substantial completion date specified in the contract that Weis has not achieved substantial completion.

44. Pursuant to paragraph 5.4.2 of Exhibit A to the Contract, RainbowVision is

entitled to collect the liquidated damages owed under the Contract, by withholding them from payments due to Weis, including the final payment of retainage due under the Contract.

45. Upon information and belief, there is a dispute, appropriate for judicial declaration, between RainbowVision and Weis regarding the following matters:

A. Whether Weis is liable for liquidated damages under the Contract, and, if so, the amount;

B. Whether RainbowVision is entitled to withhold liquidated damages from the retainage held in the escrow account at Los Alamos National Bank.

WHEREFORE, RainbowVision requests the Court enter a declaratory judgment declaring the extent of Weis's liability for liquidated damages, declaring that RainbowVision is entitled to withhold liquidated damages from the retainage held in the escrow account at Los Alamos National Bank, and granting such other and further relief as the court deems appropriate.

#### **COUNT VIII** **SLANDER OF TITLE**

46. RainbowVision incorporates the General Allegations, and the allegations of Counts I through VII, by reference as though set forth herein.

47. Weis, intentionally and without privilege or justification, recorded Weis's Claim of Lien without deducting amount for credits and offsets due to RainbowVision, including, but not limited to, offsets for liquidated damages, payments by RainbowVision for repairs undertaken by RainbowVision, and payments to subcontractors made by RainbowVision.

48. Upon information and belief, Weis's Claim of Lien purports to encumber property which it has previously released, or which it is not entitled to lien.

49. Weis's filing of its Claim of Lien caused a cloud upon the title of the Property,

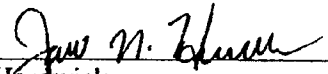
and is a slander of the title of the Property.

50. As a direct and proximate result of Weis's slander of the title of the Property, RainbowVision has suffered damages, including, but not limited to, the costs and attorneys' fees it will incur in removing the cloud upon the title.

WHEREFORE, RainbowVision requests an award of compensatory damages in an amount to be proven at trial, an award of punitive damages, and such other and further relief as the court deems appropriate.

Respectfully submitted,  
SOMMER, UDALL, HARDWICK,  
AHERN & HYATT, LLP  
Attorneys for RainbowVision Santa Fe, LLC

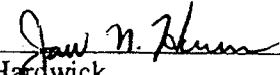
By: \_\_\_\_\_

  
Jack N. Hardwick  
P.O. Box 1984  
Santa Fe, NM 87504-1984  
(505) 982-4676

Certificate of Service

I certify that a copy of the foregoing was mailed to Ronald J. Van Amberg, P.O. Box 1447, Santa Fe, NM 87504-1447, and to Murray N. Thayer, 2021 Mountain Road, N.W., Albuquerque, NM 87104-1444 on this 6th day of February 2007.

16th

  
\_\_\_\_\_  
Jack N. Hardwick

# EXHIBIT C



STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

RAINBOWVISION SANTA FE, LLC,

Plaintiff,

vs.

WEIS BUILDERS, INC.,  
PCI CONTRACTORS, INC., and RLA, INC.

Defendants.

and

WEIS BUILDERS, INC.

Third Party Plaintiff,

vs.

HSH NORDBANK AG,  
SIMS RAINBOWVISION LLC,  
LOS ALAMOS NATIONAL BANK,  
VALLEY NATIONAL BANK, and  
LES FILE DRYWALL, INC.,

Third Party Defendants.

### THIRD PARTY COMPLAINT

Weis Builders Inc. ("WBI") as Third Party Plaintiff, makes this Third Party Complaint.

1. WBI is a Minnesota corporation duly and validly licensed in the State of New Mexico.
2. HSH Nordbank AG is a lending institution located in New York, NY.
3. Los Alamos National Bank is a banking institution in Los Alamos, New Mexico organized and existing under the laws of the United States of America.

ENDORSED  
First Judicial District Court

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Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2288  
Santa Fe, NM 87504-2288

NO. D-0101-CV 2007-00010

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4. Valley National Bank is a banking institution in Espanola, New Mexico organized and existing under the laws of the United States of America.
5. Les File Drywall is a New Mexico corporation with its principal place of business in Albuquerque, New Mexico.
6. On or about April 28, 2004, WBI and RainbowVision Santa Fe, LLC ("RVSF") entered into a contract under which WBI agreed to provide certain construction services, labor, and materials for work specified in the contract (the "Contract") for the RainbowVision Santa Fe Retirement Community (the "Project"), in Santa Fe, New Mexico, in return for compensation for its services. A true and correct copy of the Contract is being served with this pleading as Exhibit 1 pursuant to Rule 1-009(I) NMRA.
7. RVSF has improperly withheld payment from WBI.
8. RVSF has not paid the retainage to WBI.
9. An unpaid balance of at least \$1,522,319, which includes, among other things, the unpaid Contract balance (including retainage) and additional contract adjustments is currently owed to WBI for the reasonable value of its improvements to the Property, together with interest, costs, disbursements, and reasonable attorneys' fees.
10. On or about February 2, 2007, WBI filed a Claim of Lien in the sum of \$1,522,319.00, plus legal fees, costs, and interest upon the Property for amounts owed WBI for its improvements to the Property), which Claim of Lien was recorded as Instrument #1469461 in the records of Santa Fe County. A true and correct copy of WBI's Claim of Lien is being served with this pleading as Exhibit 2 pursuant to Rule 1-009(I) NMRA.

11. The Project is located on real property located at 500 Rodeo Road, Santa Fe New Mexico (the "Property") and more particularly described as:

That certain tract of land within Section 11, Township 16 North, Range 9 East, NMPM per plat 605/24 bearing uniform property code number 1-053-095-353-509

12. WBI specifically excepts from its Claim of Lien the following condominiums:

Unit 110, Instrument No. 1437694, records of Santa Fe County, New Mexico.  
Unit 111, Instrument No. 1431907, records of Santa Fe County, New Mexico.  
Unit 112, Instrument No. 1431358, records of Santa Fe County, New Mexico.  
Unit 113, Instrument No. 1431744, records of Santa Fe County, New Mexico.  
Unit 120, Instrument No. 1438953, records of Santa Fe County, New Mexico.  
Unit 121, Instrument No. 1432827, records of Santa Fe County, New Mexico.  
Unit 122, Instrument No. 1431782, records of Santa Fe County, New Mexico.  
Unit 123, Instrument No. 1431910, records of Santa Fe County, New Mexico.  
Unit 210, Instrument No. 1434135, records of Santa Fe County, New Mexico.  
Unit 211, Instrument No. 1440074, records of Santa Fe County, New Mexico.  
Unit 220, Instrument No. 1434302, records of Santa Fe County, New Mexico.  
Unit 221, Instrument No. 1432831, records of Santa Fe County, New Mexico.  
Unit 310, Instrument No. 1433860, records of Santa Fe County, New Mexico.  
Unit 311, Instrument No. 1431746, records of Santa Fe County, New Mexico.  
Unit 312, Instrument No. 1432634, records of Santa Fe County, New Mexico.  
Unit 313, Instrument No. 1432625, records of Santa Fe County, New Mexico.  
Unit 410, Instrument No. 1431907, records of Santa Fe County, New Mexico.  
Unit 411, Instrument No. 1431909, records of Santa Fe County, New Mexico.  
Unit 412, Instrument No. 1431357, records of Santa Fe County, New Mexico.  
Unit 413, Instrument No. 1432007, records of Santa Fe County, New Mexico.  
Unit 510, Instrument No. 1433009, records of Santa Fe County, New Mexico.  
Unit 511, Instrument No. 1431899, records of Santa Fe County, New Mexico.  
Unit 521, Instrument No. 1431361, records of Santa Fe County, New Mexico.  
Unit 1110, Instrument No. 1433094, records of Santa Fe County, New Mexico.  
Unit 1111, Instrument No. 1435053, records of Santa Fe County, New Mexico.  
Unit 1120, Instrument No. 1438955, records of Santa Fe County, New Mexico.  
Unit 1121, Instrument No. 1432829, records of Santa Fe County, New Mexico.  
Unit 1210, Instrument No. 1431658, records of Santa Fe County, New Mexico.  
Unit 1211, Instrument No. 1432825, records of Santa Fe County, New Mexico.  
Unit 1213, Instrument No. 1434137, records of Santa Fe County, New Mexico.  
Unit 1410, Instrument No. 1431748, records of Santa Fe County, New Mexico.  
Unit 1412, Instrument No. 1434459, records of Santa Fe County, New Mexico.  
Unit 1511, Instrument No. 1431362, records of Santa Fe County, New Mexico.  
Unit 1512, Instrument No. 1434580, records of Santa Fe County, New Mexico.  
Unit 1610, Instrument No. 1406282, records of Santa Fe County, New Mexico.  
Unit 1611, Instrument No. 1405660, records of Santa Fe County, New Mexico.  
Unit 1612, Instrument No. 1405424, records of Santa Fe County, New Mexico.  
Unit 1613, Instrument No. 1405423, records of Santa Fe County, New Mexico.  
Unit 1710, Instrument No. 1405659, records of Santa Fe County, New Mexico.

Unit 1711, Instrument No. 1406128, records of Santa Fe County, New Mexico.  
Unit 1712, Instrument No. 1405655, records of Santa Fe County, New Mexico.  
Unit 1713, Instrument No. 1406704, records of Santa Fe County, New Mexico.  
Unit 1810, Instrument No. 1405428, records of Santa Fe County, New Mexico.  
Unit 1811, Instrument No. 1405906, records of Santa Fe County, New Mexico.  
Unit 1812, Instrument No. 1405564, records of Santa Fe County, New Mexico.  
Unit 1813, Instrument No. 1405565, records of Santa Fe County, New Mexico.  
Unit 1911, Instrument No. 1406812, records of Santa Fe County, New Mexico.  
Unit 1912, Instrument No. 1405657, records of Santa Fe County, New Mexico.  
Unit 1913, Instrument No. 1420278, records of Santa Fe County, New Mexico.  
Unit 2010, Instrument No. 1405566, records of Santa Fe County, New Mexico.  
Unit 2011, Instrument No. 1405190, records of Santa Fe County, New Mexico.  
Unit 2012, Instrument No. 1405557, records of Santa Fe County, New Mexico.  
Unit 2013, Instrument No. 1405530, records of Santa Fe County, New Mexico.

13. HSH Nordbank AG claims or may claim an interest in the Property subject to the Claim of Lien by virtue of the Real Estate Mortgage with Assignment of Rents and Security Agreement and Fixture Filing recorded with the Santa Fe County Clerk December 21, 2004 as document number 1359754 and by virtue of UCC filings with the Santa Fe County Clerk December 21, 2004, as document number 1359845.

14. Los Alamos National Bank claims or may claim an interest in the Property subject to the Claim of Lien by virtue of the Line of Credit Mortgage recorded with the Santa Fe County Clerk on January 5, 2004 as document numbered 1308585 and Mortgage Modification Agreement recorded with the Santa Fe County Clerk on July 30, 2004, as document 1339736 and by virtue of the Real Estate Mortgage with Assignment of Rents and Security Agreement and Fixture Filing recorded with the Santa Fe County Clerk December 21, 2004 as document number 1359845.

15. Sims Rainbowvision LLC claims or may claim an interest in the Property subject to the Claim of Lien by virtue of the Real Estate Mortgage with Assignment of Rents and Security Agreement and Fixture Filing recorded with the Santa Fe County Clerk December 21, 2004 as document number 1359845.

16. Los Alamos National Bank and Valley National Bank jointly claim or may claim an interest in the Property by virtue of the Mortgage recorded with the Santa Fe County Clerk on January 31, 2007 as document number 14690069 and by virtue of the Assignment of Leases and Rents recorded with the Santa Fe County Clerk on January 31, 2007 as document number 14690069.

17. Les File Drywall, Inc. claims or may claim an interest in the Property by virtue of the Claim of Lien recorded with the Santa Fe County Clerk on February 23, 2007, as document number 1472023.

18. All of the Third Party Defendants are subject to the jurisdiction and venue of the Court by virtue of their interests in real property within the County of Santa Fe.

**WHEREFORE**, Weis Builders, Inc. respectfully requests the Court to enter judgment as follows:

- a. That the Claim of Lien of WBI be adjudged a proper lien on the Property for the amounts set forth above and that it be adjudged paramount and superior to the interest of any others and the same be foreclosed.
- b. That any other persons claiming, by through or under them be barred and forever foreclosed of all right, interest, or claim in or to the Property.
- c. That the Property be sold under the direction of the Court by a Special Master appointed for such purpose and the proceeds of such sale be applied in the priority provided in the WBI's Claim of Lien and according to law, and the excess, if any, of the proceeds of the sale over the amount due to WBI, after inclusion of costs of sale including Special Master's fees, be distributed according to law and the further order of the Court.

- d. That WBI be given the right to become a purchaser at the sale, and that the purchaser at the sale be let into possession of the Property.
- e. That WBI have a deficiency judgment for the amount of any deficiency, if the proceeds of such sale are not sufficient to satisfy the amount due and owing WBI as set forth above.
- f. That WBI have judgment for all costs expended herein until the time of sale, including costs of sale of the Property pursuant to judgment of foreclosure, and such other and further relief as the Court may deem just and proper.
- g. As part of any judgment or order in favor of WBI, an award to WBI of its costs, disbursements, and attorneys' fees; and
- h. Any such other legal or equitable relief as the Court deems just.

Dated: March 23, 2007

Respectfully submitted,

CALVERT MENICUCCI P.C.

By: Carl A. Calvert  
Carl A. Calvert  
8900 Washington St., N.E., Suite A  
Albuquerque, NM 87113  
(505) 247-9100

-and-

**FABYANSKE, WESTRA, HART, &  
THOMSON, P.A.**

Dean B. Thomson (MN ID #141045)

*Pro Hac Vice*

Kristine Kroenke (MN ID #336294)

*Pro Hac Vice*

800 LaSalle Avenue, Suite 1900

Minneapolis, MN 55402

(612-359-7600)

**ATTORNEYS FOR THE DEFENDANT  
AND COUNTERCLAIMANT WEIS**

**Certificate of Service**

I certify that a copy of the foregoing was mailed to

Jack N. Hardwick, Esq.  
Sommer, Udall, Hardwick, Ahern & Hyatt, LLP  
200 West Marcy Street, Suite 129  
Santa Fe, NM 87501  
PO Box 1984  
Santa Fe, NM 87504-1984

Ronald J. Van Amberg, Esq.  
P.O. Box 1447  
Santa Fe, NM 87504-1447

Murray N. Thayer, Esq.  
2021 Mountain Road, NW  
Albuquerque, NM 87104-1444

on this 23 day of March, 2007.

  
Carl A. Calvert

RV  
# C8

# **AIA** Document A121™CMc – 2003 and AGC Document 565

**Standard Form of Agreement Between Owner and Construction Manager**  
where the Construction Manager is Also the Constructor

## AGREEMENT

made as of the Twenty Eighth day of April in the year of Two Thousand and Four

(In words, indicate day, month and year)

**BETWEEN the Owner:**  
(Name and address)

RainbowVision Santa Fe LLC  
4001 Office Court Road,  
Suite 403  
Santa Fe, NM 87505

**and the Construction Manager:**  
(Name and address)

Weis Builders, Inc.  
7645 Lyndale Avenue South  
Minneapolis, MN 55423

**The Project is:**  
(Name, address and brief description)

RainbowVision Santa Fe Retirement Community  
500 Rodeo Road at Antigua  
Santa Fe, NM 87505

**The Architect is:**  
(Name and address)

Lloyd & Associates Architects  
301 N. Guadalupe Suite 104  
Santa Fe, NM 87501

The Owner and Construction Manager agree as set forth below:

## ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The 1997 Edition of AIA® Document A201™, General Conditions of the Contract for Construction, is referred to herein. This Agreement requires modification if other general conditions are utilized.

**EXHIBIT**

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 RELATIONSHIP OF PARTIES

The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services and use the Construction Manager's best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Construction Manager and other persons or entities employed by the Owner for the Project.

### § 1.2 GENERAL CONDITIONS

For the Construction Phase, the General Conditions of the contract shall be the AIA® Document A201™-1997, General Conditions of the Contract for Construction, which is incorporated herein by reference. For the Preconstruction Phase, or in the event that the Preconstruction and Construction Phases proceed concurrently, A201™-1997 shall apply to the Preconstruction Phase only as specifically provided in this Agreement. The term "Contractor" as used in A201™-1997 shall mean the Construction Manager.

## ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager shall perform the services described in this Article. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction Phase services. If the Owner and Construction Manager agree, after consultation with the Architect, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

### § 2.1 PRECONSTRUCTION PHASE

#### § 2.1.1 PRELIMINARY EVALUATION

The Construction Manager shall provide a preliminary evaluation of the Owner's program and Project budget requirements, each in terms of the other.

#### § 2.1.2 CONSULTATION

The Construction Manager with the Architect shall jointly schedule and attend regular meetings with the Owner. The Construction Manager shall consult with the Owner and Architect regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on construction feasibility, actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.

#### § 2.1.3 PRELIMINARY PROJECT SCHEDULE

When Project requirements described in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare, and periodically update, a preliminary Project schedule for the Architect's review and the Owner's approval. The Construction Manager shall obtain the Architect's approval of the portion of the preliminary Project schedule relating to the performance of the Architect's services. The Construction Manager shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect and Construction Manager. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed date of Substantial Completion. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

#### § 2.1.4 PHASED CONSTRUCTION

The Construction Manager shall make recommendations to the Owner and Architect regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economies, time of performance, availability of labor and materials, and provisions for temporary facilities.

#### **§ 2.1.5 PRELIMINARY COST ESTIMATES**

§ 2.1.5.1 When the Owner has sufficiently identified the Project requirements and the Architect has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a preliminary cost estimate utilizing area, volume or similar conceptual estimating techniques.

§ 2.1.5.2 When Schematic Design Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the Design Development Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

§ 2.1.5.3 When Design Development Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare a detailed estimate with supporting data for review by the Architect and approval by the Owner. During the preparation of the Construction Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

~~§ 2.1.5.4 If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner and Architect.~~

#### **§ 2.1.6 SUBCONTRACTORS AND SUPPLIERS**

The Construction Manager shall seek to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors, including suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner know of any objection to such subcontractor or supplier. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the Owner or Architect later to object to or reject any proposed subcontractor or supplier.

#### **§ 2.1.7 LONG-LEAD-TIME ITEMS**

The Construction Manager shall recommend to the Owner and Architect a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager. The Construction Manager shall expedite the delivery of long-lead-time items.

#### **§ 2.1.8 EXTENT OF RESPONSIBILITY**

The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Owner and the Owner's professional consultants. It is not the Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Drawings and Specifications are at variance therewith, the Construction Manager shall promptly notify the Architect and Owner in writing.

#### **§ 2.1.9 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION**

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

#### **§ 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL AND CONTRACT TIME**

§ 2.2.1 When the Drawings and Specifications are sufficiently complete, the Construction Manager shall propose a Guaranteed Maximum Price, which shall be the sum of the estimated Cost of the Work and the Construction Manager's Fee.

§ 2.2.2 As the Drawings and Specifications may not be finished at the time the Guaranteed Maximum Price proposal is prepared, the Construction Manager shall provide in the Guaranteed Maximum Price for further development of

the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The estimated Cost of the Work shall include the Construction Manager's contingency, a sum established by the Construction Manager for the Construction Manager's exclusive use to cover costs arising under Section 2.2.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order.

#### § 2.2.4 BASIS OF GUARANTEED MAXIMUM PRICE

The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include:

1. A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Guaranteed Maximum Price proposal.
2. A list of allowances and a statement of their basis.
3. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
4. The proposed Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the Fee that comprise the Guaranteed Maximum Price.
5. The Date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents Issuance dates upon which the date of Substantial Completion is based.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by the Construction Manager.

§ 2.2.7 Prior to the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing.

§ 2.2.8 Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis shall be set forth in Amendment No. 1. The Guaranteed Maximum Price shall be subject to additions and deductions by a change in the Work as provided in the Contract Documents, and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 2.2.9 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in Amendment No. 1. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

§ 2.2.10 The Guaranteed Maximum Price shall include in the Cost of the Work only those taxes which are enacted at the time the Guaranteed Maximum Price is established.

#### § 2.3 CONSTRUCTION PHASE

##### § 2.3.1 GENERAL

§ 2.3.1.1 The Construction Phase shall commence on the earlier of:

- (1) the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, or
- (2) the Owner's first authorization to the Construction Manager to:
  - (a) award a subcontract, or
  - (b) undertake construction Work with the Construction Manager's own forces, or
  - (c) issue a purchase order for materials or equipment required for the Work.

#### § 2.3.2 ADMINISTRATION

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated to a special design for the Work from the list previously reviewed and, after analyzing such bids, shall deliver such bids to the Owner and Architect. The Owner will then determine, with the advice of the Construction Manager and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the Construction Manager shall obtain bids; however, if the Guaranteed Maximum Price has been established, the Owner may not prohibit the Construction Manager from obtaining bids from other qualified bidders. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Construction Manager to the Owner and Architect (1) is recommended to the Owner by the Construction Manager; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of Sections 7.1.8 and 7.1.9 and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.3.2.4 The Construction Manager shall schedule and conduct meetings at which the Owner, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

§ 2.3.2.5 Promptly after the Owner's acceptance of the Guaranteed Maximum Price proposal, the Construction Manager shall prepare a schedule in accordance with Section 3.10 of A201™-1997, including the Owner's occupancy requirements.

§ 2.3.2.6 The Construction Manager shall provide monthly written reports to the Owner and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.3.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals.

#### § 2.4 PROFESSIONAL SERVICES

Section 3.12.10 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### § 2.5 HAZARDOUS MATERIALS

Section 10.3 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

### ARTICLE 3 OWNER'S RESPONSIBILITIES

#### § 3.1 INFORMATION AND SERVICES

§ 3.1.1 The Owner shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Owner's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

§ 3.1.2 The Owner shall, at the written request of the Construction Manager prior to commencement of the Construction Phase and thereafter, furnish to the Construction Manager reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.3 The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies for changes in the Work and other costs which are the responsibility of the Owner.

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#### § 3.1.4 STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS

In the Preconstruction Phase, the Owner shall furnish the following with reasonable promptness and at the Owner's expense. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely upon the accuracy of any such information, reports, surveys, drawings and tests described in Sections 3.1.4.1 through 3.1.4.4 but shall exercise customary precautions relating to the performance of the Work.

§ 3.1.4.1 Reports, surveys, drawings and tests concerning the conditions of the site which are required by law.

§ 3.1.4.2 Surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a project benchmark.

§ 3.1.4.3 The services of a geotechnical engineer when such services are requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, including necessary operations for anticipating subsoll conditions, with reports and appropriate professional recommendations.

§ 3.1.4.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.

§ 3.1.4.5 The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.

#### § 3.2 OWNER'S DESIGNATED REPRESENTATIVE

The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. This representative shall have the authority to make decisions on behalf of the Owner concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201™-1997, the Architect does not have such authority.

#### § 3.3 ARCHITECT

The Owner shall retain an Architect to provide Basic Services, including normal structural, mechanical and electrical engineering services, other than cost estimating services. The Owner shall authorize and cause the Architect to provide Additional Services, requested by the Construction Manager which must necessarily be provided by the Architect for the Preconstruction and Construction Phases of the Work. Such services shall be

provided in accordance with time schedules agreed to by the Owner, Architect and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect, from which compensation provisions may be deleted.

#### § 3.4 LEGAL REQUIREMENTS

The Owner shall determine and advise the Architect and Construction Manager of any special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project. The Owner shall furnish such legal services as are necessary to provide the information and services required under Section 3.1.

#### ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

The Owner shall compensate and make payments to the Construction Manager for Preconstruction Phase services as follows:

##### § 4.1 COMPENSATION

§ 4.1.1 For the services described in Sections 2.1 and 2.2, the Construction Manager's compensation shall be calculated as follows:

The Construction Manager's fee for Preconstruction Phase Services shall be Seven Thousand Dollars (\$7,000), in accordance with Weis's 1/22/03 letter of intent.

*(State basis of compensation, whether a stipulated sum, multiple of Direct Personnel Expense, actual cost, etc. Include a statement of reimbursable cost items as applicable.)*

§ 4.1.2 Compensation for Preconstruction Phase Services shall be equitably adjusted if such services extend beyond April 1, 2004 in accordance with Weis's 12/22/03 letter of intent.

§ 4.1.3 If compensation is based on a multiple of Direct Personnel Expense, Direct Personnel Expense is defined as the direct salaries of the Construction Manager's personnel engaged in the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employer benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

##### § 4.2 PAYMENTS

§ 4.2.1 Payments shall be made monthly following presentation of the Construction Manager's invoice and, where applicable, shall be in proportion to services performed.

§ 4.2.2 Payments are due and payable Thirty ( 30 ) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear interest at the rate entered below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon.)*

Interest rate shall be 4% above US Bancorp Prime Rate.

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

#### ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

The Owner shall compensate the Construction Manager for Construction Phase services as follows:

#### § 5.1 COMPENSATION

§ 5.1.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager in current funds the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Construction Manager's Fee determined as follows:

Base Fee will be Three percent (3.0%) of the Cost of the Work as defined in Article 6. For changes in the Work not associated with any "Resident Upgrade Packages" that are to be offered on a unit-by-unit basis, the fee for additive changes will be 3.0% and for deductive changes the fee will be 0.0%.

#### 5.1.2

In addition to the basic fees in 4.1.1 and 5.1.1 above, the Owner shall pay the Construction Manager a Resident Upgrade Fee equal to 15% of the cost of the work, together with such reasonable administrative costs that the Construction Manager will incur directly related to the performance of such work, associated with the Resident Upgrade Packages that the Owner is planning to offer. It is the intent that a limited number of such Upgrade packages will be offered by the Owner, and that once the scope and cost for the upgrades being considered is established, the Owner and Construction Manager will incorporate by Amendment to this Contract the terms and conditions pursuant to which the Construction Manager shall perform such work. It is intended that the Construction Manager will establish a lump sum price per unit type for each Upgrade Package to be offered, and that said lump sum price shall include the fee and administrative costs described above, as well as define the date for each unit by which the Owner must direct the Construction Manager to proceed with the Upgrade. Unit upgrades for which direction to proceed is given after the agreed upon date, or which reflect a deviation in scope from the defined Upgrade Packages will be evaluated separately, and a cost and time adjustment proposed, by the Construction Manager.

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

#### § 5.2 GUARANTEED MAXIMUM PRICE

§ 5.2.1 The sum of the Cost of the Work and the Construction Manager's Fee are guaranteed by the Construction Manager not to exceed the amount provided in Amendment No. 1, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum as adjusted by approved changes in the Work is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner. At time of Final Completion, any costs savings shall be returned 100% to the Owner and 0% to the Construction Manager.

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

#### § 5.3 CHANGES IN THE WORK

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of Amendment No. 1 may be determined by any of the methods listed in Section 7.3.3 of A201™-1997.

§ 5.3.2 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of A201™-1997 and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Section 7.3.6 of A201™-1997 shall have the meanings assigned to them in that document and shall not be modified by this Article 5. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.3 In calculating adjustments to the Contract, the terms "cost" and "costs" as used in the above-referenced provisions of A201™-1997 shall mean the Cost of the Work as defined in Article 6 of this Agreement, and the term "and a reasonable allowance for overhead and profit" shall mean the Construction Manager's Fee as defined in Section 5.1.1 of this Agreement.



§ 5.3.4 If no specific provision is made in Section 5.1.1 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.1 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

"Article 5.4: Commencement and Completion has been added. See Exhibit A."

#### ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

##### § 6.1 COSTS TO BE REIMBURSED

§ 6.1.1 The term "Cost of the Work" shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 6.

##### § 6.1.2 LABOR COSTS

- 1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's agreement, at off-site workshops.
- 2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's agreement. To the extent that some of the Construction Manager's supervisory and administrative personnel located at the Construction Manager's main office provide service to the project, a portion of their wages and salaries will be included in the cost of work and will be reimbursed in accordance with Exhibit C.

Classification

Name

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal office or offices other than the site office shall be included in the Cost of the Work, such personnel shall be identified below.)*

- 3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.
- 4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Cost of the Work under Sections 6.1.2.1 through 6.1.2.3.

##### § 6.1.3 SUBCONTRACT COSTS

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

##### § 6.1.4 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

- 1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.
- 2 Costs of materials described in the preceding Section 6.1.4.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be turned over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

##### § 6.1.5 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

- 1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed.

- whether sold to others or retained by the Construction Manager. Cost for items previously used by the Construction Manager shall mean fair market value.
- 2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval.
  - 3 Costs of removal of debris from the site.
  - 4 Reproduction costs, costs of telegrams, facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephone at the site and reasonable petty cash expenses of the site office.
  - 5 That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while traveling in discharge of duties connected with the Work.

#### § 6.1.6 MISCELLANEOUS COSTS

- 1 That portion directly attributable to this Contract of premiums for insurance and bonds, ~~(if charges for self-insurance are to be included, specify the basis of reimbursement).~~
- 2 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.
- 3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.
- 4 Fees of testing laboratories for tests required by the Contract Documents, except those related to nonconforming Work other than that for which payment is permitted by Section 6.1.8.2.
- 5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the Guaranteed Maximum Price and provided that such royalties, fees and costs are not excluded by the last sentence of Section 3.17.1 of A201™-1997 or other provisions of the Contract Documents.
- 6 Data processing costs related to the Work.
- 7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.
- 8 Legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld.
- 9 Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
- 10 All premiums (without markup) and deductibles associated with Builder's Risk Insurance provided by the Construction Manager at the Owner's request.
- 11 All premiums (without markup) and deductibles associated with providing professional liability insurance for the mechanical and electrical design services for the condominiums and IL units.

#### § 6.1.7 OTHER COSTS

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

#### § 6.1.8 EMERGENCIES AND REPAIRS TO DAMAGED OR NONCONFORMING WORK

The Cost of the Work shall also include costs described in Section 6.1.1 which are incurred by the Construction Manager except, however, where conditions requiring such action were caused by or are the result of the Construction Manager's negligence.

1. In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.6 of A201™-1997.
2. In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this agreement of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, Subcontractors or suppliers.

§ 6.1.9 The costs described in Sections 6.1.1 through 6.1.8 shall be included in the Cost of the Work notwithstanding any provision of AIA or A201™-1997 other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.2.

#### § 6.2 COSTS NOT TO BE REIMBURSED

§ 6.2.1 The Cost of the Work shall not include:

1. Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Sections 6.1.2.2 and 6.1.2.3.
2. Expenses of the Construction Manager's principal office and offices other than the site office, except as specifically provided in Section 6.1.
3. Overhead and general expenses, except as may be expressly included in Section 6.1.
4. The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
5. Rental costs of machinery and equipment, except as specifically provided in Section 6.1.5.2.
6. Except as provided in Section 6.1.8.2, costs due to the negligence of the Construction Manager or to the failure of the Construction Manager to fulfill a specific responsibility to the Owner set forth in this Agreement.
7. Costs incurred in the performance of Preconstruction Phase Services.
8. Except as provided in Section 6.1.7.1, any cost not specifically and expressly described in Section 6.1.
9. Costs which would cause the Guaranteed Maximum Price to be exceeded.

#### § 6.3 DISCOUNTS, REBATES AND REFUNDS

§ 6.3.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be secured.

§ 6.3.2 Amounts which accrue to the Owner in accordance with the provisions of Section 6.3.1 shall be credited to the Owner as a deduction from the Cost of the Work.

#### § 6.4 ACCOUNTING RECORDS

§ 6.4.1 See Exhibit A for prescribed Accounting Records requirements.

#### ARTICLE 7 CONSTRUCTION PHASE

##### § 7.1 PROGRESS PAYMENTS

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

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

§ 7.1.3 Provided an Application for Payment is received by the Architect not later than the 30<sup>th</sup> day of a month, the Owner shall make payment to the Construction Manager not later than the 30<sup>th</sup> day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than Thirty ( 30 ) days after the Architect receives the Application for Payment.

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager; less (2) that portion of those payments attributable to the Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

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

- 1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.8 of A201™-1997, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
- 2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing.
- 3 Add the Construction Manager's Fee, less retainer of Five percent ( 5.00% ). The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the two preceding Sections bears to a reasonable estimate of the probable Cost of the Work upon its completion.
- 4 Subtract the aggregate of previous payments made by the Owner.
- 5 Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation.
- 6 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of A201™-1997.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than Five percent ( 5.00% ). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts.

7.1.8.1 As an alternative means of achieving the 5% retainage described in 7.1.7 and 7.1.8 above, the Construction Manager and the Subcontractors may allocate a portion of their respective contract amounts to a "Final Completion" line item within each firm's schedule of values. The portions of each contract so allocated shall be equal to the 5% retainage stipulated. Billing against any such "final completion" line item in a schedule of values will be allowed only under the same circumstances as otherwise defined in the contract documents for the reduction or release of retainage.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data, that the Architect has made exhaustive or continuous on-site inspections or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

#### § 7.2 FINAL PAYMENT

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager when (1) the Contract has been fully performed by the Construction Manager except for the Construction Manager's responsibility to correct nonconforming Work, as provided in Section 12.2.2 of A201™-1997, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Owner's accountants; and (3) a final Certificate for Payment has then been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The amount of the final payment shall be calculated as follows:

1. Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price.
2. Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of A201™-1997 or other provisions of the Contract Documents.
3. Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.

§ 7.2.3 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of A201™-1997. The time periods stated in this Section 7.2 supersede those stated in Section 9.4.1 of A201™-1997.

§ 7.2.4 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without a further decision of the Architect. Unless agreed to otherwise, a demand for mediation or arbitration of the disputed amount shall be made by the Construction Manager within 60 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Owner's

accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.5 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1 and not excluded by Section 6.2 (1) to correct nonconforming Work or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee, if any, related thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

#### ARTICLE 8 INSURANCE AND BONDS

##### § 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in Section 11.1 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance shall be as follows:

(Paragraph deleted)

Note

8.1.2 Insurance provided will be per the construction Manager's standard policy. The Construction Manager will provide the Owner with a statement of the additional premium cost (if any) associated with other insurance coverage as the Owner may want to consider. If the Owner elects to require the Construction Manager to provide other coverage or limits, then the contract will be adjusted accordingly.

##### § 8.1.3

(Paragraph deleted)

##### § 8.1.4 Other coverage:

*(If Umbrella Excess Liability coverage is required over the primary insurance or retention, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be attained by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)*

##### § 8.2 INSURANCE REQUIRED OF THE OWNER

During both phases of the Project, the Owner shall purchase and maintain liability and property insurance, including waivers of subrogation, as set forth in Sections 11.2 and 11.4 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

##### § 8.2.1 Property Insurance:

\$10,000 Deductible Per Occurrence

(Paragraph deleted)

### **§ 8.3 PERFORMANCE BOND AND PAYMENT BOND**

§ 8.3.1 The Construction Manager shall (insert "shall" or "shall not") furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work. The amount of each bond shall be equal to One hundred percent ( 100.00% ) of the Contract Sum.

§ 8.3.2 The Construction Manager shall deliver the required bonds to the Owner after the contract is executed and three days before the commencement of any Work at the Project site. Further, Construction Manager shall deliver a binding commitment for the issuance of such bonds at least two weeks prior to the estimated date for the closing on Project financing. In the event of any early start as identified in paragraph 4.2.1.1 Owner may require Construction Manager to provide such bonds. Owner shall provide Construction Manager with 10 days notice of such requirement and stipulate in such notice the time for providing same, and the amount of coverage required by owner.

## **ARTICLE 9 MISCELLANEOUS PROVISIONS**

### **§ 9.1 DISPUTE RESOLUTION**

§ 9.1.1 During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201™-1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

### **§ 9.2 OTHER PROVISIONS**

§ 9.2.1 Unless otherwise noted, the terms used in this Agreement shall have the same meaning as those in A201™-1997, *General Conditions of the Contract for Construction*.

### **§ 9.2.2 EXTENT OF CONTRACT**

This Contract, which includes this Agreement and the other documents incorporated hereto by reference, represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and Construction Manager. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

### **§ 9.2.3 OWNERSHIP AND USE OF DOCUMENTS**

Article 1.6 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

### **§ 9.2.4 GOVERNING LAW**

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

### **§ 9.2.5 ASSIGNMENT**

The Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 13.2.2 of A201™-1997, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

## **ARTICLE 10 TERMINATION OR SUSPENSION**

### **§ 10.1 TERMINATION PRIOR TO ESTABLISHING GUARANTEED MAXIMUM PRICE**

§ 10.1.1 Prior to execution by both parties of Amendment No. 1 establishing the Guaranteed Maximum Price, the Owner may terminate this Contract at any time without cause, and the Construction Manager may terminate this Contract for any of the reasons described in Section 14.1.1 of A201™-1997.

§ 10.1.2 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 prior to commencement of the Construction Phase, the Construction Manager shall be equitably compensated for

Preconstruction Phase Services performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Section 4.1.1.

§ 10.1.3 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 after commencement of the Construction Phase, the Construction Manager shall, in addition to the compensation provided in Section 10.1.2, be paid an amount calculated as follows:

1. Take the Cost of the Work incurred by the Construction Manager.
2. Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.
3. Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders.

Subcontracts, purchase orders and rental agreements entered into by the Construction Manager with the Owner's written approval prior to the execution of Amendment No. 1 shall contain provisions permitting assignment to the Owner as described above. If the Owner accepts such assignment, the Owner shall reimburse or indemnify the Construction Manager with respect to all costs arising under the subcontract, purchase order or rental agreement except those which would not have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner elects not to accept the assignment of any subcontract, purchase order or rental agreement which would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager shall terminate such subcontract, purchase order or rental agreement and the Owner shall pay the Construction Manager the costs necessarily incurred by the Construction Manager by reason of such termination.

#### § 10.2 TERMINATION SUBSEQUENT TO ESTABLISHING GUARANTEED MAXIMUM PRICE

Subsequent to execution by both parties of Amendment No. 1, the Contract may be terminated as provided in Article 14 of A201™-1997.

§ 10.2.1 In the event of such termination by the Owner, the amount payable to the Construction Manager pursuant to Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 In the event of such termination by the Construction Manager, the amount to be paid to the Construction Manager under Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, including a reasonable estimate of the Cost of the Work for Work not actually completed.

#### § 10.3 SUSPENSION

The Work may be suspended by the Owner as provided in Article 14 of A201™-1997; in such case, the Guaranteed Maximum Price, if established, shall be increased as provided in Section 14.3.2 of A201™-1997 except that the term "cost of performance of the Contract" in that Section shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1.1 and 5.3.4 of this Agreement.

### ARTICLE 11 OTHER CONDITIONS AND SERVICES



11.1 thru 11.4  
See Exhibit A.

11.5

It is understood and agreed that the GMP is for the total cost of the work and that cost over-runs from one line item can be offset by cost savings from another line item.

11.6

All personnel listed in Exhibit C as a "Reimbursable as a cost of the work" shall be included in the cost of the work per Article 7.2, subject to the GMP per Article 6.1.2.2.

11.7

The following procedure is agreed to by Owner and or Owner's lender and Title Company in the event of a lien being filed by one of the Construction Manager's Vendors and/or Vendor's Vendor(s): At the Construction Manager's sole discretion either 1. Construction Managers shall make a cash deposit equal to 150% of each lien amount in separate escrow account held by Owner's Title Company on behalf of the Construction Manager or 2. The Construction Manager may provide a lien transfer bond for the amount of the lien. Upon said deposit being made or lien bond being provided by Construction Manager, Owner and or Owner's Lender, and Title Company shall immediately disburse to Construction Manager any monies owed to Construction Manager under the terms of this contract.

11.8

Owner and Construction Manager agree to the following punch list procedure for each phase of the project:

1. Prior to issuance of temporary or Full Certificate of Occupancy by City, Owner and/or Owner's designated representative(s) shall prepare one original interior and exterior punch list.
2. Within 7 calendar days after completion punch list work by Construction Manager, Owner and/or Owner's representative(s) will re-inspect to confirm original punch list items are complete.
3. New items will not be added to the original punch list at any time except for items which are substantial (i.e. no hot water) and thus were obviously missed during original punch list items.
4. Any item(s) not included in original punch list shall be considered warranty item(s).
5. Warranty items shall not be considered outstanding punch list items and thus shall not be subject to withholding of final payments.

11.9

If a discrepancy occurs within this Agreement and/or between this Agreement and other contract documents, it is understood and agreed that Article 11 of this Agreement, the balance of this Agreement, and Exhibits "A", "B", "C" and "D" (in that order) shall govern.

11.10

If interest costs occur per Paragraph 4.2, the cost shall be reimbursed by issuance of an Owner Change Order.

11.11

Architect shall return all submittals (i.e. shop drawings) to Contractor within 10 working days of date received from Contractor.

11.12

Modification and/or extension of project completion date due to "weather days" shall be as outlined in Exhibit "D" attached hereto.

11.13

The following Exhibits, attached hereto, form part of the Contract Documents:

Exhibit A: Modifications to the A121CM

Exhibit B: Supplementary Conditions

Exhibit C: Personnel Billing Rates and Matrix

- Exhibit D: Definition of Weather Days.
- Exhibit E: Project Scope and Budget Summary
- Exhibit F: Preliminary Divisional Cost Breakdown
- Exhibit G: Pre-Construction Phase Schedule
- Exhibit H: Preliminary Construction Phase Schedule

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

OWNER

*[Signature]*  
 (Signature)  
Don Silver, PRES  
 (Printed name and title)  
April 30, 2004  
 Date

ATTEST

CONSTRUCTION MANAGER

*[Signature]*  
 (Signature)  
Peter Warrington, VICE PRESIDENT  
 (Printed name and title)  
April 28, 2004  
 Date

ATTEST

**Rainbow/Vision Santa Fe/Weis Contract Agreement**  
**Exhibit A**  
**Additional Provisions/Modifications based on the AIA A121CMC (2003 Edition)**

**5.4 COMMENCEMENT AND COMPLETION**

Add the following paragraphs:

**5.4.1** The date of commencement is the date from which the Contract Time of subparagraph 5.4.2 is measured; it shall be the date of the giving of the Notice to Proceed (the "Commencement Date"). The Owner shall issue the Notice to Proceed within ten calendar days of the last to occur of all of the following (the "Conditions to Commencement"): (i) closing of financing acceptable to Owner, sufficient in an amount to satisfy the Owner's financial obligations hereunder, and (ii) receipt of all permits and approvals necessary to allow commencement and continuation of construction. In no event shall the Construction Manager commence any work on site by placing materials at the site or by conducting other work at the site until a Notice to proceed has been given.

The immediately aforementioned notwithstanding, Construction Manager and Owner acknowledge that prior to receiving a Notice to Proceed the Construction Manager may be required to enter into certain other subcontracts, issue purchase orders, or make similar commitments which, if the Project were not to proceed would result in the incurrence, by Construction Manager of certain costs, financial penalties, or other like or similar expenses. Owner agrees to reimburse Construction Manager all such costs, penalties, or similar expenses, so long as, and only to the extent that Construction Manager has received Owner's written approval prior to the incurrence of such costs, and/or the entering into such subcontracts, authorization of such purchase orders or making such similar commitments. Any activity conducted hereunder shall in no way effect the dates established for substantial completion for each phase as shall be provided for in Amendment No. 1 hereto.

**5.4.2** It is anticipated that the Work is to be completed in phases so as to permit residents of the Project to move in on a phased basis (each of which shall be referred to as a "Phase").

.1 Substantial Completion of each Phase is to occur on or before an agreed date. The agreed dates for each Phase shall be established by Amendment No. 1 to this Agreement at the time the GMP is established, which shall be an agreed upon number of calendar days from the Commencement Date. Once established each of these days shall be measured from the Commencement Date and may only be extended in accordance with the Contract Documents.

.2 Each date by which Substantial Completion of a Phase must occur pursuant to the Contract Documents shall be referred to as a "Phase Completion Deadline". The period of time from the Commencement Date to the applicable Phase Completion Deadline shall be referred to as the "Phase Contract Time".

.3 The Owner and the Construction Manager acknowledge that if the Construction Manager fails to achieve substantial completion of a Phase before the applicable Phase Completion Deadline, the Owner will suffer damages which are difficult to ascertain. However, the Owner and the Construction Manager agree that the degree to which the Owner will be damaged by the Construction Manager's failure to substantially complete a particular Phase of the Project within the Phase Contract Time generally will decrease as the overall Project nears Substantial Completion. Accordingly, the Construction Manager agrees to pay the Owner as liquidated damages with respect to each particular Phase, and not as a penalty, for each calendar day that passes after the Phase Completion Deadline has expired for the particular Phase of the Project, until the date that the Construction Manager achieves Substantial Completion of that particular Phase, an amount equal to the portion of the GMP allocable to that particular Phase times the construction financing daily interest for Project (the "Stipulated Damage

Amount"). Any liquidated damages payable by the Construction Manager as to a particular Phase shall then be determined by multiplying the Stipulated Damage amount by each day of delay. The Stipulated Damage Amounts for each phase shall be established by an amendment hereto at the closing for financing on the Project.

.4 For purposes of determining that portion of the GMP allocable to a particular Phase, the following method of calculating same will be utilized:

(i) Reasonably determine that amount of the total GMP which generally applies to construction of the Project (as a whole) by adding the sum of the following amounts contained within the GMP: (Specific amounts to be determined when GMP is established by Amendment to the Contract.)

|                            |          |
|----------------------------|----------|
| Site Development           | \$ _____ |
| General Conditions         | \$ _____ |
| Construction Manager's Fee | \$ _____ |
| Other                      | \$ _____ |
| Total                      | \$ _____ |

(ii) Subtract total in (i) above from the total GMP to determine the "remaining GMP".

(iii) Utilize the approved Schedule of Values and construction costing information to calculate the percentage of the cost of a particular Phase to the "remaining GMP" amount as determined in (ii) above.

(iv) Apply the percentage from (iii) above for the particular Phase(s) to the GMP.

.5 The Stipulated Damage amount for each Phase is intended to be cumulative of the other Phases. Accordingly, if the Phase Completion Deadline for more than one (1) Phase shall have elapsed without the applicable Phases having been substantially completed, then the Stipulated Damage Amount for each Phase not so substantially complete shall be due and owing by the Construction Manager to the Owner. The Owner may collect the Stipulated Damage Amounts by withholding them from payments due the Construction Manager or by separate demand. The Stipulated Damage Amounts provided herein shall be in lieu of all other claims, costs, losses, damages and/or expenses that the Owner might otherwise have against the Construction Manager by reason of its failure to achieve Substantial Completion before the relevant Phase completion Deadline; whether arising from contract or tort, or actual, direct, indirect or consequential damages, and the Owner hereby releases the Construction Manager therefrom.

.6

.1 The Construction Manager agrees that final completion of each Phase of the Work shall occur as soon as possible after Substantial Completion of the Phase, but no later than thirty (30) calendar days after the date on which Substantial Completion of that Phase has occurred, as evidenced by the Architect's Certificate of Substantial Completion. Final payment as to a Phase shall be due upon final completion of such Phase.

.2 Owner acknowledges that there may be certain items which may be on order that, through no fault of the Construction Manager, may not arrive and/or otherwise be available for incorporation into the Work within said thirty (30) day period. To the extent that Owner, in Owner's sole discretion, accepts a Phase as having achieved final completion, even though such items remain outstanding, Owner may, (a) acknowledge such acceptance, and (b) withhold up to one and one half (1.5) times the total cost (as determined by the Construction Manager) for each Phase, or \$5000 for each Phase (whichever is greater), of such Work which remains incomplete or unincorporated.

3 Further, it is the intent that outstanding items described in 5.4.2.6.2 are to be secured and installed as quickly as possible -- preferably within five (5) days after the Construction Manager receives those items. It is acknowledged that some items may be more significant than others in terms of the operation or marketability of the project. It is also acknowledged that unless determined otherwise, the costs incurred by the Construction Manager for procuring, expediting and installing the items covered by 5.4.2.6.2 are reimbursable costs as defined under Article 6 of the Contract. Accordingly, it may be less costly for the Owner, and less disruptive to the operation of the facility, to have several items accumulated and installed at one time rather than have each item installed as it is delivered. Therefore, for each item outstanding as of Substantial Completion, within five (5) days the Construction Manager shall provide the Owner, in writing, with a proposed plan indicating the expected delivery date and proposed installation date for each item. The Owner and Construction Manager will jointly review (and revise as needed) said plan and reach an agreement on the plan. The Construction Manager will report to the Owner on a weekly basis of the status of the items remaining to be installed, and immediately notify the Owner of any change in delivery date or installation date due to unforeseen procurement or delivery problems. ~~If after receiving an outstanding item the Construction~~ Manager fails to commence the Work within five (5) days after agreed upon commencement date, or subsequently fails to complete the Work in accordance with the agreed upon schedule, the Owner may exercise its right to carry out the work as provided in section 2.4 of the A201 General Conditions

4 The provision stated above for withholding 1.5 times the cost of items outstanding at the time of Substantial Completion does not apply to any Upgrade Options initiated by the Owner subsequent to the decision date established by the Construction Manager for each upgrade option proposed for a given residential unit.

7 Except for the portions of the project which the Owner has requested completion and occupancy prior to the completion of the Common Areas in the El Centro building, it is the intent that when developing the Phase Completion Deadlines described in 5.4.2.1 and 5.4.2.2 above, for the purposes of determining what, if any, stipulated damage amount may be owed by Construction Manager, no phase shall be deemed to have achieved Substantial Completion until such time as (1) the common areas (as defined in Amendment No. 1) portion of the Project shall have achieved Substantial Completion or (2) the Owner agrees to deem the phase Substantially Complete or (3) the Owner takes beneficial occupancy of all or part of the phase. Further and accordingly, when establishing the completion dates for each phase as provided for herein by amendment hereto, such amendment shall also provide that no phase shall be deemed complete for the purposes hereof unless (1) and/or until the common area portion of the Project shall have attained substantial completion, (2) the Owner has agreed to deem the phase Substantially Complete, or (3) the Owner takes beneficial occupancy of all or part of the phase.

#### 8.4 ACCOUNTING RECORDS

6.4.1 The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to the Owner and Owner's lender. The Owner and the Owner's accountants and the lender and lender's accountant or consultants shall be afforded reasonable access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement and the Project, (collectively "the records") and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law. All Records shall be maintained in accordance with generally accepted accounting principles, consistently applied. There shall be an "open book" policy, in effect at all times with regard to all Records relative to the project

maintained by either the Construction Manager or the Owner, or anyone on their behalf, and each party shall have full and complete access to said Records maintained by the other at all reasonable times. The Construction Manager shall require all Subcontractors and Sub-Subcontractors retained on a cost-plus basis to retain Records and permit the same access by Owner as is required of the Construction Manager under this Article 6.4.

6.4.1.1 If the Owner, Owner's accountants, Lender or Lender's accountants elect to perform an audit of "the records" maintained by Construction Manager, said audit shall be performed within six (6) months of the Final Completion of the project. This stipulation does not affect the Construction Manager's obligation to maintain "the records" for the time period noted in 6.4.1.

6.4.2 If, at any time during construction, any inspection by the Owner or the Lender of the Construction Manager's Records or any other data relating to the contract documents reveals an overcharge or undercharge by the Construction Manager as confirmed by an independent auditor, the next Application for Payment shall be appropriately adjusted by the amount of such overcharge or undercharge and related fee.

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## **ARTICLE 7**

### **CONSTRUCTION PHASE**

#### **7.1 PROGRESS PAYMENTS**

Add the following:

7.1.11 To the extent of payments received by the Construction Manager from the Owner, the Construction Manager warrants the real property on which the Project is located will remain free of any legitimate and proper claims of lien arising from the Work performed by or through the Construction Manager. If any such liens are properly recorded, the Construction Manager shall have fifteen (15) business days from its receipt of written notice by the Owner or Owner's agent (including Title company) of such recording within which to discharge or secure by cash deposit or by construction lien transfer bond any such claims of lien. If the Construction Manager fails to discharge or otherwise secure such claim of lien within said time period, the Owner shall be entitled to satisfy the lien or take whatever action it deems appropriate to remove the lien from its property. All reasonable expenses and costs, including reasonable attorney's fees, incurred by the Owner after the abovementioned fifteen (15) day period to effect the discharge, securing and/or removal of any such claims of lien shall be promptly reimbursed to the Owner by the Construction Manager.

7.1.12 Concurrently with each Application for Payment, Construction Manager will deliver to Owner lien waivers (which may be conditioned upon payment) waiving all lien rights in respect of the Project, executed by Construction Manager, and executed by Subcontractors and suppliers covering amounts paid on their account or to be paid with funds received from such Application for Payment. All lien waivers shall be in form and substance satisfactory to Owner and the Owners Lender(s). Additionally, the Construction Manager shall provide further evidence regarding application of each progress payment to payment of all Subcontractors and suppliers providing services or material in respect of the Project, and shall comply with such other reasonable requirements as the Owners Lender(s) may impose with respect to obtaining advances of funds be applied to each Application for Payment."

**ARTICLE 9**  
**MISCELLANEOUS PROVISIONS**

**9.1 DISPUTE RESOLUTION**

Add the following the following subparagraphs to 9.1.1:

.1 Claims between the parties to this Agreement shall be resolved as set forth below. At all times, the parties shall approach the dispute resolution process in good faith.

.2 In the event of a Claim between the parties, the parties shall promptly meet in good faith to resolve the Claim informally before invoking the dispute resolution procedures outlined elsewhere in the Contract Documents, including the A201 General Conditions and Supplementary Conditions, and below. If the parties are not able to quickly resolve the claim, either party may request participation by the Architect. Both parties shall promptly submit a written summary of its position to the Architect. Upon receipt of both summaries, the Architect shall immediately convene a formal meeting with the parties to further discuss the Claim. If the Claim is not resolved within three business days after the commencement of such meeting, either party may then commence the dispute resolution process defined in the Contract Documents.

.3 If the informal dispute resolution efforts outlined in 9.1.1.2 are not successful, then the dispute resolution procedures outlined in the balance of the Contract Documents. Any mediation conducted pursuant to this Paragraph 9.1 shall be held in Santa Fe, unless the parties mutually agree otherwise.

.4 Intentionally omitted

.5 Intentionally omitted

.6 Consent to arbitration involving an additional person or entity shall not constitute agreement to arbitration of a dispute not described in such consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

.7 Intentionally omitted

.8 The arbitration shall be held in Santa Fe.

.9 Notwithstanding anything herein to the contrary, if (1) the Claims involve a proposed, net aggregate payment or reimbursement in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose, an "interested person or entity" means any person or entity if (a) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (b) the interested person or entity is so situated that the disposition of the claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law.

## **ARTICLE 11**

### **OTHER CONDITIONS AND SERVICES**

**11.1** The Construction Manager recognizes that any Lender involved in financing the Project will have requirements pertaining to this Agreement. The Construction Manager agrees to cooperate with and assist the Owner and the Architect in amending and supplementing the Contract Documents to conform to reasonable and customary requirements of any Lender (to the extent such requirements are acceptable to the Owner). However, the Construction Manager shall not be responsible for actually preparing amendments or supplements to the Contract Documents for any reason at any time. Such amendments or supplements may include, without limitation, provisions:

A. Naming any Lender as an additional insured on the Construction Manager's bonds and insurance policies and providing notice to any Lender of termination, cancellation or material modification of such policies.

B. ~~Requiring approval of Applications for Payment by a consultant designated by a Lender prior to payment.~~

C. Agreeing not to amend Contract Documents without the reasonable and timely consent of the Lender.

D. Requiring approval of Change Orders by the Lender, provide that Lender approval will be provided on a timely basis and the Owner will use its best efforts to secure such timely approval.

E. Requiring notice of the Owner's default to the Lender, with a Lender having the right to cure, and requiring continued performance by the Construction Manager, provided that the Lender assumes all contract obligations of the Owner.

F. Subordinating any lien rights of the Construction Manager to rights of the Lender.

G. Requiring copies of all written notices to be sent to the Lender.

H. Granting the Lender the right to inspect the work and to examine records pertaining thereto.

I. Recognizing the pledge of the Owner's rights under Contract Documents to the Lender.

J. Requiring the Construction Manager to acknowledge, on the Lender's request, whether or not the Owner is in default of its obligations under the Contract.

K. Requiring the Construction Manager to assist the Owner in preparing and submitting reports and information concerning the Work as may be reasonably required by the Lender.

**11.2** Nothing contained in Paragraph 11.2 or Paragraph 11.3 is intended to derogate from any other rights to terminate this Contract that may be granted the Construction Manager elsewhere in this Contract, including, but not limited to, the provisions of Article 2 and Article 14 of the General Conditions and Article 10 of this Agreement.

**11.3** The Construction Manager may perform all or any part of the Work with its own forces, or through an Affiliate, provided that (1) the Construction Manager secures at least two competitive bids with respect to the work Construction Manager intends to perform (2) the Owner consents thereto in writing, which consent shall not be unreasonably withheld, after full disclosure by the Construction Manager to the Owner of the affiliation or relationship of the Affiliate to the Construction Manager and (3) any Work performed by an Affiliate shall be covered in a separate agreement between the Construction Manager



and the Affiliate, which shall satisfy all of the requirements for subcontracts as set forth in Paragraph 5.3 of the General Conditions and which shall be approved by the Owner in writing.

11.4 Any amounts payable hereunder which are not paid when due shall thereafter accrue interest at Wall Street Journal "prime" plus one percent (1%) per annum or at the highest rate allowed under the law of the state where the Project is located, whichever is less.

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**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit B**  
**Supplementary Conditions to the AIA A201 General Conditions (1997 Edition)**

1. The following Supplementary Conditions shall apply to that certain Standard Form of Agreement Between Owner and Construction Manager (the "Agreement") dated
2. For purposes of these Supplementary Conditions, capitalized terms shall have the meaning given to them in the Contract Documents (as such term is defined in Article 1 of the Agreement), unless otherwise defined in these Supplementary Conditions.

~~3. The following paragraphs supplement, modify, or amend that certain Contract Document entitled "General Conditions of the Contract for Construction," AIA Document A201, Fifteenth Edition, 1997, Articles 1 through 14 inclusive (the "General Conditions"). Where only a portion of any provision of the General Conditions is supplemented, modified, or amended, the remaining portions of that provision shall remain unaltered and in effect. In the event of any inconsistency between the General Conditions and these Supplementary Conditions, the terms of these Supplementary Conditions shall apply. Hereinafter, all references to the General Conditions shall mean the General Conditions as amended by these Supplementary Conditions.~~

**A. INTENTIONALLY OMITTED**

- B. PARAGRAPH 1.2.4 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.4 Where no explicit quality or standards for materials or workmanship are established for Work, such Work is to be of good quality for the intended use and consistent with quality of the surrounding Work and of the construction of the Project generally.

- C. PARAGRAPH 1.2.6 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.5 All indications or notations which apply to one of a number of similar situations, materials or processes shall be deemed to apply to all such situations, materials or processes wherever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

**D. INTENTIONALLY OMITTED**

- E. SUBPARAGRAPH 1.5.1, add at the end of the first sentence: ", unless otherwise identified and incorporated by reference in Agreement."**

- F. SUBPARAGRAPH 2.2.5 Modify Subparagraph 2.2.5 as follows:**

"In addition to the sets the Construction Manager used for bidding, the Owner will furnish a to be agreed upon number of sets of black and white prints of the Drawings and copies of the Project Manual free of charge for execution of the Work. Additional sets may be purchased from the Office of the Architect."

- G. SUBPARAGRAPH 3.2.3, delete the second sentence, and add at the end: "If the Construction Manager performs Work knowing it involves such error, inconsistency, omission or difference without such notice to the Architect, the Construction Manager shall assume appropriate responsibility for such Work and shall bear the costs attributed to correction."

- H. PARAGRAPH 3.3 "SUPERVISION AND CONSTRUCTION PROCEDURES" is hereby supplemented by the addition of the following sub-paragraphs:

3.3.4. The Construction Manager shall carefully check its own work and that of Subcontractors as the Work is being performed. The Construction Manager shall ensure that incorrect or faulty Work is corrected as soon as possible but in any event in a timely manner so as not to impact the project schedule.

3.3.5 During the finishing stages of the project, the Construction Manager shall make frequent inspections of the Work in the presence of the Architect or the Owners Representative and the applicable Subcontractor(s) involved, if any, and the Architect shall identify incorrect and faulty Work. The Construction Manager shall ensure that incorrect or faulty Work is corrected in accordance with 3.3.4.

- I. PARAGRAPH 3.4 "LABOR AND MATERIALS" is hereby supplemented by addition of the following Subparagraphs 3.4.3 and 3.4.4:

3.4.4 Should the Owner make reasonable objection, based upon qualifications, fitness, behavior or temperament, to the presence of any personnel of Construction Manager or any subcontractor, such person shall not perform services on the Project site, or otherwise in connection with the Project, without written consent of the Owner.

3.4.5 The Construction Manager shall not change or replace the assigned Project Manager or Superintendent without prior written consent by the Owner.

- J. SUBPARAGRAPH 3.5.1, Add to the end: "Construction Manager's warranties shall commence upon Substantial Completion of the Work for each Phase and continue for a period of one year thereafter."

- K. PARAGRAPH 3.5 "WARRANTY" is hereby supplemented by the addition of the following sub-paragraphs:

3.5.2. In the event of a claim by the Owner against the Construction Manager under Paragraph 3.5.1, of these General Conditions (or under any other express written warranty-made by the Construction Manager) for any item of Work performed under the Contract Documents, the Owner shall give notice (a "Warranty Notice") of the claim to the Architect and the Construction Manager and thereafter, the Architect or Architects authorized representative and the Construction Manager shall inspect the item(s) of Work in question. If following its inspection the Architect determines that any such item is included within the Construction Manager's warranty under the Contract Documents, then:

- (a) Upon formal notification from the Architect, the Construction Manager shall have thirty (30) days, notwithstanding any other time period specified in the Contract Documents, to either (1) complete the cure for the item or, for a Longer Cure Item, commence the cure and thereafter diligently proceed to complete the cure, or (2) if the Construction Manager disputes the warranty coverage of the item, commence the

dispute resolution procedures described in Section 4.3 of the General Conditions.

- (b) if upon the expiration of the thirty (30) day period the Construction Manager has failed to satisfy the provisions of either clause (a) (1) or clause (a) (2) immediately above, then the Owner shall have the right to engage a third party Construction Manager of the Owner's sole selection to cure or complete the cure of the warranty item at the Construction Manager's expense.
- (c) If the Construction Manager fails to cure an item within the required time and if the item is finally determined by arbitration or, when permitted, judicial proceedings to be covered by any Construction Manager's warranty under the Contract Documents, then the Construction Manager shall be liable for all expenses incurred by the Owner in enforcing its warranty claim including legal and Architectural fees and expenses, an administrative charge of a percentage equal to Construction Manager's fee times the cost to cure the warranty item to cover the Owner's administrative costs to enforce the warranty claim, and, when a third party Construction Manager has been engaged by the Owner under this Paragraph 3.5.2, the costs and expenses of the third party Construction Manager.

**L. INTENTIONALLY OMITTED**

- M. ARTICLE 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES** is supplemented by the following replacement language for Subparagraph 3.12.4

3.12.4 Shop Drawings, Product Data, Samples and similar submittals which are required by the Contract Documents to be submitted for Architect's review shall become Contract Documents upon Architect's review and approval. Submittals which are not required by the Contract Documents to be submitted for Architect's review are not Contract Documents.

- N. ARTICLE 3.16 "ACCESS TO WORK"** is hereby supplemented by addition of the following Subparagraph:

"3.16.2 Representatives of the State Agencies shall have access at all reasonable times to the Work wherever it is in preparation or progress, and the Construction Manager shall provide proper facilities for such access and inspection."

- O. PARAGRAPH 4.2.4 "COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION"** is hereby supplemented by the additions of the following subparagraphs: Nothing contained herein shall prohibit the Owner's Representative from communicating directly with the Construction Manager for the purpose of receiving information and/or providing the Construction Manager with clarification as to Owner's position with regard to any matters affecting or concerning the Work.

4.2.4.1 The following definitions shall apply to construction communications:

4.2.4.1.1 Contract Document Clarifications: An answer from the Architect, in response to an inquiry from the Construction Manager, intended to make some

requirement(s) of the Drawings or plans clearly understood. Drawing/plan clarifications may be sketches, drawings, or in a narrative form and are not intended to change any requirements of the Contract Documents. Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.2 Non-Conformance Notice:** A Notice issued by the Architect documenting that the Work or some portion thereof has not been performed in accordance with the requirements of the Contract Documents. Payment shall not be made on any portion of the Work for which a Non-Conformance Notice has been issued and the Work not corrected to the satisfaction of the Architect.

Upon receipt of a Non-Conformance Notice the Construction Manager shall provide a written Response to the Non-Conformance Notice within five (5) working days after receipt of the Notice. The Construction Manager's response shall state either (a) the basis of Construction Manager's determination that the Work was performed in accordance with the Contract Documents or (b) the corrective action Construction Manager intends to take, at its sole expense, to correct the non-conforming work

If the Construction Manager disputes issuance of the Notice the Architect has five (5) working days in which to respond by either (a) withdrawing the Notice of Non-Conformance or (b) directing the Construction Manager to correct the Work.

If directed to correct the Work, the Construction Manager shall do so within five (5) working days after receipt of such direction from the Architect, or such other time as may be agreed to with the Architect, without loss of rights for claim recovery or dispute resolution as may be available by the Contract.

**4.2.4.1.3 Requests for Information:** A written request from the Construction Manager or one of its subcontractors, to the Architect, seeking an interpretation or a clarification of some requirement of the Contract Documents. The Construction Manager shall clearly and concisely set forth the issue for which it seeks clarification or interpretation and why a response is needed from the Architect.

Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.4 Substitution/Or-Equal Submittals:** A written request from the Construction Manager to substitute a material, article, device, product, fixture, form, type of construction, or process called for in the Contract Documents with another item that shall substantially equal in all respects to that so indicated or supplied. Each such request shall specifically set forth any manner in which the proposed change does not conform to the Contract Documents and Construction Manager (and any subcontractor initiating the request) warrants that the proposed substitute conforms in all respects with the contract documents except as specifically identified as non-conforming in the request.

**4.2.4.1.5 Submittals/Shop Drawings:** When required by any technical specification included in these Contract Documents, the Construction Manager shall transmit to the Architect technical submittals, shop drawings, or samples, including supporting catalog cuts, manufacturer's literature, sketches or drawings, calculations, and other pertinent, in sufficient detail to enable the Architect to review the information and determine that the Construction Manager clearly understands the requirements of the Contract Documents. Construction Manager (and any subcontractor initiating a submittal) warrants that all Work and materials depicted in technical submittals, shop drawings and samples shall conform in all respects to the requirements of the Contract Documents, except as otherwise specifically identified as non-conforming.

4.2.4.1.6 Schedule Submittals: When required by the Construction Schedule Specification of these Contract Documents, the Construction Manager shall submit required schedules, schedule updates, schedule revisions, time impact analysis, etc. for review.

P. INTENTIONALLY OMITTED

Q. SUBPARAGRAPH 4.3.7.2 is hereby revised (and paragraphs 4.3.7.3 and 4.3.7.4 are added) to read as follows:

4.3.7.2 Weather days: Construction Manager confirms that the Contract Time, Phased Contract Time and the agreed upon dates for same as set forth in Amendment No. 1 to this Agreement are reasonable periods to perform The Work. ~~Construction Manager has included in the work schedule ordinary and normally anticipated lost days due to adverse weather ("weather days") and therefore~~ Construction Manager shall not be entitled to an extension of the Contract Time or Phased Contract Time as a result of weather conditions normally experienced in the greater Santa Fe area unless (1) the Construction Manager is unable to make up for the weather delay by scheduling work for a Saturday in accordance with 4.3.7.2 below, and (2) the number of weather days lost (and not made up by Saturday work) in that calendar month exceeds the number of weather days provided for in the Contract Time.

4.3.7.3 The Construction Manager's work schedule is based upon a regular five-day work week per calendar week. It is mutually agreed that in the event of a weather day the Construction Manager, before requesting a time extension the Construction Manager will first try to make up that weather day on the next Saturday available during the following 30 calendar days. A Saturday will be considered to be "available" only if all of the following conditions are met: (1) no work has already been scheduled for that day that would interfere with the work being rescheduled, (2) it is not a national holiday, (3) working on that Saturday is allowed by local ordinance, and (4) materials and workforce equivalent to what was scheduled for the lost weekday are available on that Saturday. The Construction Manager will only be required to utilize a Saturday if either (a) the Construction Manager incurs no additional cost in rescheduling work for that Saturday, or (b) the Owner agrees to compensate the Construction Manager (by Change Order) for any additional costs (such as for labor rate differential) the Construction Manager may incur.

4.3.7.4 The requirement stated above for the Construction Manager to utilize a Saturday to make up for a weather delay only applies the number of weather days included in each calendar month as indicated in the following list of Anticipated Lost Days. For every weather day beyond the number included below, the Construction Manager shall be entitled to an equivalent number of days extension to the Contract Time. The Construction Manager may (at the CM's sole discretion) attempt to mitigate the delay utilizing additional Saturdays as outlined in 4.3.7.3, but has no obligation to do so.

For the purposes of this Paragraph the table provided below setting forth the norms/anticipated lost weather days shall be utilized by the parties in determining lost weather days:

| <u>Month</u> | <u>Anticipated Lost Days<br/>Due to Adverse Weather</u> |
|--------------|---------------------------------------------------------|
| January      | 1                                                       |
| February     | 1                                                       |
| March        | 0                                                       |
| April        | 1                                                       |
| May          | 0                                                       |
| June         | 0                                                       |
| July         | 1                                                       |
| August       | 1                                                       |
| September    | 2                                                       |
| October      | 2                                                       |
| November     | 1                                                       |
| December     | 0                                                       |

See the Exhibit D "Weather Delays" - attached to the Contract.

R. INTENTIONALLY OMITTED

S. SUBPARAGRAPH 4.6.8, add as new subparagraph :

"4.6.8 Limitations of Arbitration. Notwithstanding anything in the Contract Documents to the contrary, if (1) the Claims involve a proposed, net aggregate payment to owner or Construction Manager in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose an "interested person or entity" means any person or entity if (3) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (4) the interested person or entity is so situated that the disposition of the Claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law."

T. SUBPARAGRAPH 5.2.1, change "promptly" to "within 10 days" in lines 5 and 7.

U. PARAGRAPH 7.3 "CONSTRUCTION CHANGE DIRECTIVES"

Subparagraph 7.3.3.3 is hereby changed to read as follows:

7.3.3.3 The following fees apply to Changes to the Work;

7.3.3.3.1 INTENTIONALLY OMITTED

7.3.3.3.2 The same markup applied by the subcontractor in the subcontractors base subcontract, which shall be defined in said subcontract and subject to Owner's approval, to the cost of work performed by any subcontractor.

V. INTENTIONALLY OMITTED

W. INTENTIONALLY OMITTED

X. PARAGRAPH 9.8.1. of the General Conditions is hereby deleted in its entirety and the following is substituted in lieu thereof:

9.8.1 "Substantial Completion" of the Project shall be deemed to occur when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use and, in addition, all requirements of the Contract Documents for Substantial Completion, including the following conditions, have been fulfilled as follows:

a. A Temporary or Final Certificate of Occupancy has been issued and all construction related approvals, licenses and requirements have been obtained or satisfied for the Project such that the Project may be operated for its intended use.

b. INTENTIONALLY OMITTED

Y. PARAGRAPH 9.8.2. of the General Conditions is hereby deleted in its entirety and the following Paragraphs 9.8.2.1. through 9.8.2.8. are substituted in lieu thereof:

9.8.2.1. When the Construction Manager considers that the Work, or portion thereof which the Owner agrees to accept separately, is substantially complete, the Construction Manager shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Construction Manager shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents. Following receipt of the Construction Manager's list, the Architect will make an inspection (the "Initial Punch List Inspection") to determine whether the Work or designated portion thereof is Substantially Complete. Upon completion of its Initial Punch List Inspection, the Architect shall prepare and submit to the Construction Manager and the Owner the Architect's list (the "Punch List") of items to be completed or corrected. For the items on the Punch List, the Architect shall specify:

- a. a date (a "Punch Item Date") by which such items shall be completed, which Punch Item Date shall be no more than forty-five (45) days from the date of the Punch List unless the Architect determines that reasonable cause exists for a later completion date; and
- b. the cost to complete or correct the items as reasonably determined by the Architect.

The Architect shall expressly state on the Punch List what the Construction Manager must do to achieve Substantial Completion under Paragraph 9.8.1 of the General. If as a result of the Initial Punch List Inspection the Architect determines that Substantial Completion has occurred, the Architect shall prepare a Certificate of Substantial Completion pursuant to Paragraph 9.8.2.8 below.



9.8.2.2 If the Construction Manager has not given notice that the Work is substantially complete and requested inspection thereof on or before the date for Substantial Completion set by the parties in the Contract Documents, then the Owner may request the Architect to make an Initial Punch List Inspection of the Work to (x) prepare the Punch List pursuant to the provisions of Paragraph 9.8.2.1. above and (y) determine if Substantial Completion has occurred.

9.8.2.3. Upon the request of the Construction Manager prior to the expiration of the relevant Punch Item Date(s) and for good cause shown, the Architect may extend any Punch Item Date(s) for a reasonable period. Following receipt of the Punch List and the Construction Manager's compliance with the requirements of Paragraph 9.8.1. above, the Construction Manager may submit a request for another inspection by the Architect, if necessary, to determine whether Substantial Completion of the Work has been achieved.

9.8.2.4. If the Construction Manager fails to satisfactorily complete any item(s) on the Punch List by the applicable Punch Item Date(s), then the Owner has the right to take over the work in accordance with Section 2.4 of the General Conditions.

9.8.2.5. When the requirements of Paragraph 9.8.1. above have been met and upon the request of either the Owner or the Construction Manager, the Architect shall prepare a Certificate of Substantial Completion, in the form set out in Paragraph 9.8.3 below, which shall establish the date of Substantial Completion and shall establish responsibilities of the Owner and the Construction Manager for security, maintenance, heat, utilities, damage to the Work, and insurance. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise specifically stated in the Contract Documents or in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Construction Manager for their written acceptance of responsibilities assigned to them in such certificate.

## Z. INTENTIONALLY OMITTED

AA. In addition to the provisions of Paragraph 9.10 Final Completion shall not have been deemed to have occurred until the date upon which all of the following have occurred:

### a. INTENTIONALLY OMITTED

b. Delivery of conditional or unconditional lien waivers from each person who performed work at or provide or fabricated materials in connection with the Work (including all subcontracts executed in connection therewith), other than from those persons whose claims are being contested by Construction Manager in good faith and for which Construction Manager has provided to Owner a bond or security in an amount reasonably acceptable to Owner, and

c. Issuance and obtaining of a final, unconditional certificate of occupancy and all construction-related approvals, licenses, and requirements for the Project enabling it to be occupied and operated for its intended use.

BB. SUBPARAGRAPH 9.10.4.1, after "Claims" add: "previously made in writing and identified by Owner as unsettled at the time of final payment."

CC. Paragraph 10.1.1 add the following: "Construction Manager shall prepare and submit to Owner for Owner's approval a comprehensive safety program. Further, Construction Manager shall provide written verification and certification in a form satisfactory to the

Owner, that all subcontractors have familiarized themselves with the safety program and agreed to abide by said program and training regimen thereunder.

- DD. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." In the first line of Subparagraph 11.1.1, following the work "companies," insert the following:

\*, acceptable to the Owner,.\*

- EE. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." Add the following to subparagraph 11.1.3:

"Certificates called for herein shall be furnished in duplicate and shall specifically set forth evidence of all coverage required by 11.1.2 and the Construction Manager shall furnish to the Architect copies of all endorsements that are subsequently issued amending coverage or limits."

- 
- FF. SUBPARAGRAPH 13.4.3, add as a new subparagraph:

"In the event of any litigation between the parties, the prevailing party shall be entitled to reimbursements for all reasonable attorneys' fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party to the extent allowed by law."

- GG. PARAGRAPH 13.5 "TESTS AND INSPECTIONS" is hereby supplemented by the addition of the following subparagraph:

"13.5.7 When work has been installed contrary to any Contract requirements and the Construction Manager requests the privilege of testing in lieu of removal, such testing shall be at the Construction Manager's expense."

- HH. INTENTIONALLY OMITTED

- II. Add the following new Article:

#### ARTICLE 15: REQUESTS FOR INFORMATION

15.1.1 In the event that the Construction Manager or its subcontractor, at any tier, determines that some portion of the Drawings, Specifications, or other Contract Documents requires clarification or interpretation by the Architect, the Construction Manager shall submit a Request for Information in writing to the Architect. Requests for Information may only be submitted by the Construction Manager and shall be only submitted on the Request for Information Forms provided by the Architect. The Construction Manager shall clearly and concisely set forth the issue for which clarification and interpretation is sought and why a response is needed from the Architect. If the Request for Information is being used to request confirmation of an interpretation or understanding of a requirement, the Construction Manager shall set forth that interpretation or understanding of the requirement along with reasons why such an understanding was reached.

15.1.2 The Architect will review all Requests for Information to determine whether they are Requests for Information within the meaning of this term. If the Architect determines

that the document is not a Request for Information, it will be returned to the Construction Manager, unreviewed as to content, for resubmittal on the proper form and in the proper manner. In either case, the Architect must reply to RFI in writing within the time requested by the Construction Manager, or three (3) working days, whichever is earlier.

15.1.3 Responses from the Architect are not intended to change any requirement of the Contract Documents. In the event the Construction Manager believes that a response to a Request for Information will cause a change to the requirements of the Contract Document, the Construction Manager shall immediately give written notice to the Architect in accordance with Section 4 of the General Conditions stating that the Construction Manager considers the response to be a change in the scope of work or a change to the project schedule..

END OF SUPPLEMENTARY CONDITIONS

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**RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit "C"**

**Weather Delays**

1. A "Work Day" is defined as Monday thru Friday, 7:30 am- 4:400 pm.
2. The occurrence of one or more of the following will constitute a weather delay as indicated:
  - a. 0.25" of rain during the workday constitutes one lost workday
  - b. 2.0" of snow during the workday constitutes one lost workday
  - c. 12" of snow in a 24-hour period constitutes two lost workdays.
  - d. Temperature of 5 degrees below zero (Fahrenheit) constitutes one lost workday.
  - e. Any drying time required for soil stabilization (as directed by the geotechnical engineer) due to rain or snow will constitute lost work day(s).
3. Weather days will be included in the final schedule approved as part of the GMP proposal to be incorporated into the contract by amendment. The number of weather days included will be in accordance with Section 3.P of Exhibit B. Adjustments to the contract completion dates due to adverse weather will be made in accordance with Section 3.P of Exhibit B.

**RainbowVision Santa Fe/Wets Contract Agreement**  
**Exhibit "D"**  
**Personnel Billing Rates**

| <u>Position</u>                               | <u>Reimbursable<br/>as a Cost of<br/>the Work<br/>(w/in GMP)</u> | <u>Included<br/>In Fee</u> | <u>Notes</u> | <u>Expected<br/>to be<br/>Full or Part<br/>Time</u> | <u>Billing<br/>Rate<br/>(\$/hr)</u> |
|-----------------------------------------------|------------------------------------------------------------------|----------------------------|--------------|-----------------------------------------------------|-------------------------------------|
| <b><u>Field Staff Stationed on Site</u></b>   |                                                                  |                            |              |                                                     |                                     |
| Superintendent                                | X                                                                |                            | 1            | Full                                                | \$70                                |
| Project Engineer, QA/QC                       | X                                                                |                            | 1            | Full                                                | \$80                                |
| Carpenter                                     | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| Laborer                                       | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| <b><u>Personnel Not Stationed on Site</u></b> |                                                                  |                            |              |                                                     |                                     |
| Vice President                                |                                                                  | X                          |              |                                                     |                                     |
| CFO                                           |                                                                  | X                          |              |                                                     |                                     |
| Project Manager                               | X                                                                |                            | 3            | Part                                                | \$75                                |
| General Superintendent                        | X                                                                |                            | 3            | Part                                                | \$75                                |
| Project Coordinator                           |                                                                  | X                          |              |                                                     |                                     |
| Safety Director                               | X                                                                |                            | 3            | Part                                                | \$50                                |
| Project Accountant                            |                                                                  | X                          |              |                                                     |                                     |
| <b><u>Pre-Construction Personnel</u></b>      |                                                                  |                            |              |                                                     |                                     |
| Senior Estimator/Pre-Con Services M           | X                                                                |                            | 4            | Part                                                | \$90                                |
| Assistant Estimator                           | X                                                                |                            | 4            | Part                                                | \$60                                |

**Notes:**

- 1 Field staff on project site.
- 2 It is expected that all trade work will be subcontracted. Trade labor rates shown only if need for Gen Conditions.
- 3 Billed only for time spent on site and traveling to project
- 4 Billed only for time during pre-construction phase, subject to Pre-construction services billing cap (see Exhibit F).

**RainbowVision Santa Fe/Weis Contract Agreement  
Exhibit E  
Project Scope & Budget Summary**

- The Scope of the project includes:
  - 40 Single-story Condominium living units
  - 80 Single-level Independent Living units built in a series of two-story buildings
  - 26 Assisted Living apartments (and related support spaces) constructed on the 2<sup>nd</sup> level of the central services building
  - Central services building (El Centro) containing commercial kitchen, dining spaces, activity spaces, administrative and marketing offices, retail spaces, and a spa/wellness center.
  - ~~◦ 13 acres of site development, with some off-site, public improvements~~
  - Total building area is approximately 183,000 sf.
- Based on a preliminary site plan and building design commissioned by the Owner, the Construction Manager prepared a detailed, preliminary cost report and presented that report to the Owner on February 1, 2004. Based on that scope and cost report, the Owner has established a construction budget of \$20,540,000, based on the Preliminary Divisional Cost Breakdown shown in Exhibit F.
- The Owner has contracted with the Architect to complete the design of the project in accordance with the budget stated above. The completion of the design, and related activities is proceeding in accordance with the Preconstruction Phase Schedule prepared and updated regularly by the Construction Manager. See Exhibit G.
- The Construction Manager has also prepared a Preliminary Construction Schedule. See Exhibit H. A final Construction Schedule will be included in the GMP report and made part of the contract by amendment.
- The Owner, Architect and Construction Manager are working together to monitor the completion of the design to ensure meeting the Construction Budget.
- Upon receipt of the Design Development documents, the Construction Manager will, in accordance with contract Section 2.2 prepare a GMP report that will include all of the elements outlined in Section 2.2.4. Prior to submitting the final GMP report, the Construction Manager will review the preliminary cost estimates with the Owner and Architect to determine if any adjustments to scope are required in order to achieve the construction budget stated above. Upon approval by the Owner, the GMP will be incorporated into the contract by amendment, in accordance with Section 2.2.
- During the completion of the design The Construction Manager will continue to meet regularly with the Owner and Architect, and will regularly review the Architect's work in progress to monitor the design as a means to ensure conformance to the construction budget.

**RainbowVision Santa Fe/Weis Contract Agreement**

**EXHIBIT F**

**Preliminary Divisional Cost Breakdown**

| <b>C.S.I. SYSTEMS BREAKDOWN</b>            | <b>Total<br/>Costs</b> | <b>%</b>            |
|--------------------------------------------|------------------------|---------------------|
| Division 1 - General Conditions            | \$1,047,401            | 5.9%                |
| Division 1 - Building Permit Allowance     | \$184,620              | 1.0%                |
| Division 2 - Site Construction             | \$1,534,319            | 8.7%                |
| Division 3 - Concrete                      | \$965,149              | 5.5%                |
| Division 4 - Masonry                       | \$488,608              | 2.8%                |
| Division 5 - Metals                        | \$439,822              | 2.5%                |
| Division 6 - Woods & Plastics              | \$2,609,476            | 14.8%               |
| Division 7 - Thermal & Moisture Protection | \$968,353              | 5.5%                |
| Division 8 - Doors & Windows               | \$771,105              | 4.4%                |
| Division 9 - Finishes                      | \$3,286,198            | 18.6%               |
| Division 10 - Specialties                  | \$592,969              | 3.4%                |
| Division 11 - Equipment (See Note 1)       | \$445,320              | 2.5%                |
| Division 12 - Furnishings (See Note 2)     | \$49,196               | 0.3%                |
| Division 14 - Conveying                    | \$230,919              | 1.3%                |
| Division 15 - Mechanical                   | \$2,410,820            | 13.7%               |
| Division 16 - Electrical                   | \$1,638,100            | 9.3%                |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    | <b>100%</b>         |
| Escalation - For 2004                      | 0.0%                   | -                   |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    |                     |
| Est./Const Contingency - El Centro         | 5.0%                   | \$243,521           |
| Est./Const Contingency - Balance           | 3.0%                   | \$383,726           |
| <b>Sub-Total</b>                           | <b>\$18,288,523</b>    |                     |
| Builders Risk Insurance                    | 0.8%                   | \$146,308           |
| Liability Insurance                        | 0.85%                  | \$156,896           |
|                                            |                        | <b>\$18,591,527</b> |
| Construction Manager Fee                   | 3.00%                  | \$557,748           |
| <b>Sub-Total</b>                           | <b>\$19,149,273</b>    |                     |
| Performance and Payment Bond               |                        | \$108,393           |
| NM Gross Receipts Tax                      |                        | \$1,284,062         |
| <b>Project Totals</b>                      |                        | <b>\$20,539,728</b> |

**Notes:**

1. "Equipment" includes residential appliances, commercial kitchen and laundry equipment.
2. "Furnishings" does not include FF&E - which is being designed and purchased by the Owner under a separate contract.

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit G**  
**Preconstruction Phase Schedule**

Refer to the "Preconstruction Schedule" dated \_\_\_\_\_ (filename: RVSF007), attached separately but made a part of this Exhibit by reference.

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**RainbowVision Santa Fe/Weis Contract Agreement**  
**Exhibit H**  
**Preliminary Construction Phase Schedule**

Refer to the "Preliminary Construction Schedule" dated \_\_\_\_\_ (filename: \_\_\_\_\_),  
attached separately but made a part of this Exhibit by reference.

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Amendment No. 1  
(Revised December 15, 2004)  
To Contract Agreement Between  
RainbowVision Santa Fe, LLC and Weis Builders, Inc

In accordance with article 2.2.9 of the Contract Agreement, the Guaranteed Maximum Price (GMP) and Project Schedule are hereby modified to reflect the following:

- The Guaranteed Maximum Price will be Twenty-One Million Five Hundred Thirty Nine Thousand, Seven Hundred Twenty-Eight Dollars (\$21,539,728).

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- The Construction Start date will be January 3, 2005. Based on that start date:
- The Substantial Completion date for Buildings 16, 17, 18, 19, and 20 will be October 28, 2005.
- The Substantial Completion date for the balance of the project will be April 26, 2006.

Accordingly, the GMP Divisional Cost Breakdown (Exhibit F) shall be modified as per the attached revision, dated September 30, 2004. The revised GMP is based on the following:

- Weis September 15, 2004 "Confirmation of GMP" letter (with attachments)
- Weis September 30, 2004 "Summary of Approved Enhancements"

The Construction Schedule (Exhibit H) shall be as shown in the attached update, dated December 15, 2004.

For:  
RainbowVision Santa Fe, LLC

  
(Signature)

JOE SILVER, PRESIDENT  
(Printed Name and Title)  
RAINBOWVISION PROPERTIES, INC.  
MANAGING MEMBER  
(Date)

For:  
Weis Builders Inc.

  
(Signature)

PETER WORTHINGTON, VICE PRESIDENT  
(Printed Name and Title)  
DEC. 15, 2004  
(Date)

| Act ID | Description                            | Dir     | Early Start | Early Finish | Notes                                  |
|--------|----------------------------------------|---------|-------------|--------------|----------------------------------------|
| 1000   | Receive Utilities Permit               | 0       | 05AUG04 A   |              |                                        |
| 1120   | Receptor Station Permit                | 0       | 05AUG04 A   |              |                                        |
| 1080   | Receive Bid Package #2 Building Permit | 0       | 02NOV04 A   |              | Get Package #2 Building Permit         |
| 1000   | Learn Coating                          | 0       | 22DEC04     |              | Learn Coating                          |
| 1005   | Notice to Proceed                      | 0       | 23DEC04     |              | Notice to Proceed                      |
| 1180   | Receive Bid Package #3 Building Permit | 0       | 22DEC04     |              | Receive Bid Package #3 Building Permit |
| 1010   | Site Construction Start                | 0       | 01JAN05     |              | Site Construction Start                |
| 1020   | Building Construction Start            | 0       | 01JAN05     |              | Building Construction Start            |
| 225    | OSUARD                                 | 0       | 01JAN05     | 06FEB05      |                                        |
| 117    | 18JAN05                                | 28JUN05 |             |              |                                        |
| 130    | 25JAN05                                | 29JUL05 |             |              |                                        |
| 144    | 06FEB05                                | 30AUG05 |             |              |                                        |
| 158    | 21FEB05                                | 28SEP05 |             |              |                                        |
| 171    | 05MAR05                                | 28OCT05 |             |              |                                        |
| 0      | 28OCT05                                | 28OCT05 |             |              |                                        |
| 176    | 26JAN05                                | 25FEB05 |             |              |                                        |
| 186    | 03FEB05                                | 19OCT05 |             |              |                                        |
| 194    | 06FEB05                                | 14NOV05 |             |              |                                        |
| 147    | 21FEB05                                | 14SEP05 |             |              |                                        |
| 158    | 05MAR05                                | 12OCT05 |             |              |                                        |
| 201    | 05APR05                                | 14DEC05 |             |              |                                        |

Early bar  
Progress bar  
Start milestone point  
Finish milestone point

Rainbow Vision Retirement Community  
Santa Fe, New Mexico  
Wells Builders, Inc.

WBS  
WBS  
WBS  
WBS

| ID                                         | Description | Dur | Early Start | Early Finish |
|--------------------------------------------|-------------|-----|-------------|--------------|
| +Independent Living Building 6 - 14 Units  |             | 247 | 08FEB95     | 30JAN98      |
| +Independent Living Building 7 - 10 Units  |             | 242 | 08FEB95     | 13JAN98      |
| +Independent Living Building 8 - 8 Units   |             | 256 | 28FEB95     | 20FEB96      |
| +Independent Living Building 9 - 14 Units  |             | 298 | 22DEC95     | 14FEB96      |
| +Independent Living Building 10 - 10 Units |             | 272 | 04MAR95     | 28MAR98      |
| +Independent Living Building 11 - 4 Units  |             | 283 | 18MAR95     | 18APR96      |
| +Independent Living Building 12            |             | 182 | 30MAR95     | 01DEC95      |
| +Independent Living Building 13            |             | 186 | 11APR95     | 08JUN95      |
| +Independent Living Building 14            |             | 189 | 18MAR95     | 10NOV95      |
| +Independent Living Building 15            |             | 348 | 22DEC95     | 24APR98      |

☐ Early Day  
☐ Property Tax  
☐ Gas Inflation Index  
☐ First Mortgage Cost

Rainbow Vision Retirement Community  
 Santa Fe, New Mexico  
 Webb Builders, Inc.

SFC CLERK RECORDED 02/02/2007

### CLAIM OF LIEN

To RainbowVision Santa Fe, LLC owner or reputed owner of the premises hereinafter described, and to all who may be concerned:

The Claimant, Weis Builders Inc. claims a lien in the sum One Million, Five Hundred Twenty-Two Thousand, Three Hundred Nineteen dollars (\$1,522,319) plus legal fees, costs and interest, upon the following described property, to-wit:

RainbowVision Santa Fe (excluding Buildings #1, 2, 3, 4, 5, 11, 12, 14, 15, 16, 17, 18, 19, 20) located at 500 Rodeo Road, Santa Fe, New Mexico, more particularly described as:

Towship 16 N, Range 9 E, Section 11, L.C.E. for RainbowVision condominiums, per Plat 605/24, and bearing uniform property code number 1-053-095-353-509 (excluding Buildings # 1, 2, 3, 4, 5, 11, 12, 14, 15, 16, 17, 18, 19, 20),

together with all improvements thereon, for labor/services performed and materials furnished by the claimant in the construction, alteration and repair, of a certain multi-building resort retirement community consisting of nineteen (19) one and two story residential buildings and a combination commercial/residential building (El Centro) situated on the property described above.

After deducting all just credits and offsets claimant's demands are: Unpaid amounts invoiced, including retainage (\$1,168,362), unpaid contract balance (\$15,685), and unpaid change order requests (\$338,272).

The name of the owner or reputed owner of said property is RainbowVision Santa Fe, LLC and the name of the person with whom claimant contracted, for whom claimant performed services or to whom claimant furnished the said materials is RainbowVision Santa Fe, LLC.

The terms, time given and condition of claimant's contract are as shown in the contract documents attached hereto and marked Exhibit "T" and made a part of this claim.

Wherefore, claimant claims a lien upon said property and improvements thereon in the amount stated.

Weis Builders Inc.

By

Peter Worthington, Vice President

EXHIBIT

2

SFC CLERK RECORDED 02/02/2007

STATE OF MINNESOTA        )  
                                  ) ss  
COUNTY OF HENNEPIN        )

Verification

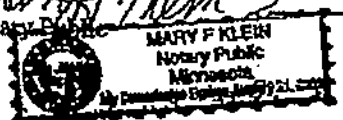
Peter Worthington, of lawful age and upon being duly sworn upon his/her oath, states and verifies as follows: that he/she has read the foregoing Claim of Lien and understands the contents thereof; that the matters and things contained therein are true and correct to the best of his/her knowledge, information and belief.

SUBSCRIBED AND SWORN TO before me this 30<sup>th</sup> day of Jan, 2007

My Commission Expires:

1/31/08

*Mary F Klein*  
Notary Public



COUNTY OF SANTA FE        )  
STATE OF NEW MEXICO       ) ss

CLAIM OF LIEN  
PAGES: 48

Hereby Certify That This Instrument Was Filed for  
Record On The 2ND Day Of February, A D., 2007 at 11.45  
And Was Duly Recorded as Instrument # 1469461  
In The Records Of Santa Fe County

Witness My Hand And Seal Of Office  
Valerie Espinoza  
Deputy \_\_\_\_\_ County Clerk, Santa Fe, NM



# **AIA Document A121™CMc – 2003 and AGC Document 565**

**Standard Form of Agreement Between Owner and Construction Manager  
where the Construction Manager is Also the Constructor**

**AGREEMENT**

made as of the Twenty Eighth day of April in the year of Two Thousand and Four  
(In words, indicate day, month and year)

**BETWEEN** the Owner:  
(Name and address)

RainbowVision Santa Fe LLC  
4001 Office Court Road,  
Suite 403  
Santa Fe, NM 87505

and the Construction Manager:  
(Name and address)

Weis Builders, Inc.  
7645 Lyndale Avenue South  
Minneapolis, MN 55423

The Project is:  
(Name, address and brief description)

RainbowVision Santa Fe Retirement Community  
500 Rodeo Road at Artigua  
Santa Fe, NM 87505

The Architect is:  
(Name and address)

Lloyd & Associates Architects  
301 N. Guadalupe Suite 104  
Santa Fe, NM 87501

The Owner and Construction Manager agree as set forth below:

**ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form and is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The 1997 Edition of AIA® Document A201™, General Conditions of the Contract for Construction, is referred to herein. This Agreement requires modification if other general conditions are utilized.

**TABLE OF CONTENTS**

**ARTICLE 1 GENERAL PROVISIONS**

- § 1.1 Relationship of the Parties
- § 1.2 General Conditions

**ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES**

- § 2.1 Preconstruction Phase
- § 2.2 Guaranteed Maximum Price Proposal and Contract Time
- § 2.3 Construction Phase
- § 2.4 Professional Services
- § 2.5 Hazardous Materials

**ARTICLE 3 OWNER'S RESPONSIBILITIES**

- § 3.1 Information and Services
- § 3.2 Owner's Designated Representative
- § 3.3 Architect
- § 3.4 Legal Requirements

**ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES**

- § 4.1 Compensation
- § 4.2 Payments

**ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES**

- § 5.1 Compensation
- § 5.2 Guaranteed Maximum Price
- § 5.3 Changes in the Work

**ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE**

- § 6.1 Costs to Be Reimbursed
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- § 6.3 Discounts, Rebates and Refunds
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**ARTICLE 7 CONSTRUCTION PHASE**

- § 7.1 Progress Payments
- § 7.2 Final Payment

**ARTICLE 8 INSURANCE AND BONDS**

- § 8.1 Insurance Required of the Construction Manager
- § 8.2 Insurance Required of the Owner
- § 8.3 Performance Bond and Payment Bond

**ARTICLE 9 MISCELLANEOUS PROVISIONS**

- § 9.1 Dispute Resolution
- § 9.2 Other Provisions

**ARTICLE 10 TERMINATION OR SUSPENSION**

- § 10.1 Termination Prior to Establishing Guaranteed Maximum Price
- § 10.2 Termination Subsequent to Establishing Guaranteed Maximum Price
- § 10.3 Suspension

**ARTICLE 11 OTHER CONDITIONS AND SERVICES**



**ARTICLE 1 GENERAL PROVISIONS****§ 1.1 RELATIONSHIP OF PARTIES**

The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services and use the Construction Manager's best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Construction Manager and other persons or entities employed by the Owner for the Project.

**§ 1.2 GENERAL CONDITIONS**

For the Construction Phase, the General Conditions of the contract shall be the AIA® Document A201™-1997, General Conditions of the Contract for Construction, which is incorporated herein by reference. For the Preconstruction Phase, or in the event that the Preconstruction and Construction Phases proceed concurrently, A201™-1997 shall apply to the Preconstruction Phase only as specifically provided in this Agreement. The term "Contractor" as used in A201™-1997 shall mean the Construction Manager.

**ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES**

The Construction Manager shall perform the services described in this Article. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction Phase services. If the Owner and Construction Manager agree, after consultation with the Architect, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

**§ 2.1 PRECONSTRUCTION PHASE****§ 2.1.1 PRELIMINARY EVALUATION**

The Construction Manager shall provide a preliminary evaluation of the Owner's program and Project budget requirements, each in terms of the other.

**§ 2.1.2 CONSULTATION**

The Construction Manager with the Architect shall jointly schedule and attend regular meetings with the Owner. The Construction Manager shall consult with the Owner and Architect regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.

**§ 2.1.3 PRELIMINARY PROJECT SCHEDULE**

When Project requirements described in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare, and periodically update, a preliminary Project schedule for the Architect's review and the Owner's approval. The Construction Manager shall obtain the Architect's approval of the portion of the preliminary Project schedule relating to the performance of the Architect's services. The Construction Manager shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect and Construction Manager. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed date of Substantial Completion. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

**§ 2.1.4 PHASED CONSTRUCTION**

The Construction Manager shall make recommendations to the Owner and Architect regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economics, time of performance, availability of labor and materials, and provisions for temporary facilities.

**§ 2.1.5 PRELIMINARY COST ESTIMATES**

**§ 2.1.5.1** When the Owner has sufficiently identified the Project requirements and the Architect has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a preliminary cost estimate utilizing area, volume or similar conceptual estimating techniques.

**§ 2.1.5.2** When Schematic Design Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the Design Development Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

**§ 2.1.5.3** When Design Development Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare a detailed estimate with supporting data for review by the Architect and approval by the Owner. During the preparation of the Construction Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

**§ 2.1.5.4** If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

**§ 2.1.6 SUBCONTRACTORS AND SUPPLIERS**

The Construction Manager shall seek to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors, including suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner know of any objection to such subcontractor or supplier. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the Owner or Architect later to object to or reject any proposed subcontractor or supplier.

**§ 2.1.7 LONG-LEAD-TIME ITEMS**

The Construction Manager shall recommend to the Owner and Architect a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager. The Construction Manager shall expedite the delivery of long-lead-time items.

**§ 2.1.8 EXTENT OF RESPONSIBILITY**

The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Owner and the Owner's professional consultants. It is not the Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Drawings and Specifications are at variance therewith, the Construction Manager shall promptly notify the Architect and Owner in writing.

**§ 2.1.9 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION**

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

**§ 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL AND CONTRACT TIME**

**§ 2.2.1** When the Drawings and Specifications are sufficiently complete, the Construction Manager shall propose a Guaranteed Maximum Price, which shall be the sum of the estimated Cost of the Work and the Construction Manager's Fee.

**§ 2.2.2** As the Drawings and Specifications may not be finished at the time the Guaranteed Maximum Price proposal is prepared, the Construction Manager shall provide in the Guaranteed Maximum Price for further development of

the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The estimated Cost of the Work shall include the Construction Manager's contingency, a sum established by the Construction Manager for the Construction Manager's exclusive use to cover costs arising under Section 2.2.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order.

#### § 2.2.4 BASIS OF GUARANTEED MAXIMUM PRICE

The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include:

1. A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Guaranteed Maximum Price proposal.
2. A list of allowances and a statement of their basis.
3. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
4. The proposed Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the Fee that comprise the Guaranteed Maximum Price.
5. The Date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents issuance dates upon which the date of Substantial Completion is based.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discovers any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by the Construction Manager.

§ 2.2.7 Prior to the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing.

§ 2.2.8 Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis shall be set forth in Amendment No. 1. The Guaranteed Maximum Price shall be subject to additions and deductions by a change in the Work as provided in the Contract Documents, and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 2.2.9 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in Amendment No. 1. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

§ 2.2.10 The Guaranteed Maximum Price shall include in the Cost of the Work only those taxes which are enacted at the time the Guaranteed Maximum Price is established.

#### § 2.3 CONSTRUCTION PHASE

##### § 2.3.1 GENERAL

§ 2.3.1.1 The Construction Phase shall commence on the earlier of:

- (1) the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, or
- (2) the Owner's first authorization to the Construction Manager to:
  - (a) award a subcontract, or
  - (b) undertake construction Work with the Construction Manager's own forces, or
  - (c) issue a purchase order for materials or equipment required for the Work.

#### § 2.3.2 ADMINISTRATION

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated to a special design for the Work from the list previously reviewed and, after analyzing such bids, shall deliver such bids to the Owner and Architect. The Owner will then determine, with the advice of the Construction Manager and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the Construction Manager shall obtain bids; however, if the Guaranteed Maximum Price has been established, the Owner may not prohibit the Construction Manager from obtaining bids from other qualified bidders. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Construction Manager to the Owner and Architect (1) is recommended to the Owner by the Construction Manager; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of Sections 7.1.8 and 7.1.9 and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.3.2.4 The Construction Manager shall schedule and conduct meetings at which the Owner, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

§ 2.3.2.5 Promptly after the Owner's acceptance of the Guaranteed Maximum Price proposal, the Construction Manager shall prepare a schedule in accordance with Section 3.10 of A201™-1997, including the Owner's occupancy requirements.

§ 2.3.2.6 The Construction Manager shall provide monthly written reports to the Owner and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.3.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals.

#### § 2.4 PROFESSIONAL SERVICES

Section 3.12.10 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### § 2.5 HAZARDOUS MATERIALS

Section 10.3 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

**ARTICLE 3 OWNER'S RESPONSIBILITIES****§ 3.1 INFORMATION AND SERVICES**

§ 3.1.1 The Owner shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Owner's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

§ 3.1.2 The Owner shall, at the written request of the Construction Manager prior to commencement of the Construction Phase and thereafter, furnish to the Construction Manager reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.3 The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies for changes in the Work and other costs which are the responsibility of the Owner.

**§ 3.1.4 STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS**

In the Preconstruction Phase, the Owner shall furnish the following with reasonable promptness and at the Owner's expense. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely upon the accuracy of any such information, reports, surveys, drawings and tests described in Sections 3.1.4.1 through 3.1.4.4 but shall exercise customary precautions relating to the performance of the Work.

§ 3.1.4.1 Reports, surveys, drawings and tests concerning the conditions of the site which are required by law.

§ 3.1.4.2 Surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a project benchmark.

§ 3.1.4.3 The services of a geotechnical engineer when such services are requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, including necessary operations for ascertaining subsurface conditions, with reports and appropriate professional recommendations.

§ 3.1.4.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.

§ 3.1.4.5 The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.

**§ 3.2 OWNER'S DESIGNATED REPRESENTATIVE**

The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. This representative shall have the authority to make decisions on behalf of the Owner concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201™-1997, the Architect does not have such authority.

**§ 3.3 ARCHITECT**

The Owner shall retain an Architect to provide Basic Services, including normal structural, mechanical and electrical engineering services, other than cost estimating services. The Owner shall authorize and cause the Architect to provide Additional Services, requested by the Construction Manager which must necessarily be provided by the Architect for the Preconstruction and Construction Phases of the Work. Such services shall be

provided in accordance with time schedules agreed to by the Owner, Architect and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect, from which compensation provisions may be deleted.

#### § 3.4 LEGAL REQUIREMENTS

The Owner shall determine and advise the Architect and Construction Manager of any special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project. The Owner shall furnish such legal services as are necessary to provide the information and services required under Section 3.1.

#### ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

The Owner shall compensate and make payments to the Construction Manager for Preconstruction Phase services as follows:

##### § 4.1 COMPENSATION

§ 4.1.1 For the services described in Sections 2.1 and 2.2, the Construction Manager's compensation shall be calculated as follows:

The Construction Manager's fee for Preconstruction Phase Services shall be Seven Thousand Dollars (\$7,000), in accordance with Weir's 12/22/03 letter of intent.

*(State basis of compensation, whether a stipulated sum, multiple of Direct Personnel Expense, actual cost, etc. Include a statement of reimbursable cost items as applicable.)*

§ 4.1.2 Compensation for Preconstruction Phase Services shall be equitably adjusted if such services extend beyond April 1, 2004 in accordance with Weir's 12/22/03 letter of intent.

§ 4.1.3 If compensation is based on a multiple of Direct Personnel Expense, Direct Personnel Expense is defined as the direct salaries of the Construction Manager's personnel engaged in the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

##### § 4.2 PAYMENTS

§ 4.2.1 Payments shall be made monthly following presentation of the Construction Manager's invoices and, where applicable, shall be in proportion to services performed.

§ 4.2.2 Payments are due and payable Thirty ( 30 ) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear interest at the rate entered below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon.)*

Interest rate shall be 4% above US Bancorp Prime Rate.

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

#### ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

The Owner shall compensate the Construction Manager for Construction Phase services as follows:

#### § 5.1 COMPENSATION

§ 5.1.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager in current funds the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Construction Manager's Fee determined as follows:

Basic Fee will be Three percent (3.0%) of the Cost of the Work as defined in Article 6. For changes in the Work not associated with any "Resident Upgrade Packages" that are to be offered on a unit-by-unit basis, the fee for additive changes will be 3.0% and for deductive changes the fee will be 0.0%.

#### 5.1.2

In addition to the basic fees in 4.1.1 and 5.1.1 above, the Owner shall pay the Construction Manager a Resident Upgrade Fee equal to 15% of the cost of the work, together with such reasonable administrative costs that the Construction Manager will incur directly related to the performance of such work, associated with the Resident Upgrade Packages that the Owner is planning to offer. It is the intent that a limited number of such Upgrade packages will be offered by the Owner, and that once the scope and cost for the upgrades being considered is established, the Owner and Construction Manager will incorporate by Amendment to this Contract the terms and conditions pursuant to which the Construction Manager shall perform such work. It is intended that the Construction Manager will establish a lump sum price per unit type for each Upgrade Package to be offered, and that said lump sum price shall include the fee and administrative costs described above, as well as define the date for each unit by which the Owner must direct the Construction Manager to proceed with the Upgrade. Unit upgrades for which direction to proceed is given after the agreed upon date, or which reflect a deviation in scope from the defined Upgrade Packages will be evaluated separately, and a cost and time adjustment proposed, by the Construction Manager.

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

#### § 5.2 GUARANTEED MAXIMUM PRICE

§ 5.2.1 The sum of the Cost of the Work and the Construction Manager's Fee are guaranteed by the Construction Manager not to exceed the amount provided in Amendment No. 1, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum as adjusted by approved changes in the Work is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner. At time of Final Completion, any costs savings shall be returned 100% to the Owner and 0% to the Construction Manager.

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

#### § 5.3 CHANGES IN THE WORK

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of Amendment No. 1 may be determined by any of the methods listed in Section 7.3.3 of A201™-1997.

§ 5.3.2 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of A201™-1997 and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Section 7.3.6 of A201™-1997 shall have the meanings assigned to them in that document and shall not be modified by this Article 5. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.3 In calculating adjustments to the Contract, the terms "cost" and "costs" as used in the above-referenced provisions of A201™-1997 shall mean the Cost of the Work as defined in Article 6 of this Agreement, and the term "and a reasonable allowance for overhead and profit" shall mean the Construction Manager's Fee as defined in Section 5.1.1 of this Agreement.

§ 5.1.4 If no specific provision is made in Section 5.1.1 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.1 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

| "Article 5.4: Commencement and Completion has been added. See Exhibit A."

#### ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

##### § 6.1 COSTS TO BE REIMBURSED

§ 6.1.1 The term "Cost of the Work" shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 6.

##### § 6.1.2 LABOR COSTS

- 1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's agreement, at off-site workshops.
- 2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's agreement. To the extent that some of the Construction Manager's supervisory and administrative personnel located at the Construction Manager's main office provide service to the project, a portion of their wages and salaries will be included in the cost of work and will be reimbursed in accordance with Exhibit C.

Classification

Name

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal office or offices other than the site office shall be included in the Cost of the Work, such personnel shall be identified below.)*

- 3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.
- 4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Cost of the Work under Sections 6.1.2.1 through 6.1.2.3.

##### § 6.1.3 SUBCONTRACT COSTS

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

##### § 6.1.4 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

- 1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.
- 2 Costs of materials described in the preceding Section 6.1.4.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spillage. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

##### § 6.1.5 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

- 1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed.



whether sold to others or retained by the Construction Manager. Cost for items previously used by the Construction Manager shall meet fair market value.

- 2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval.
- 3 Costs of removal of debris from the site.
- 4 Reproduction costs, costs of telegrams, facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephone at the site and reasonable petty cash expenses of the site office.
- 5 That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while traveling in discharge of duties connected with the Work.

#### § 6.1.6 MISCELLANEOUS COSTS

- 1 That portion directly attributable to this Contract of premiums for insurance and bonds. *(If charges for self-insurance are to be included, specify the basis of reimbursement.)*
- 2 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.
- 3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.
- 4 Fees of testing laboratories for tests required by the Contract Documents, except those related to nonconforming Work other than that for which payment is permitted by Section 6.1.8.2.
- 5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the Guaranteed Maximum Price and provided that such royalties, fees and costs are not excluded by the last sentence of Section 3.17.1 of A201™-1997 or other provisions of the Contract Documents.
- 6 Data processing costs related to the Work.
- 7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.
- 8 Legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld.
- 9 Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
- 10 All premiums (without markup) and deductibles associated with Builder's Risk Insurance provided by the Construction Manager at the Owner's request.
- 11 All premiums (without markup) and deductibles associated with providing professional liability insurance for the mechanical and electrical design services for the condominiums and IL units.

#### § 6.1.7 OTHER COSTS

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

#### § 6.1.8 EMERGENCIES AND REPAIRS TO DAMAGED OR NONCONFORMING WORK

The Cost of the Work shall also include costs described in Section 6.1.1 which are incurred by the Construction Manager except, however, where conditions requiring such action were caused by or are the result of the Construction Manager's negligence.

1. In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.6 of A201™-1997.
2. In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this agreement of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, Subcontractors or suppliers.

§ 6.1.9 The costs described in Sections 6.1.1 through 6.1.8 shall be included in the Cost of the Work notwithstanding any provision of AIA or A201™-1997 other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.2.

**§ 6.2 COSTS NOT TO BE REIMBURSED**

§ 6.2.1 The Cost of the Work shall not include:

1. Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Sections 6.1.2.2 and 6.1.2.3.
2. Expenses of the Construction Manager's principal office and offices other than the site office, except as specifically provided in Section 6.1.
3. Overhead and general expenses, except as may be expressly included in Section 6.1.
4. The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
5. Rental costs of machinery and equipment, except as specifically provided in Section 6.1.5.2.
6. Except as provided in Section 6.1.8.2, costs due to the negligence of the Construction Manager or to the failure of the Construction Manager to fulfill a specific responsibility to the Owner set forth in this Agreement.
7. Costs incurred in the performance of Preconstruction Phase Services.
8. Except as provided in Section 6.1.7.1, any cost not specifically and expressly described in Section 6.1.
9. Costs which would cause the Guaranteed Maximum Price to be exceeded.

**§ 6.3 DISCOUNTS, REBATES AND REFUNDS**

§ 6.3.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be secured.

§ 6.3.2 Amounts which accrue to the Owner in accordance with the provisions of Section 6.3.1 shall be credited to the Owner as a deduction from the Cost of the Work.

**§ 6.4 ACCOUNTING RECORDS**

§ 6.4.1 See Exhibit A for revised Accounting Records requirements.

**ARTICLE 7 CONSTRUCTION PHASE**

**§ 7.1 PROGRESS PAYMENTS**

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

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

§ 7.1.3 Provided an Application for Payment is received by the Architect not later than the 30<sup>th</sup> day of a month, the Owner shall make payment to the Construction Manager not later than the 30<sup>th</sup> day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than Thirty ( 30 ) days after the Architect receives the Application for Payment.

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager; less (2) that portion of those payments attributable to the Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

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

1. Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.8 of A201™-1997, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
2. Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing.
3. Add the Construction Manager's Fee, less retentions of Five percent ( 5.00% ). The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the two preceding Sections bears to a reasonable estimate of the probable Cost of the Work upon its completion.
4. Subtract the aggregate of previous payments made by the Owner.
5. Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation.
6. Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of A201™-1997.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than Five percent ( 5.00% ). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontractors.

7.1.8.1 As an alternative means of achieving the 5% retainage described in 7.1.7 and 7.1.8 above, the Construction Manager and the Subcontractors may allocate a portion of their respective contract amounts to a "Final Completion" line item within each firm's schedule of values. The portions of each contract so allocated shall be equal to the 5% retainage stipulated. Billing against any such "final completion" line item in a schedule of values will be allowed only under the same circumstances as otherwise defined in the contract documents for the retention or release of retainage.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Application for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data, that the Architect has made exhaustive or continuous on-site inspections or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

#### § 7.2 FINAL PAYMENT

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager when (1) the Contract has been fully performed by the Construction Manager except for the Construction Manager's responsibility to correct nonconforming Work, as provided in Section 12.2.2 of A201™-1997, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Owner's accountants; and (3) a final Certificate for Payment has been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The amount of the final payment shall be calculated as follows:

1. Takes the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price.
2. Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of A201™-1997 or other provisions of the Contract Documents.
3. Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.

§ 7.2.3 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of A201™-1997. The time periods stated in this Section 7.2 supersede those stated in Section 9.4.1 of A201™-1997.

§ 7.2.4 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without a further decision of the Architect. Unless agreed to otherwise, a demand for mediation or arbitration of the disputed amount shall be made by the Construction Manager within 60 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Owner's

accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.5 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1 and not excluded by Section 6.2 (1) to correct nonconforming Work or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee, if any, related thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

#### ARTICLE 8 INSURANCE AND BONDS

##### § 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in Section 11.1 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance shall be as follows:

(Paragraph deleted)

Note:

8.1.2 Insurance provided will be per the construction Manager's standard policy. The Construction Manager will provide the Owner with a statement of the additional premium cost (if any) associated with other insurance coverage as the Owner may want to consider. If the Owner elects to require the Construction Manager to provide other coverage or limits, then the contract will be adjusted accordingly.

##### § 8.1.3

(Paragraph deleted)

##### § 8.1.4 Other coverage:

(If Umbrella Excess Liability coverage is required over the primary insurance or retention, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be attached by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)

##### § 8.2 INSURANCE REQUIRED OF THE OWNER

During both phases of the Project, the Owner shall purchase and maintain liability and property insurance, including waivers of subrogation, as set forth in Sections 11.2 and 11.4 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

##### § 8.2.1 Property Insurance:

\$10,000 Deductible Per Occurrence

(Paragraph deleted)

### **§ 8.3 PERFORMANCE BOND AND PAYMENT BOND**

**§ 8.3.1** The Construction Manager shall (insert "shall" or "shall not") furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work. The amount of each bond shall be equal to One hundred percent ( 100.00% ) of the Contract Sum.

**§ 8.3.2** The Construction Manager shall deliver the required bonds to the Owner after the contract is executed and three days before the commencement of any Work at the Project site. Further, Construction Manager shall deliver a binding commitment for the issuance of such bonds at least two weeks prior to the estimated date for the closing on Project financing. In the event of any early start as identified in paragraph 4.2.1.1 Owner may require Construction Manager to provide such bonds. Owner shall provide Construction Manager with 10 days notice of such requirement and stipulate in such notice the time for providing same, and the amount of coverage required by owner.

### **ARTICLE 9 MISCELLANEOUS PROVISIONS**

#### **§ 9.1 DISPUTE RESOLUTION**

**§ 9.1.1** During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201™-1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

#### **§ 9.2 OTHER PROVISIONS**

**§ 9.2.1** Unless otherwise noted, the terms used in this Agreement shall have the same meaning as those in A201™-1997, *General Conditions of the Contract for Construction*.

#### **§ 9.2.2 EXTENT OF CONTRACT**

This Contract, which includes this Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and Construction Manager. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

#### **§ 9.2.3 OWNERSHIP AND USE OF DOCUMENTS**

Article 1.6 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### **§ 9.2.4 GOVERNING LAW**

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

#### **§ 9.2.5 ASSIGNMENT**

The Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 19.2.2 of A201™-1997, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

### **ARTICLE 10 TERMINATION OR SUSPENSION**

#### **§ 10.1 TERMINATION PRIOR TO ESTABLISHING GUARANTEED MAXIMUM PRICE**

**§ 10.1.1** Prior to execution by both parties of Amendment No. 1 establishing the Guaranteed Maximum Price, the Owner may terminate this Contract at any time without cause, and the Construction Manager may terminate this Contract for any of the reasons described in Section 14.1.1 of A201™-1997.

**§ 10.1.2** If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 prior to commencement of the Construction Phase, the Construction Manager shall be equitably compensated for

Preconstruction Phase Services performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Section 4.1.1.

§ 10.1.3 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 after commencement of the Construction Phase, the Construction Manager shall, in addition to the compensation provided in Section 10.1.2, be paid an amount calculated as follows:

1. Take the Cost of the Work incurred by the Construction Manager.
2. Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.
3. Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders.

Subcontracts, purchase orders and rental agreements entered into by the Construction Manager with the Owner's written approval prior to the execution of Amendment No. 1 shall contain provisions permitting assignment to the Owner as described above. If the Owner accepts such assignment, the Owner shall reimburse or indemnify the Construction Manager with respect to all costs arising under the subcontract, purchase order or rental agreement except those which would not have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner elects not to accept the assignment of any subcontract, purchase order or rental agreement which would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager shall terminate such subcontract, purchase order or rental agreement and the Owner shall pay the Construction Manager the costs necessarily incurred by the Construction Manager by reason of such termination.

#### § 10.2 TERMINATION SUBSEQUENT TO ESTABLISHING GUARANTEED MAXIMUM PRICE

Subsequent to execution by both parties of Amendment No. 1, the Contract may be terminated as provided in Article 14 of A201™-1997.

§ 10.2.1 In the event of such termination by the Owner, the amount payable to the Construction Manager pursuant to Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 In the event of such termination by the Construction Manager, the amount to be paid to the Construction Manager under Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, including a reasonable estimate of the Cost of the Work for Work not actually completed.

#### § 10.3 SUSPENSION

The Work may be suspended by the Owner as provided in Article 14 of A201™-1997; in such case, the Guaranteed Maximum Price, if established, shall be increased as provided in Section 14.3.2 of A201™-1997 except that the term "cost of performance of the Contract" in that Section shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1.1 and 5.3.4 of this Agreement.

#### ARTICLE 11 OTHER CONDITIONS AND SERVICES

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Over Notes:

(237)(30001)

11.1 thru 11.4  
See Exhibit A

11.5

It is understood and agreed that the GMP is for the total cost of the work and that cost over-runs from one line item can be offset by cost savings from another line item.

11.6

All personnel listed in Exhibit C as a "Reimbursable as a cost of the work" shall be included in the cost of the work per Article 7.2, subject to the GMP per Article 6.1.2.2.

11.7

The following procedure is agreed to by Owner and/or Owner's Lender and Title Company in the event of a lien being filed by one of the Construction Manager's Vendors and/or Vendor's Vendor(s): At the Construction Manager's sole discretion either 1. Construction Manager shall make a cash deposit equal to 150% of each lien amount in separate escrow accounts held by Owner's Title Company on behalf of the Construction Manager or 2. The Construction Manager may provide a lien transfer bond for the amount of the lien. Upon said deposit being made or lien bond being provided by Construction Manager, Owner and/or Owner's Lender, and Title Company shall immediately disburse to Construction Manager any monies owed to Construction Manager under the terms of this contract.

11.8

Owner and Construction Manager agree to the following punch list procedure for each phase of the project:

1. Prior to issuance of temporary or Full Certificate of Occupancy by City, Owner and/or Owner's designated representative(s) shall prepare one original interior and exterior punch list.
2. Within 7 calendar days after completion punch list work by Construction Manager, Owner and/or Owner's representative(s) will re-inspect to confirm original punch list items are complete.
3. New items will not be added to the original punch list at any time except for items which are substantial (i.e. no hot water) and that were obviously missed during original punch list items.
4. Any item(s) not included in original punch list shall be considered warranty item(s).
5. Warranty items shall not be considered outstanding punch list items and thus shall not be subject to withholding of final payments.

11.9

If a discrepancy occurs within this Agreement and/or between this Agreement and other contract documents, it is understood and agreed that Article 11 of this Agreement, the balance of this Agreement, and Exhibits "A", "B", "C" and "D" (in that order) shall govern.

11.10

If interest costs occur per Paragraph 4.2, the cost shall be reimbursed by issuance of an Owner Change Order.

11.11

Architect shall return all submittals (i.e. shop drawings) to Contractor within 10 working days of date received from Contractor.

11.12

Modification and/or extension of project completion date due to "weather days" shall be as outlined in Exhibit "D" attached hereto.

11.13

The following Exhibits, attached hereto, form part of the Contract Documents:

Exhibit A: Modifications to the A121CM

Exhibit B: Supplementary Conditions

Exhibit C: Personnel Billing Rates and Matrix

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Exhibit D: Definition of Weather Days.  
Exhibit E: Project Scope and Budget Summary  
Exhibit F: Preliminary Divisional Cost Breakdown  
Exhibit G: Pre-Construction Phase Schedule  
Exhibit H: Preliminary Construction Phase Schedule

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

OWNER

*[Signature]*  
(Signature)  
JOE SILVER PRESIDENT  
(Printed name and title)  
MAR 1, 2004  
Date  
C. J. [Signature]  
ATTEST

CONSTRUCTION MANAGER

*[Signature]*  
(Signature)  
PETER W. WATSON, DICE MEMBER  
(Printed name and title)  
APR 1, 2004  
Date  
C. J. [Signature]  
ATTEST

**RainbowVision Santa Fe/Weis Contract Agreement**  
**Exhibit A**  
**Additional Provisions/Modifications based on the AIA A121CMC (2003 Edition)**

**5.4 COMMENCEMENT AND COMPLETION**

Add the following paragraphs:

**5.4.1** The date of commencement is the date from which the Contract Time of subparagraph 5.4.2 is measured; it shall be the date of the giving of the Notice to Proceed (the "Commencement Date"). The Owner shall issue the Notice to Proceed within ten calendar days of the last to occur of all of the following (the "Conditions to Commencement"): (i) closing of financing acceptable to Owner, sufficient in an amount to satisfy the Owner's financial obligations hereunder, and (ii) receipt of all permits and approvals necessary to allow commencement and continuation of construction. In no event shall the Construction Manager commence any work on site by placing materials at the site or by conducting other Work at the site until a Notice to proceed has been given.

The immediately aforementioned notwithstanding, Construction Manager and Owner acknowledge that prior to receiving a Notice to Proceed the Construction Manager may be required to enter into certain other subcontracts, issue purchase orders, or make similar commitments which, if the Project were not to proceed would result in the incurrence, by Construction Manager of certain costs, financial penalties, or other like or similar expenses. Owner agrees to reimburse Construction Manager all such costs, penalties, or similar expenses, so long as, and only to the extent that Construction Manager has received Owner's written approval prior to the incurrence of such costs, and/or the entering into such subcontracts, authorization of such purchase orders or making such similar commitments. Any activity conducted hereunder shall in no way effect the dates established for substantial completion for each phase as shall be provided for in Amendment No. 1 hereto.

**5.4.2** It is anticipated that the Work is to be completed in phases so as to permit residents of the Project to move in on a phased basis (each of which shall be referred to as a "Phase").

1 Substantial Completion of each Phase is to occur on or before an agreed date. The agreed dates for each Phase shall established by Amendment No. 1 to this Agreement at the time the GMP is established, which shall be an agreed upon number of calendar days from the Commencement Date. Once established each of these days shall be measured from the Commencement Date and may only be extended in accordance with the Contract Documents.

2 Each date by which Substantial Completion of a Phase must occur pursuant to the Contract Documents shall be referred to as a "Phase Completion Deadline". The period of time from the Commencement Date to the applicable Phase Completion Deadline shall be referred to as the "Phase Contract Time".

3 The Owner and the Construction Manager acknowledge that if the Construction Manager fails to achieve substantial completion of a Phase before the applicable Phase Completion Deadline, the Owner will suffer damages which are difficult to ascertain. However, the Owner and the Construction Manager agree that the degree to which the Owner will be damaged by the Construction Manager's failure to substantially complete a particular Phase of the Project within the Phase Contract Time generally will decrease as the overall Project nears Substantial Completion. Accordingly, the Construction Manager agrees to pay the Owner as liquidated damages with respect to each particular Phase, and not as a penalty, for each calendar day that passes after the Phase Completion Deadline has expired for the particular Phase of the Project, until the date that the Construction Manager achieves Substantial Completion of that particular Phase, an amount equal to the portion of the GMP allocable to that particular Phase times the construction financing daily interest for Project (the "Stipulated Damage

Amount). Any liquidated damages payable by the Construction Manager as to a particular Phase shall then be determined by multiplying the Stipulated Damage amount by each day of delay. The Stipulated Damage Amounts for each phase shall be established by an amendment hereto at the closing for financing on the Project.

.4 For purposes of determining that portion of the GMP allocable to a particular Phase, the following method of calculating same will be utilized:

(i) Reasonably determine that amount of the total GMP which generally applies to construction of the Project (as a whole) by adding the sum of the following amounts contained within the GMP: (Specific amounts to be determined when GMP is established by Amendment to the Contract.)

|                            |    |
|----------------------------|----|
| Site Development           | \$ |
| General Conditions         | \$ |
| Construction Manager's Fee | \$ |
| Other                      | \$ |
| Total                      | \$ |

(ii) Subtract total in (i) above from the total GMP to determine the "remaining GMP".

(iii) Utilize the approved Schedule of Values and construction costing information to calculate the percentage of the cost of a particular Phase to the "remaining GMP" amount as determined in (ii) above.

(iv) Apply the percentage from (iii) above for the particular Phase(s) to the GMP.

.5 The Stipulated Damage amount for each Phase is intended to be cumulative of the other Phases. Accordingly, if the Phase Completion Deadline for more than one (1) Phase shall have elapsed without the applicable Phases having been substantially completed, then the Stipulated Damage Amount for each Phase not so substantially complete shall be due and owing by the Construction Manager to the Owner. The Owner may collect the Stipulated Damage Amounts by withholding them from payments due the Construction Manager or by separate demand. The Stipulated Damage Amounts provided herein shall be in lieu of all other claims, costs, losses, damages and/or expenses that the Owner might otherwise have against the Construction Manager by reason of its failure to achieve Substantial Completion before the relevant Phase completion Deadline, whether arising from contract or tort, or actual, direct, indirect or consequential damages, and the Owner hereby releases the Construction Manager therefrom.

.B

.1 The Construction Manager agrees that final completion of each Phase of the Work shall occur as soon as possible after Substantial Completion of the Phase, but no later than thirty (30) calendar days after the date on which Substantial Completion of that Phase has occurred, as evidenced by the Architect's Certificate of Substantial Completion. Final payment as to a Phase shall be due upon final completion of such Phase.

.2 Owner acknowledges that there may be certain items which may be on order that, through no fault of the Construction Manager, may not arrive and/or otherwise be available for incorporation into the Work within said thirty (30) day period. To the extent that Owner, in Owner's sole discretion, accepts a Phase as having achieved final completion, even though such items remain outstanding, Owner may, (a) acknowledge such acceptance, and (b) withhold up to one and one half (1.5) times the total cost (as determined by the Construction Manager) for each Phase, or \$5000 for each Phase (whichever is greater), of such Work which remains incomplete or unincorporated.

3 Further, it is the intent that outstanding items described in 5.4.2.6.2 are to be secured and installed as quickly as possible – preferably within five (5) days after the Construction Manager receives those items. It is acknowledged that some items may be more significant than others in terms of the operation or marketability of the project. It is also acknowledged that unless determined otherwise, the costs incurred by the Construction Manager for procuring, expediting and installing the items covered by 5.4.2.6.2 are reimbursable costs as defined under Article 8 of the Contract. Accordingly, it may be less costly for the Owner, and less disruptive to the operation of the facility, to have several items accumulated and installed at one time rather than have each item installed as it is delivered. Therefore, for each item outstanding as of Substantial Completion, within five (5) days the Construction Manager shall provide the Owner, in writing, with a proposed plan indicating the expected delivery date and proposed installation date for each item. The Owner and Construction Manager will jointly review (and revise as needed) said plan and reach an agreement on the plan. The Construction Manager will report to the Owner on a weekly basis of the status of the items remaining to be installed, and immediately notify the Owner of any change in delivery date or installation date due to unforeseen procurement or delivery problems. If after receiving an outstanding item the Construction Manager fails to commence the Work within five (5) days after agreed upon commencement date, or subsequently fails to complete the Work in accordance with the agreed upon schedule, the Owner may exercise its right to carry out the work as provided in section 2.4 of the A201 General Conditions.

4 The provision stated above for withholding 1.5 times the cost of items outstanding at the time of Substantial Completion does not apply to any Upgrade Options initiated by the Owner subsequent to the decision date established by the Construction Manager for each upgrade option proposed for a given residential unit.

7 Except for the portions of the project which the Owner has requested completion and occupancy prior to the completion of the Commons Areas in the El Centro building, it is the intent that when developing the Phase Completion Deadlines described in 5.4.2.1 and 5.4.2.2 above, for the purposes of determining what, if any, stipulated damage amount may be owed by Construction Manager, no phase shall be deemed to have achieved Substantial Completion until such time as (1) the common areas (as defined in Amendment No. 1) portion of the Project shall have achieved Substantial Completion or (2) the Owner agrees to deem the phase Substantially Complete or (3) the Owner takes beneficial occupancy of all or part of the phase. Further and accordingly, when establishing the completion dates for each phase as provided for herein by amendment hereto, such amendment shall also provide that no phase shall be deemed complete for the purposes hereof unless (1) and/or until the common area portion of the Project shall have attained substantial completion, (2) the Owner has agreed to deem the phase Substantially Complete, or (3) the Owner takes beneficial occupancy of all or part of the phase.

#### 6.4 ACCOUNTING RECORDS

6.4.1 The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to the Owner and Owner's lender. The Owner and the Owner's accountants and the lender and lender's accountant or consultants shall be afforded reasonable access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement and the Project, (collectively "the records") and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law. All Records shall be maintained in accordance with generally accepted accounting principles, consistently applied. There shall be an "open book" policy, in effect at all times with regard to all Records relative to the project.

maintained by either the Construction Manager or the Owner, or anyone on their behalf, and each party shall have full and complete access to said Records maintained by the other at all reasonable times. The Construction Manager shall require all Subcontractors and Sub-Subcontractors retained on a cost-plus basis to retain Records and permit the same access by Owner as is required of the Construction Manager under this Article 6.4.

6.4.1.1 If the Owner, Owner's accountants, Lender or Lender's accountants elect to perform an audit of "the records" maintained by Construction Manager, said audit shall be performed within six (6) months of the Final Completion of the project. This stipulation does not affect the Construction Manager's obligation to maintain "the records" for the time period noted in 6.4.1.

6.4.2 If, at any time during construction, any inspection by the Owner or the Lender of the Construction Manager's Records or any other data relating to the contract documents reveals an overcharge or undercharge by the Construction Manager as confirmed by an independent auditor, the next Application for Payment shall be appropriately adjusted by the amount of such overcharge or undercharge and related Fee.

## ARTICLE 7 CONSTRUCTION PHASE

### 7.1 PROGRESS PAYMENTS

Add the following:

7.1.11 To the extent of payments received by the Construction Manager from the Owner, the Construction Manager warrants the real property on which the Project is located will remain free of any legitimate and proper claims of lien arising from the Work performed by or through the Construction Manager. If any such liens are properly recorded, the Construction Manager shall have fifteen (15) business days from its receipt of written notice by the Owner or Owner's agent (including Title company) of such recording within which to discharge or secure by cash deposit or by construction lien transfer bond any such claims of lien. If the Construction Manager fails to discharge or otherwise secure such claim of lien within said time period, the Owner shall be entitled to satisfy the lien or take whatever action it deems appropriate to remove the lien from its property. All reasonable expenses and costs, including reasonable attorney's fees, incurred by the Owner after the abovementioned fifteen (15) day period to effect the discharge, securing and/or removal of any such claims of lien shall be promptly reimbursed to the Owner by the Construction Manager.

7.1.12 Concurrently with each Application for Payment, Construction Manager will deliver to Owner lien waivers (which may be conditioned upon payment) waiving all lien rights in respect of the Project, executed by Construction Manager, and executed by Subcontractors and suppliers covering amounts paid on their account or to be paid with funds received from such Application for Payment. All lien waivers shall be in form and substance satisfactory to Owner and the Owners Lender(s). Additionally, the Construction Manager shall provide further evidence regarding application of each progress payment to payment of all Subcontractors and suppliers providing services or material in respect of the Project, and shall comply with such other reasonable requirements as the Owners Lender(s) may impose with respect to obtaining advances of funds be applied to each Application for Payment."

**ARTICLE 9  
MISCELLANEOUS PROVISIONS**

**9.1 DISPUTE RESOLUTION**

Add the following the following subparagraphs to 9.1.1:

.1 Claims between the parties to this Agreement shall be resolved as set forth below. At all times, the parties shall approach the dispute resolution process in good faith.

.2 In the event of a Claim between the parties, the parties shall promptly meet in good faith to resolve the Claim informally before invoking the dispute resolution procedures outlined elsewhere in the Contract Documents, including the A201 General Conditions and Supplementary Conditions, and below. If the parties are not able to quickly resolve the claim, either party may request participation by the Architect. Both parties shall promptly submit a written summary of its position to the Architect. Upon receipt of both summaries, the Architect shall immediately convene a formal meeting with the parties to further discuss the Claim. If the Claim is not resolved within three business days after the commencement of such meeting, either party may then commence the dispute resolution process defined in the Contract Documents.

.3 If the informal dispute resolution efforts outlined in 9.1.1.2 are not successful, then the dispute resolution procedures outlined in the balance of the Contract Documents. Any mediation conducted pursuant to this Paragraph 9.1 shall be held in Santa Fe, unless the parties mutually agree otherwise.

.4 Intentionally omitted

.5 Intentionally omitted

.6 Consent to arbitration involving an additional person or entity shall not constitute agreement to arbitration of a dispute not described in such consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

.7 Intentionally omitted

.8 The arbitration shall be held in Santa Fe.

.9 Notwithstanding anything herein to the contrary, if (1) the Claims involve a proposed, net aggregate payment or reimbursement in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose, an "interested person or entity" means any person or entity if (a) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (b) the interested person or entity is so situated that the disposition of the claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law.

**ARTICLE 11  
OTHER CONDITIONS AND SERVICES**

11.1 The Construction Manager recognizes that any Lender involved in financing the Project will have requirements pertaining to this Agreement. The Construction Manager agrees to cooperate with and assist the Owner and the Architect in amending and supplementing the Contract Documents to conform to reasonable and customary requirements of any Lender (to the extent such requirements are acceptable to the Owner). However, the Construction Manager shall not be responsible for actually preparing amendments or supplements to the Contract Documents for any reason at any time. Such amendments or supplements may include, without limitation, provisions:

- A. Naming any Lender as an additional insured on the Construction Manager's bonds and insurance policies and providing notice to any Lender of termination, cancellation or material modification of such policies.
- B. Requiring approval of Applications for Payment by a consultant designated by a Lender prior to payment.
- C. Agreeing not to amend Contract Documents without the reasonable and timely consent of the Lender.
- D. Requiring approval of Change Orders by the Lender, provide that Lender approval will be provided on a timely basis and the Owner will use its best efforts to secure such timely approval.
- E. Requiring notice of the Owner's default to the Lender, with a Lender having the right to cure, and requiring continued performance by the Construction Manager, provided that the Lender assumes all contract obligations of the Owner.
- F. Subordinating any lien rights of the Construction Manager to rights of the Lender.
- G. Requiring copies of all written notices to be sent to the Lender.
- H. Granting the Lender the right to inspect the work and to examine records pertaining thereto.
- I. Recognizing the pledge of the Owner's rights under Contract Documents to the Lender.
- J. Requiring the Construction Manager to acknowledge, on the Lender's request, whether or not the Owner is in default of its obligations under the Contract.
- K. Requiring the Construction Manager to assist the Owner in preparing and submitting reports and information concerning the Work as may be reasonably required by the Lender.

11.2 Nothing contained in Paragraph 11.2 or Paragraph 11.3 is intended to derogate from any other rights to terminate this Contract that may be granted the Construction Manager elsewhere in this Contract, including, but not limited to, the provisions of Article 2 and Article 14 of the General Conditions and Article 10 of this Agreement.

11.3 The Construction Manager may perform all or any part of the Work with its own forces, or through an Affiliate, provided that (1) the Construction Manager secures at least two competitive bids with respect to the work Construction Manager intends to perform (2) the Owner consents thereto in writing, which consent shall not be unreasonably withheld, after full disclosure by the Construction Manager to the Owner of the affiliation or relationship of the Affiliate to the Construction Manager and (3) any Work performed by an Affiliate shall be covered in a separate agreement between the Construction Manager

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and the Affiliate, which shall satisfy all of the requirements for subcontracts as set forth in Paragraph 5.3 of the General Conditions and which shall be approved by the Owner in writing.

11.4 Any amounts payable hereunder which are not paid when due shall thereafter accrue interest at Wall Street Journal "prime" plus one percent (1%) per annum or at the highest rate allowed under the law of the state where the Project is located, whichever is less.



**RainbowVision Santa Fe/Wals Contract Agreement  
Exhibit B  
Supplementary Conditions to the AIA A201 General Conditions (1997 Edition)**

1. The following Supplementary Conditions shall apply to that certain Standard Form of Agreement Between Owner and Construction Manager (the "Agreement") dated
2. For purposes of these Supplementary Conditions, capitalized terms shall have the meaning given to them in the Contract Documents (as such term is defined in Article 1 of the Agreement), unless otherwise defined in these Supplementary Conditions.
3. The following paragraphs supplement, modify, or amend that certain Contract Document entitled "General Conditions of the Contract for Construction," AIA Document A201, Fifteenth Edition, 1997, Articles 1 through 14 inclusive (the "General Conditions"). Where only a portion of any provision of the General Conditions is supplemented, modified, or amended, the remaining portions of that provision shall remain unaltered and in effect. In the event of any inconsistency between the General Conditions and these Supplementary Conditions, the terms of these Supplementary Conditions shall apply. Hereinafter, all references to the General Conditions shall mean the General Conditions as amended by these Supplementary Conditions.

**A. INTENTIONALLY OMITTED**

- B. PARAGRAPH 1.2.4 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.4 Where no explicit quality or standards for materials or workmanship are established for Work, such Work is to be of good quality for the intended use and consistent with quality of the surrounding Work and of the construction of the Project generally.

- C. PARAGRAPH 1.2.5 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.5 All indications or notations which apply to one of a number of similar situations, materials or processes shall be deemed to apply to all such situations, materials or processes whenever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

**D. INTENTIONALLY OMITTED**

- E. SUBPARAGRAPH 1.5.1, add at the end of the first sentence: ", unless otherwise identified and incorporated by reference in Agreement."**

- F. SUBPARAGRAPH 2.2.5 Modify Subparagraph 2.2.5 as follows:**

"In addition to the sets the Construction Manager used for bidding, the Owner will furnish a to be agreed upon number of sets of black and white prints of the Drawings and copies of the Project Manual free of charge for execution of the Work. Additional sets may be purchased from the Office of the Architect."

- G. SUBPARAGRAPH 3.2.3, delete the second sentence, and add at the end: "If the Construction Manager performs Work knowing it involves such error, inconsistency, omission or difference without such notice to the Architect, the Construction Manager shall assume appropriate responsibility for such Work and shall bear the costs attributed to correction."
- H. PARAGRAPH 3.3 "SUPERVISION AND CONSTRUCTION PROCEDURES" is hereby supplemented by the addition of the following sub-paragraphs:
  - 3.3.4. The Construction Manager shall carefully check its own work and that of Subcontractors as the Work is being performed. The Construction Manager shall ensure that incorrect or faulty Work is corrected as soon as possible but in any event in a timely manner so as not to impact the project schedule.
  - 3.3.5 During the finishing stages of the project, the Construction Manager shall make frequent inspections of the Work in the presence of the Architect or the Owners Representative and the applicable Subcontractor(s) involved, if any, and the Architect shall identify incorrect and faulty Work. The Construction Manager shall ensure that incorrect or faulty Work is corrected in accordance with 3.3.4.
- I. PARAGRAPH 3.4 "LABOR AND MATERIALS" is hereby supplemented by addition of the following Subparagraphs 3.4.3 and 3.4.4:
  - 3.4.4 Should the Owner make reasonable objection, based upon qualifications, fitness, behavior or temperament, to the presence of any personnel of Construction Manager or any subcontractor, such person shall not perform services on the Project site, or otherwise in connection with the Project, without written consent of the Owner.
  - 3.4.5 The Construction Manager shall not change or replace the assigned Project Manager or Superintendent without prior written consent by the Owner.
- J. SUBPARAGRAPH 3.5.1, Add to the end: "Construction Manager's warranties shall commence upon Substantial Completion of the Work for each Phase and continue for a period of one year thereafter."
- K. PARAGRAPH 3.5 "WARRANTY" is hereby supplemented by the addition of the following sub-paragraphs:
  - 3.5.2. In the event of a claim by the Owner against the Construction Manager under Paragraph 3.5.1. of these General Conditions (or under any other express written warranty made by the Construction Manager) for any item of Work performed under the Contract Documents, the Owner shall give notice (a "Warranty Notice") of the claim to the Architect and the Construction Manager and thereafter, the Architect or Architects authorized representative and the Construction Manager shall inspect the item(s) of Work in question. If following its inspection the Architect determines that any such item is included within the Construction Manager's warranty under the Contract Documents, then:
    - (a) Upon formal notification from the Architect, the Construction Manager shall have thirty (30) days, notwithstanding any other time period specified in the Contract Documents, to either (1) complete the cure for the item or, for a Longer Cure Item, commence the cure and thereafter diligently proceed to complete the cure, or (2) if the Construction Manager disputes the warranty coverage of the item, commence the

dispute resolution procedures described in Section 4.3 of the General Conditions.

- (b) If upon the expiration of the thirty (30) day period the Construction Manager has failed to satisfy the provisions of either clause (a) (1) or clause (a) (2) immediately above, then the Owner shall have the right to engage a third party Construction Manager of the Owner's sole selection to cure or complete the cure of the warranty item at the Construction Manager's expense.
- (c) If the Construction Manager fails to cure an item within the required time and if the item is finally determined by arbitration or, when permitted, judicial proceedings to be covered by any Construction Manager's warranty under the Contract Documents, then the Construction Manager shall be liable for all expenses incurred by the Owner in enforcing its warranty claim including legal and Architectural fees and expenses, an administrative charge of a percentage equal to Construction Manager's fee times the cost to cure the warranty item to cover the Owner's administrative costs to enforce the warranty claim, and, when a third party Construction Manager has been engaged by the Owner under this Paragraph 3.5.2, the costs and expenses of the third party Construction Manager.

**L. INTENTIONALLY OMITTED**

**M. ARTICLE 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES is supplemented by the following replacement language for Subparagraph 3.12.4**

3.12.4 Shop Drawings, Product Data, Samples and similar submittals which are required by the Contract Documents to be submitted for Architect's review shall become Contract Documents upon Architect's review and approval. Submittals which are not required by the Contract Documents to be submitted for Architect's review are not Contract Documents.

**N. ARTICLE 3.18 "ACCESS TO WORK" is hereby supplemented by addition of the following Subparagraph:**

"3.18.2 Representatives of the State Agencies shall have access at all reasonable times to the Work whenever it is in preparation or progress, and the Construction Manager shall provide proper facilities for such access and inspection."

**O. PARAGRAPH 4.24 "COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION" is hereby supplemented by the additions of the following subparagraphs: Nothing contained herein shall prohibit the Owner's Representative from communicating directly with the Construction Manager for the purpose of receiving information and/or providing the Construction Manager with clarification as to Owner's position with regard to any matters affecting or concerning the Work.**

**4.24.1 The following definitions shall apply to construction communications:**

**4.24.1.1 Contract Document Clarifications:** An answer from the Architect, in response to an inquiry from the Construction Manager, intended to make some

requirement(s) of the Drawings or plans clearly understood. Drawing/plan clarifications may be sketches, drawings, or in a narrative form and are not intended to change any requirements of the Contract Documents. Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.2 Non-Conformance Notice:** A Notice issued by the Architect documenting that the Work or some portion thereof has not been performed in accordance with the requirements of the Contract Documents. Payment shall not be made on any portion of the Work for which a Non-Conformance Notice has been issued and the Work not corrected to the satisfaction of the Architect.

Upon receipt of a Non-Conformance Notice the Construction Manager shall provide a written Response to the Non-Conformance Notice within five (5) working days after receipt of the Notice. The Construction Manager's response shall state either (a) the basis of Construction Manager's determination that the Work was performed in accordance with the Contract Documents or (b) the corrective action Construction Manager intends to take, at its sole expense, to correct the non-conforming work.

If the Construction Manager disputes issuance of the Notice the Architect has five (5) working days in which to respond by either (a) withdrawing the Notice of Non-Conformance or (b) directing the Construction Manager to correct the Work.

If directed to correct the Work, the Construction Manager shall do so within five (5) working days after receipt of such direction from the Architect, or such other time as may be agreed to with the Architect, without loss of rights for claim recovery or dispute resolution as may be available by the Contract.

**4.2.4.1.3 Requests for Information:** A written request from the Construction Manager or one of its subcontractors, to the Architect, seeking an interpretation or a clarification of some requirement of the Contract Documents. The Construction Manager shall clearly and concisely set forth the issue for which it seeks clarification or interpretation and why a response is needed from the Architect.

Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.4 Substitution/Or-Equal Submittals:** A written request from the Construction Manager to substitute a material, article, device, product, fixture, form, type of construction, or process called for in the Contract Documents with another item that shall substantially equal in all respects to that so indicated or supplied. Each such request shall specifically set forth any manner in which the proposed change does not conform to the Contract Documents and Construction Manager (and any subcontractor initiating the request) warrants that the proposed substitute conforms in all respects with the contract documents except as specifically identified as non-conforming in the request.

**4.2.4.1.5 Submittals/Shop Drawings:** When required by any technical specification included in these Contract Documents, the Construction Manager shall transmit to the Architect technical submittals, shop drawings, or samples, including supporting catalog cuts, manufacturer's literature, sketches or drawings, calculations, and other pertinent, in sufficient detail to enable the Architect to review the information and determine that the Construction Manager clearly understands the requirements of the Contract Documents. Construction Manager (and any subcontractor initiating a submittal) warrants that all Work and materials depicted in technical submittals, shop drawings and samples shall conform in all respects to the requirements of the Contract Documents, except as otherwise specifically identified as non-conforming.

4.2.4.1.8 Schedule Submittals: When required by the Construction Schedule Specification of these Contract Documents, the Construction Manager shall submit required schedules, schedule updates, schedule revisions, time impact analysis, etc. for review.

P. INTENTIONALLY OMITTED

Q. SUBPARAGRAPH 4.3.7.2 is hereby revised (and paragraphs 4.3.7.3 and 4.3.7.4 are added) to read as follows:

4.3.7.2 Weather days: Construction Manager confirms that the Contract Time, Phased Contract Time and the agreed upon dates for same as set forth in Amendment No. 1 to this Agreement are reasonable periods to perform The Work. Construction Manager has included in the work schedule ordinary and normally anticipated lost days due to adverse weather ("weather days") and therefore Construction Manager shall not be entitled to an extension of the Contract Time or Phased Contract Time as a result of weather conditions normally experienced in the greater Santa Fe area unless (1) the Construction Manager is unable to make up for the weather delay by scheduling work for a Saturday in accordance with 4.3.7.2 below, and (2) the number of weather days lost (and not made up by Saturday work) in that calendar month exceeds the number of weather days provided for in the Contract Time.

4.3.7.3 The Construction Manager's work schedule is based upon a regular five-day work week per calendar week. It is mutually agreed that in the event of a weather day the Construction Manager, before requesting a time extension the Construction Manager will first try to make up that weather day on the next Saturday available during the following 30 calendar days. A Saturday will be considered to be "available" only if all of the following conditions are met: (1) no work has already been scheduled for that day that would interfere with the work being rescheduled, (2) it is not a national holiday, (3) working on that Saturday is allowed by local ordinance, and (4) materials and workforce equivalent to what was scheduled for the lost weekday are available on that Saturday. The Construction Manager will only be required to utilize a Saturday if either (a) the Construction Manager incurs no additional cost in rescheduling work for that Saturday, or (b) the Owner agrees to compensate the Construction Manager (by Change Order) for any additional costs (such as for labor rate differential) the Construction Manager may incur.

4.3.7.4 The requirement stated above for the Construction Manager to utilize a Saturday to make up for a weather delay only applies the number of weather days included in each calendar month as indicated in the following list of Anticipated Lost Days. For every weather day beyond the number included below, the Construction Manager shall be entitled to an equivalent number of days extension to the Contract Time. The Construction Manager may (at its CM's sole discretion) attempt to mitigate the delay utilizing additional Saturdays as outlined in 4.3.7.3, but has no obligation to do so.

For the purposes of this Paragraph the table provided below setting forth the norms/anticipated lost weather days shall be utilized by the parties in determining lost weather days:

| <u>Month</u> | <u>Anticipated Lost Days<br/>Due to Adverse Weather</u> |
|--------------|---------------------------------------------------------|
| January      | 1                                                       |
| February     | 1                                                       |
| March        | 0                                                       |
| April        | 1                                                       |
| May          | 0                                                       |
| June         | 0                                                       |
| July         | 1                                                       |
| August       | 1                                                       |
| September    | 2                                                       |
| October      | 2                                                       |
| November     | 1                                                       |
| December     | 0                                                       |

See the Exhibit D "Weather Delays" - attached to the Contract.

R. INTENTIONALLY OMITTED

S. SUBPARAGRAPH 4.8.8, add as new subparagraph :

"4.8.8 Limitations of Arbitration. Notwithstanding anything in the Contract Documents to the contrary, if (1) the Claims involve a proposed, net aggregate payment to owner or Construction Manager in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose an "interested person or entity" means any person or entity if (3) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (4) the interested person or entity is so situated that the disposition of the Claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law."

T. SUBPARAGRAPH 5.2.1, change "promptly" to "within 10 days" in lines 5 and 7.

U. PARAGRAPH 7.3 "CONSTRUCTION CHANGE DIRECTIVES"

Subparagraph 7.3.3.3 is hereby changed to read as follows:

7.3.3.3 The following fees apply to Changes to the Work:

7.3.3.3.1 INTENTIONALLY OMITTED

7.3.3.3.2 The same markup applied by the subcontractor in the subcontractors base subcontract, which shall be defined in said subcontract and subject to Owner's approval, to the cost of work performed by any subcontractor.

V. INTENTIONALLY OMITTED

W. INTENTIONALLY OMITTED

X. PARAGRAPH 9.8.1. of the General Conditions is hereby deleted in its entirety and the following is substituted in lieu thereof:

9.8.1 "Substantial Completion" of the Project shall be deemed to occur when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use and, in addition, all requirements of the Contract Documents for Substantial Completion, including the following conditions, have been fulfilled as follows:

a. A Temporary or Final Certificate of Occupancy has been issued and all construction related approvals, licenses and requirements have been obtained or satisfied for the Project such that the Project may be operated for its intended use.

b. INTENTIONALLY OMITTED

Y. PARAGRAPH 9.8.2. of the General Conditions is hereby deleted in its entirety and the following Paragraphs 9.8.2.1. through 9.8.2.5. are substituted in lieu thereof:

9.8.2.1. When the Construction Manager considers that the Work, or portion thereof which the Owner agrees to accept separately, is substantially complete, the Construction Manager shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Construction Manager shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents. Following receipt of the Construction Manager's list, the Architect will make an inspection (the "Initial Punch List Inspection") to determine whether the Work or designated portion thereof is Substantially Complete. Upon completion of its Initial Punch List inspection, the Architect shall prepare and submit to the Construction Manager and the Owner the Architect's list (the "Punch List") of items to be completed or corrected. For the items on the Punch List, the Architect shall specify:

a. a date (a "Punch Item Date") by which such items shall be completed, which Punch Item Date shall be no more than forty-five (45) days from the date of the Punch List unless the Architect determines that reasonable cause exists for a later completion date; and

b. the cost to complete or correct the items as reasonably determined by the Architect.

The Architect shall expressly state on the Punch List what the Construction Manager must do to achieve Substantial Completion under Paragraph 9.8.1 of the General. If as a result of the Initial Punch List Inspection the Architect determines that Substantial Completion has occurred, the Architect shall prepare a Certificate of Substantial Completion pursuant to Paragraph 9.8.2.5 below.

9.8.2.2 If the Construction Manager has not given notice that the Work is substantially complete and requested inspection thereof on or before the date for Substantial Completion set by the parties in the Contract Documents, then the Owner may request the Architect to make an Initial Punch List Inspection of the Work to (x) prepare the Punch List pursuant to the provisions of Paragraph 9.8.2.1, above and (y) determine if Substantial Completion has occurred.

9.8.2.3. Upon the request of the Construction Manager prior to the expiration of the relevant Punch Item Date(s) and for good cause shown, the Architect may extend any Punch Item Date(s) for a reasonable period. Following receipt of the Punch List and the Construction Manager's compliance with the requirements of Paragraph 9.8.1, above, the Construction Manager may submit a request for another inspection by the Architect, if necessary, to determine whether Substantial Completion of the Work has been achieved.

9.8.2.4. If the Construction Manager fails to satisfactorily complete any item(s) on the Punch List by the applicable Punch Item Date(s), then the Owner has the right to take over the work in accordance with Section 2.4 of the General Conditions.

9.8.2.5. When the requirements of Paragraph 9.8.1, above have been met and upon the request of either the Owner or the Construction Manager, the Architect shall prepare a Certificate of Substantial Completion, in the form set out in Paragraph 9.8.3 below, which shall establish the date of Substantial Completion and shall establish responsibilities of the Owner and the Construction Manager for security, maintenance, heat, utilities, damage to the Work, and insurance. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise specifically stated in the Contract Documents or in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Construction Manager for their written acceptance of responsibilities assigned to them in such certificate.

**Z. INTENTIONALLY OMITTED**

**AA.** In addition to the provisions of Paragraph 9.10 Final Completion shall not have been deemed to have occurred until the date upon which all of the following have occurred:

**a. INTENTIONALLY OMITTED**

**b.** Delivery of conditional or unconditional lien waivers from each person who performed work at or provide or fabricated materials in connection with the Work (including all subcontracts executed in connection therewith), other than from those persons whose claims are being contested by Construction Manager in good faith and for which Construction Manager has provided to Owner a bond or security in an amount reasonably acceptable to Owner, and

**c.** Issuance and obtaining of a final, unconditional certificate of occupancy and all construction-related approvals, licenses, and requirements for the Project enabling it to be occupied and operated for its intended use.

**BB.** SUBPARAGRAPH 9.10.4.1, after "Claims" add: "previously made in writing and identified by Owner as unsettled at the time of final payment."

**CC.** Paragraph 10.1.1 add the following: "Construction Manager shall prepare and submit to Owner for Owner's approval a comprehensive safety program. Further, Construction Manager shall provide written verification and certification in a form satisfactory to the



Owner, that all subcontractors have familiarized themselves with the safety program and agreed to abide by said program and training regimen thereunder.

- DD. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." In the first line of Subparagraph 11.1.1, following the work "companies," insert the following:

\*, acceptable to the Owner,."

- EE. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." Add the following to subparagraph 11.1.3:

"Certificates called for herein shall be furnished in duplicate and shall specifically set forth evidence of all coverage required by 11.1.2 and the Construction Manager shall furnish to the Architect copies of all endorsements that are subsequently issued amending coverage or limits."

- FF. SUBPARAGRAPH 13.4.3. add as a new subparagraph:

"In the event of any litigation between the parties, the prevailing party shall be entitled to reimbursements for all reasonable attorneys' fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party to the extent allowed by law."

- GG. PARAGRAPH 13.5 "TESTS AND INSPECTIONS" is hereby supplemented by the addition of the following subparagraph: -

"13.5.7 When work has been installed contrary to any Contract requirements and the Construction Manager requests the privilege of testing in lieu of removal, such testing shall be at the Construction Manager's expense."

- HH. INTENTIONALLY OMITTED

- II. Add the following new Article:

#### ARTICLE 15: REQUESTS FOR INFORMATION

15.1.1 In the event that the Construction Manager or its subcontractor, at any time, determines that some portion of the Drawings, Specifications, or other Contract Documents requires clarification or interpretation by the Architect, the Construction Manager shall submit a Request for Information in writing to the Architect. Requests for information may only be submitted by the Construction Manager and shall be only submitted on the Request for Information Forms provided by the Architect. The Construction Manager shall clearly and concisely set forth the issue for which clarification and interpretation is sought and why a response is needed from the Architect. If the Request for information is being used to request confirmation of an interpretation or understanding of a requirement, the Construction Manager shall set forth that interpretation or understanding of the requirement along with reasons why such an understanding was reached.

15.1.2 The Architect will review all Requests for information to determine whether they are Requests for information within the meaning of this term. If the Architect determines

that the document is not a Request for Information, it will be returned to the Construction Manager, unreviewed as to content, for resubmittal on the proper form and in the proper manner. In either case, the Architect must reply to RFI in writing within the time requested by the Construction Manager, or three (3) working days, whichever is earlier.

15.1.3 Responses from the Architect are not intended to change any requirement of the Contract Documents. In the event the Construction Manager believes that a response to a Request for Information will cause a change to the requirements of the Contract Document, the Construction Manager shall immediately give written notice to the Architect in accordance with Section 4 of the General Conditions stating that the Construction Manager considers the response to be a change in the scope of work or a change to the project schedule.

END OF SUPPLEMENTARY CONDITIONS

**RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit "C"**

**Weather Delays**

1. A "Work Day" is defined as Monday thru Friday, 7:30 am- 4:00 pm.
2. The occurrence of one or more of the following will constitute a weather delay as indicated:
  - a. 0.25" of rain during the workday constitutes one lost workday
  - b. 2.0" of snow during the workday constitutes one lost workday
  - c. 12" of snow in a 24-hour period constitutes two lost workdays.
  - d. Temperature of 5 degrees below zero (Fahrenheit) constitutes one lost workday.
  - e. Any drying time required for soil stabilization (as directed by the geotechnical engineer) due to rain or snow will constitute lost work day(s).
3. Weather days will be included in the final schedule approved as part of the GMP proposal to be incorporated into the contract by amendment. The number of weather days included will be in accordance with Section 3.P of Exhibit B. Adjustments to the contract completion dates due to adverse weather will be made in accordance with Section 3.P of Exhibit B.

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**RainbowVision Santa Fe/Weis Contract Agreement  
Exhibit "D"  
Personnel Billing Rates**

| Position                               | Reimbursable<br>as a Cost of<br>the Work<br>(w/in GMP) | Included<br>in Fee | Notes | Expected<br>to be<br>Full or Part<br>Time | Billing<br>Rate<br>(\$/hr) |
|----------------------------------------|--------------------------------------------------------|--------------------|-------|-------------------------------------------|----------------------------|
| <b>Field Staff Stationed on Site</b>   |                                                        |                    |       |                                           |                            |
| Superintendent                         | X                                                      |                    | 1     | Full                                      | \$70                       |
| Project Engineer, QA/QC                | X                                                      |                    | 1     | Full                                      | \$80                       |
| Carpenter                              | X                                                      |                    | 2     | Full                                      | Varies - local rate        |
| Laborer                                | X                                                      |                    | 2     | Full                                      | Varies - local rate        |
| <b>Personnel Not Stationed on Site</b> |                                                        |                    |       |                                           |                            |
| Vice President                         |                                                        | X                  |       |                                           |                            |
| CFO                                    |                                                        | X                  |       |                                           |                            |
| Project Manager                        | X                                                      |                    | 3     | Part                                      | \$76                       |
| General Superintendent                 | X                                                      |                    | 3     | Part                                      | \$75                       |
| Project Coordinator                    |                                                        | X                  |       |                                           |                            |
| Safety Director                        | X                                                      |                    | 3     | Part                                      | \$50                       |
| Project Accountant                     |                                                        | X                  |       |                                           |                            |
| <b>Pre-Construction Personnel</b>      |                                                        |                    |       |                                           |                            |
| Senior Estimator/Pre-Con Services M    | X                                                      |                    | 4     | Part                                      | \$90                       |
| Assistant Estimator                    | X                                                      |                    | 4     | Part                                      | \$60                       |

**Notes:**

- 1 Field staff on project site.
- 2 It is expected that all trade work will be subcontracted. Trade labor rates shown only if need for Gen Conditions.
- 3 Billed only for time spent on site and traveling to project
- 4 Billed only for time during pre-construction phase, subject to Pre-construction services billing cap (see Exhibit F).

**RainbowVision Santa Fe/Wele Contract Agreement  
Exhibit E  
Project Scope & Budget Summary**

- The Scope of the project includes:
  - 40 Single-story Condominium living units
  - 80 Single-level Independent Living units built in a series of two-story buildings
  - 28 Assisted Living apartments (and related support spaces) constructed on the 2<sup>nd</sup> level of the central services building
  - Central services building (El Centro) containing commercial kitchen, dining spaces, activity spaces, administrative and marketing offices, retail spaces, and a spa/wellness center.
  - 13 acres of site development, with some off-site, public improvements
  - Total building area is approximately 183,000 sf.
- Based on a preliminary site plan and building design commissioned by the Owner, the Construction Manager prepared a detailed, preliminary cost report and presented that report to the Owner on February 1, 2004. Based on that scope and cost report, the Owner has established a construction budget of \$20,540,000, based on the Preliminary Divisional Cost Breakdown shown in Exhibit F.
- The Owner has contracted with the Architect to complete the design of the project in accordance with the budget stated above. The completion of the design, and related activities is proceeding in accordance with the Preconstruction Phase Schedule prepared and updated regularly by the Construction Manager. See Exhibit G.
- The Construction Manager has also prepared a Preliminary Construction Schedule. See Exhibit H. A final Construction Schedule will be included in the GMP report and made part of the contract by amendment.
- The Owner, Architect and Construction Manager are working together to monitor the completion of this design to ensure meeting the Construction Budget.
- Upon receipt of the Design Development documents, the Construction Manager will, in accordance with contract Section 2.2 prepare a GMP report that will include all of the elements outlined in Section 2.2.4. Prior to submitting the final GMP report, the Construction Manager will review the preliminary cost estimates with the Owner and Architect to determine if any adjustments to scope are required in order to achieve the construction budget stated above. Upon approval by the Owner, the GMP will be incorporated into the contract by amendment, in accordance with Section 2.2.
- During the completion of the design The Construction Manager will continue to meet regularly with the Owner and Architect, and will regularly review the Architect's work in progress to monitor the design as a means to ensure conformance to the construction budget.

**RainbowVision Santa Fe/Weta Contract Agreement  
EXHIBIT F**

**Preliminary Divisional Cost Breakdown**

| <b>C.S.I. SYSTEMS BREAKDOWN</b>            |       | <b>Total<br/>Costs</b> | <b>%</b>    |
|--------------------------------------------|-------|------------------------|-------------|
| Division 1 - General Conditions            |       | \$1,047,401            | 5.9%        |
| Division 1 - Building Permit Allowance     |       | \$184,820              | 1.0%        |
| Division 2 - Site Construction             |       | \$1,534,319            | 8.7%        |
| Division 3 - Concrete                      |       | \$965,149              | 5.5%        |
| Division 4 - Masonry                       |       | \$488,508              | 2.8%        |
| Division 5 - Metals                        |       | \$439,822              | 2.5%        |
| Division 6 - Woods & Plastics              |       | \$2,609,476            | 14.8%       |
| Division 7 - Thermal & Moisture Protection |       | \$988,353              | 5.5%        |
| Division 8 - Doors & Windows               |       | \$771,105              | 4.4%        |
| Division 9 - Finishes                      |       | \$3,286,188            | 18.6%       |
| Division 10 - Specialties                  |       | \$592,969              | 3.4%        |
| Division 11 - Equipment (See Note 1)       |       | \$445,320              | 2.5%        |
| Division 12 - Furnishings (See Note 2)     |       | \$49,196               | 0.3%        |
| Division 14 - Conveying                    |       | \$230,919              | 1.3%        |
| Division 15 - Mechanical                   |       | \$2,410,820            | 13.7%       |
| Division 16 - Electrical                   |       | \$1,838,100            | 9.3%        |
| <b>Sub-Total</b>                           |       | <b>\$17,661,276</b>    | <b>100%</b> |
| Escalation - For 2004                      | 0.0%  | -                      |             |
| <b>Sub-Total</b>                           |       | <b>\$17,661,276</b>    |             |
| Est./Const Contingency - El Centro         | 5.0%  | \$243,521              |             |
| Est./Const Contingency - Balance           | 3.0%  | \$383,726              |             |
| <b>Sub-Total</b>                           |       | <b>\$18,288,523</b>    |             |
| Builders Risk Insurance                    | 0.8%  | \$148,308              |             |
| Liability Insurance                        | 0.65% | \$156,698              |             |
|                                            |       | <b>\$18,591,627</b>    |             |
| Construction Manager Fee                   | 3.00% | \$557,746              |             |
| <b>Sub-Total</b>                           |       | <b>\$19,148,273</b>    |             |
| Performance and Payment Bond               |       | \$108,383              |             |
| NM Gross Receipts Tax                      |       | \$1,284,062            |             |
| <b>Project Totals</b>                      |       | <b>\$20,539,728</b>    |             |

**Notes:**

1. "Equipment" includes residential appliances, commercial kitchen and laundry equipment.
2. "Furnishings" does not include FF&E - which is being designed and purchased by the Owner under a separate contract.

**RainbowVision Santa Fe/Vels Contract Agreement  
Exhibit G  
Preconstruction Phase Schedule**

Refer to the "Preconstruction Schedule" dated  
separately but made a part of this Exhibit by reference.

(filename: RVSF007), attached

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**Rainbow Vision Santa Fe/Weis Contract Agreement**  
**Exhibit H**  
**Preliminary Construction Phase Schedule**

Refer to the "Preliminary Construction Schedule" dated  
attached separately but made a part of this Exhibit by reference.

(filename: )

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Amendment No. 1  
(Revised December 15, 2004)  
To Contract Agreement Between  
RainbowVision Santa Fe, LLC and Wels Builders, Inc

In accordance with article 2.2.9 of the Contract Agreement, the Guaranteed Maximum Price (GMP) and Project Schedule are hereby modified to reflect the following:

- The Guaranteed Maximum Price will be Twenty-One Million Five Hundred Thirty Nine Thousand, Seven Hundred Twenty-Eight Dollars (\$21,539,728).
- The Construction Start date will be January 3, 2005. Based on that start date:
- The Substantial Completion date for Buildings 16, 17, 18, 19, and 20 will be October 28, 2005.
- The Substantial Completion date for the balance of the project will be April 28, 2006.

Accordingly, the GMP Divisional Cost Breakdown (Exhibit F) shall be modified as per the attached revision, dated September 30, 2004. The revised GMP is based on the following:

- Wels September 15, 2004 "Confirmation of GMP" letter (with attachments)
- Wels September 30, 2004 "Summary of Approved Enhancements"

The Construction Schedule (Exhibit H) shall be as shown in the attached update, dated December 15, 2004.

For:  
RainbowVision Santa Fe, LLC

(Signature)

(Printed Name and Title)

(Date)

For:  
Wels Builders Inc.

  
(Signature)

PETER WORTHINGTON, VICE PRESIDENT  
(Printed Name and Title)

DEC-15, 2004  
(Date)

# EXHIBIT D

4125  
ENDORSED  
First Judicial District Court

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

APR 30 2007

Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2268  
Santa Fe, NM 87504-2268

RAINBOWVISION SANTA FE, LLC,

Plaintiff,

vs.

NO. D-0101-CV 2007-00010

WEIS BUILDERS, INC.,  
PCI CONTRACTORS, INC., and RLA, INC.

Defendants.

and

WEIS BUILDERS, INC.

Third Party Plaintiff,

vs.

HSH NORDBANK AG,  
SIMS RAINBOWVISION LLC,  
LOS ALAMOS NATIONAL BANK,  
VALLEY NATIONAL BANK,  
LES FIE DRYWALL, INC.,  
RODGERS PLUMBING AND HEATING CO. INC.,  
DOMINGUEZ CARPET AND TILE, INC.,  
EKER BROTHERS, INC., and  
T L C COMPANY, INC.

Third Party Defendants.

AMENDED THIRD PARTY COMPLAINT

Weis Builders Inc. ("WBI") as Third Party Plaintiff, makes this Third Party Complaint.

1. WBI is a Minnesota corporation duly and validly licensed in the State of New Mexico.

4/30/07

2. HSH Nordbank AG is a lending institution located in New York, NY.
3. Los Alamos National Bank is a banking institution in Los Alamos, New Mexico organized and existing under the laws of the United States of America.
4. Valley National Bank is a banking institution in Espanola, New Mexico organized and existing under the laws of the United States of America.
5. Les File Drywall is a New Mexico corporation with its principal place of business in Albuquerque, New Mexico.
6. Rodgers Plumbing and Heating Co., Inc. is a New Mexico corporation with its principal place of business in Albuquerque, New Mexico.
7. Dominguez Carpet And Tile, Inc. is a New Mexico corporation with its principal place of business in Santa Fe, New Mexico.
8. Eker Brothers, Inc. is a New Mexico Corporation with its principal address in Santa Fe, New Mexico, and its registered agent in Albuquerque, New Mexico.
9. T L C Company, Inc. is a New Mexico Corporation with its principal place of business in Albuquerque, New Mexico.
10. On or about April 28, 2004, WBI and RainbowVision Santa Fe, LLC ("RVSF") entered into a contract under which WBI agreed to provide certain construction services, labor, and materials for work specified in the contract (the "Contract") for the RainbowVision Santa Fe Retirement Community (the "Project"), in Santa Fe, New Mexico, in return for compensation for its services. A true and correct copy of the Contract is being served with this pleading as Exhibit 1 pursuant to Rule 1-009(D) NMRA.
11. RVSF has improperly withheld payment from WBI.

12. RVSF has not paid the retainage to WBI.
13. An unpaid balance of at least \$1,522,319, which includes, among other things, the unpaid Contract balance (including retainage) and additional contract adjustments is currently owed to WBI for the reasonable value of its improvements to the Property, together with interest, costs, disbursements, and reasonable attorneys' fees.
14. On or about February 2, 2007, WBI filed a Claim of Lien in the sum of \$1,522,319.00, plus legal fees, costs, and interest upon the Property for amounts owed WBI for its improvements to the Property), which Claim of Lien was recorded as Instrument #1469461 in the records of Santa Fe County. A true and correct copy of WBI's Claim of Lien is being served with this pleading as Exhibit 2 pursuant to Rule 1-009(I) NMRA.
15. The Project is located on real property located at 500 Rodeo Road, Santa Fe New Mexico (the "Property") and more particularly described as:

That certain tract of land within Section 11, Township 16 North,  
Range 9 East, NMPM per plat 605/24 bearing uniform property code  
number 1-053-095-353-509

16. WBI specifically excepts from its Claim of Lien the following condominiums:

Unit 110, Instrument No. 1437694, records of Santa Fe County, New Mexico.  
Unit 111, Instrument No. 1431907, records of Santa Fe County, New Mexico.  
Unit 112, Instrument No. 1431358, records of Santa Fe County, New Mexico.  
Unit 113, Instrument No. 1431744, records of Santa Fe County, New Mexico.  
Unit 120, Instrument No. 1438953, records of Santa Fe County, New Mexico.  
Unit 121, Instrument No. 1432827, records of Santa Fe County, New Mexico.  
Unit 122, Instrument No. 1431782, records of Santa Fe County, New Mexico.  
Unit 123, Instrument No. 1431910, records of Santa Fe County, New Mexico.  
Unit 210, Instrument No. 1434135, records of Santa Fe County, New Mexico.  
Unit 211, Instrument No. 1440074, records of Santa Fe County, New Mexico.  
Unit 220, Instrument No. 1434302, records of Santa Fe County, New Mexico.  
Unit 221, Instrument No. 1432831, records of Santa Fe County, New Mexico.  
Unit 310, Instrument No. 1433860, records of Santa Fe County, New Mexico.  
Unit 311, Instrument No. 1431746, records of Santa Fe County, New Mexico.  
Unit 312, Instrument No. 1432634, records of Santa Fe County, New Mexico.  
Unit 313, Instrument No. 1432625, records of Santa Fe County, New Mexico.

Unit 111, Instrument No. 1431907, records of Santa Fe County, New Mexico.  
 Unit 410, Instrument No. 1434300, records of Santa Fe County, New Mexico.  
 Unit 411, Instrument No. 1431909, records of Santa Fe County, New Mexico.  
 Unit 412, Instrument No. 1431357, records of Santa Fe County, New Mexico.  
 Unit 413, Instrument No. 1432007, records of Santa Fe County, New Mexico.  
 Unit 510, Instrument No. 1433009, records of Santa Fe County, New Mexico.  
 Unit 511, Instrument No. 1431899, records of Santa Fe County, New Mexico.  
 Unit 521, Instrument No. 1431361, records of Santa Fe County, New Mexico.  
 Unit 1110, Instrument No. 1433094, records of Santa Fe County, New Mexico.  
 Unit 1111, Instrument No. 1435053, records of Santa Fe County, New Mexico.  
 Unit 1120, Instrument No. 1438955, records of Santa Fe County, New Mexico.  
 Unit 1121, Instrument No. 1432829, records of Santa Fe County, New Mexico.  
 Unit 1210, Instrument No. 1431658, records of Santa Fe County, New Mexico.  
 Unit 1211, Instrument No. 1432825, records of Santa Fe County, New Mexico.  
 Unit 1213, Instrument No. 1434137, records of Santa Fe County, New Mexico.  
 Unit 1410, Instrument No. 1431748, records of Santa Fe County, New Mexico.  
 Unit 1412, Instrument No. 1434459, records of Santa Fe County, New Mexico.  
 Unit 1511, Instrument No. 1431362, records of Santa Fe County, New Mexico.  
 Unit 1512, Instrument No. 1434580, records of Santa Fe County, New Mexico.  
 Unit 1610, Instrument No. 1406282, records of Santa Fe County, New Mexico.  
 Unit 1611, Instrument No. 1405660, records of Santa Fe County, New Mexico.  
 Unit 1612, Instrument No. 1405424, records of Santa Fe County, New Mexico.  
 Unit 1613, Instrument No. 1405423, records of Santa Fe County, New Mexico.  
 Unit 1710, Instrument No. 1405659, records of Santa Fe County, New Mexico.  
 Unit 1711, Instrument No. 1406128, records of Santa Fe County, New Mexico.  
 Unit 1712, Instrument No. 1405655, records of Santa Fe County, New Mexico.  
 Unit 1713, Instrument No. 1406704, records of Santa Fe County, New Mexico.  
 Unit 1810, Instrument No. 1405428, records of Santa Fe County, New Mexico.  
 Unit 1811, Instrument No. 1405906, records of Santa Fe County, New Mexico.  
 Unit 1812, Instrument No. 1405564, records of Santa Fe County, New Mexico.  
 Unit 1813, Instrument No. 1405565, records of Santa Fe County, New Mexico.  
 Unit 1911, Instrument No. 1406812, records of Santa Fe County, New Mexico.  
 Unit 1912, Instrument No. 1405657, records of Santa Fe County, New Mexico.  
 Unit 1913, Instrument No. 1420278, records of Santa Fe County, New Mexico.  
 Unit 2010, Instrument No. 1405566, records of Santa Fe County, New Mexico.  
 Unit 2011, Instrument No. 1405190, records of Santa Fe County, New Mexico.  
 Unit 2012, Instrument No. 1405557, records of Santa Fe County, New Mexico.  
 Unit 2013, Instrument No. 1405530, records of Santa Fe County, New Mexico.

17. HSH Nordbank AG claims or may claim an interest in the Property subject to the Claim of Lien by virtue of the Real Estate Mortgage with Assignment of Rents and Security Agreement and Fixture Filing recorded with the Santa Fe County Clerk December 21, 2004 as document number 1359754 and by virtue of UCC filings with the Santa Fe County Clerk December 21, 2004, as document number 1359845.

not been remedied, Contract warranty obligations have not been honored, and that substantial completion was not achieved within the times specified in the Contract.

28. The purported damages referred to in Plaintiff RVSF's Complaint, if any, were caused by the conduct of the Third-Party Complaint Indemnity Subcontractors insofar as the Third-Party Complaint Indemnity Subcontractors performed defective work that did not meet industry standards, failed to remedy defective work, failed to honor their warranty obligations, and failed to perform their work within the times specified in the Contract.

29. If RVSF has suffered any loss or damage as alleged in its Complaint or otherwise for work performed for the Third-Party Complaint Indemnity Subcontractors, and such liability is expressly denied by WBI, then such loss or damage was directly caused by the negligence, breach of contract, breach of warranty, products liability, or other fault or improper action of the Third-Party Complaint Indemnity Subcontractors.

30. If WBI is found to have any liability to RVSF for work performed by the Third-Party Complaint Indemnity Subcontractors, and such liability is specifically denied, then WBI is entitled to contribution or indemnity from the Third-Party Complaint Indemnity Subcontractors pursuant to equitable principles and the express and implied terms of contractual agreements.

31. WBI is entitled to entry of judgment in its favor and against the Third-Party Complaint Indemnity Subcontractors, based upon principles of contribution and indemnity, for an amount equal to any liability on RVSF's claims regarding the Third-Party Complaint Indemnity Subcontractors' work, although such liability is denied. WBI is further entitled to entry of judgment in its favor and against the Third-Party Complaint

Indemnity Subcontractors for an amount equal to the attorneys' fees and costs incurred to defend against RVSP's claims.

**WHEREFORE,** Weis Builders, Inc. respectfully requests the Court to enter judgment as follows:

- a. That the Claim of Lien of WBI be adjudged a proper lien on the Property for the amounts set forth above and that it be adjudged paramount and superior to the interest of any others and the same be foreclosed.
- b. That any other persons claiming, by through or under them be barred and forever foreclosed of all right, interest, or claim in or to the Property.
- c. That the Property be sold under the direction of the Court by a Special Master appointed for such purpose and the proceeds of such sale be applied in the priority provided in the WBI's Claim of Lien and according to law, and the excess, if any, of the proceeds of the sale over the amount due to WBI, after inclusion of costs of sale including Special Master's fees, be distributed according to law and the further order of the Court.
- d. That WBI be given the right to become a purchaser at the sale, and that the purchaser at the sale be let into possession of the Property.
- e. That WBI have a deficiency judgment for the amount of any deficiency, if the proceeds of such sale are not sufficient to satisfy the amount due and owing WBI as set forth above.
- f. That WBI have judgment for all costs expended herein until the time of sale, including costs of sale of the Property pursuant to judgment of



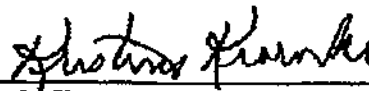
foreclosure, and such other and further relief as the Court may deem just and proper.

- g. Judgment in favor of WBI and against Les File Drywall, Inc., Rodgers Plumbing & Heating Co., Inc. Dominguez Carpet and Tile, Inc., Eker Brothers, Inc., and T L C Company, Inc. on WBI's claim against Les File Drywall, Inc., Rodgers Plumbing & Heating Co., Inc. Dominguez Carpet and Tile, Inc., Eker Brothers, Inc., and T L C Company, Inc. for contribution and indemnity, including attorneys' fees and costs incurred to defend against RVSF's claims.
- h. As part of any judgment or order in favor of WBI, an award to WBI of its costs, disbursements, and attorneys' fees; and
- i. Any such other legal or equitable relief as the Court deems just.

Dated: April 23, 2007

Respectfully submitted,

FABYANSKE, WESTRA, HART, &  
THOMSON, P.A.

By:   
Dean E. Thomson (MN ID #141045)  
(Admitted Pro Hac Vice)  
Kristine Kroenke (MN ID #336294)  
(Admitted Pro Hac Vice)  
800 LaSalle Avenue, Suite 1900  
Minneapolis, MN 55402  
(612-359-7600)

-and-

**CALVERT MENICUCCI P.C.**

Carl A. Calvert  
8900 Washington St., N.E., Suite A  
Albuquerque, NM 87113  
(505) 247-9100

**ATTORNEYS FOR THE DEFENDANT  
AND COUNTERCLAIMANT WEIS**

**Certificate of Service**

I certify that a copy of the foregoing was mailed to

Jack N. Hardwick, Esq.  
Sommer, Udall, Hardwick, Ahern & Hyatt, LLP  
200 West Marcy Street, Suite 129  
Santa Fe, NM 87501  
PO Box 1984  
Santa Fe, NM 87504-1984

Ronald J. Van Amberg, Esq.  
P.O. Box 1447  
Santa Fe, NM 87504-1447

Murray N. Thayer, Esq.  
2021 Mountain Road, NW  
Albuquerque, NM 87104-1444

James R. Jurgens, Esq.  
Jurgens & With, P.A.  
100 La Salle Circle, Suite A  
Santa Fe, NM 87505

on this 25<sup>th</sup> day of April, 2007.

  
\_\_\_\_\_  
Carl A. Calvert

RV  
# C8

# **AIA** Document A121™CMc – 2003 and AGC Document 565

## **Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is Also the Constructor**

### **AGREEMENT**

made as of the Twenty Eighth day of April in the year of Two Thousand and Four  
(By word, indicate day, month and year)

### **BETWEEN the Owner: (Name and address)**

RainbowVision Santa Fe LLC  
4001 Office Court Road,  
Suite 403  
Santa Fe, NM 87505

### **and the Construction Manager: (Name and address)**

Weiss Builders, Inc.  
7645 Lyndale Avenue South  
Minneapolis, MN 55423

### **The Project is: (Name, address and brief description)**

RainbowVision Santa Fe Retirement Community  
500 Rodeo Road at Antigua  
Santa Fe, NM 87505

### **The Architect is: (Name and address)**

Lloyd & Associates Architects  
301 N. Guadalupe Suite 104  
Santa Fe, NM 87501

The Owner and Construction Manager agree as set forth below:

### **ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The 1997 Edition of AIA® Document A201™, General Conditions of the Contract for Construction, is referred to herein. This Agreement requires modification if other general conditions are utilized.



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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 RELATIONSHIP OF PARTIES

The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services and use the Construction Manager's best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Construction Manager and other persons or entities employed by the Owner for the Project.

### § 1.2 GENERAL CONDITIONS

For the Construction Phase, the General Conditions of the contract shall be the AIA® Document A201™-1997, General Conditions of the Contract for Construction, which is incorporated herein by reference. For the Preconstruction Phase, or in the event that the Preconstruction and Construction Phases proceed concurrently, A201™-1997 shall apply to the Preconstruction Phase only as specifically provided in this Agreement. The term "Contractor" as used in A201™-1997 shall mean the Construction Manager.

## ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager shall perform the services described in this Article. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction Phase services. If the Owner and Construction Manager agree, after consultation with the Architect, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

### § 2.1 PRECONSTRUCTION PHASE

#### § 2.1.1 PRELIMINARY EVALUATION

The Construction Manager shall provide a preliminary evaluation of the Owner's program and Project budget requirements, each in terms of the other.

#### § 2.1.2 CONSULTATION

The Construction Manager with the Architect shall jointly schedule and attend regular meetings with the Owner. The Construction Manager shall consult with the Owner and Architect regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.

#### § 2.1.3 PRELIMINARY PROJECT SCHEDULE

When Project requirements described in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare, and periodically update, a preliminary Project schedule for the Architect's review and the Owner's approval. The Construction Manager shall obtain the Architect's approval of the portion of the preliminary Project schedule relating to the performance of the Architect's services. The Construction Manager shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect and Construction Manager. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed date of Substantial Completion. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

#### § 2.1.4 PHASED CONSTRUCTION

The Construction Manager shall make recommendations to the Owner and Architect regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economies, time of performance, availability of labor and materials, and provisions for temporary facilities.

#### **§ 2.1.5 PRELIMINARY COST ESTIMATES**

§ 2.1.5.1 When the Owner has sufficiently identified the Project requirements and the Architect has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a preliminary cost estimate utilizing area, volume or similar conceptual estimating techniques.

§ 2.1.5.2 When Schematic Design Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the Design Development Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

§ 2.1.5.3 When Design Development Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare a detailed estimate with supporting data for review by the Architect and approval by the Owner. During the preparation of the Construction Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

§ 2.1.5.4 If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

#### **§ 2.1.6 SUBCONTRACTORS AND SUPPLIERS**

The Construction Manager shall seek to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors, including suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner know of any objection to such subcontractor or supplier. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the Owner or Architect later to object to or reject any proposed subcontractor or supplier.

#### **§ 2.1.7 LONG-LEAD-TIME ITEMS**

The Construction Manager shall recommend to the Owner and Architect a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager. The Construction Manager shall expedite the delivery of long-lead-time items.

#### **§ 2.1.8 EXTENT OF RESPONSIBILITY**

The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Owner and the Owner's professional consultants. It is not the Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Drawings and Specifications are at variance therewith, the Construction Manager shall promptly notify the Architect and Owner in writing.

#### **§ 2.1.9 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION**

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

#### **§ 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL AND CONTRACT TIME**

§ 2.2.1 When the Drawings and Specifications are sufficiently complete, the Construction Manager shall propose a Guaranteed Maximum Price, which shall be the sum of the estimated Cost of the Work and the Construction Manager's Fee.

§ 2.2.2 As the Drawings and Specifications may not be finished at the time the Guaranteed Maximum Price proposal is prepared, the Construction Manager shall provide in the Guaranteed Maximum Price for further development of

the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The estimated Cost of the Work shall include the Construction Manager's contingency, a sum established by the Construction Manager for the Construction Manager's exclusive use to cover costs arising under Section 2.2.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order.

#### § 2.2.4 BASIS OF GUARANTEED MAXIMUM PRICE

The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include:

1. A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Guaranteed Maximum Price proposal.
2. A list of allowances and a statement of their basis.
3. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
4. The proposed Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the Fee that comprise the Guaranteed Maximum Price.
5. The Date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents Issuance dates upon which the date of Substantial Completion is based.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by the Construction Manager.

§ 2.2.7 Prior to the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing.

§ 2.2.8 Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis shall be set forth in Amendment No. 1. The Guaranteed Maximum Price shall be subject to additions and deductions by a change in the Work as provided in the Contract Documents, and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 2.2.9 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in Amendment No. 1. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

§ 2.2.10 The Guaranteed Maximum Price shall include in the Cost of the Work only those taxes which are enacted at the time the Guaranteed Maximum Price is established.

#### § 2.3 CONSTRUCTION PHASE

##### § 2.3.1 GENERAL

§ 2.3.1.1 The Construction Phase shall commence on the earlier of:

- (1) the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, or
- (2) the Owner's first authorization to the Construction Manager to:
  - (a) award a subcontract, or
  - (b) undertake construction Work with the Construction Manager's own forces, or
  - (c) issue a purchase order for materials or equipment required for the Work.

#### § 2.3.2 ADMINISTRATION

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated to a special design for the Work from the list previously reviewed and, after analyzing such bids, shall deliver such bids to the Owner and Architect. The Owner will then determine, with the advice of the Construction Manager and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the Construction Manager shall obtain bids; however, if the Guaranteed Maximum Price has been established, the Owner may not prohibit the Construction Manager from obtaining bids from other qualified bidders. ~~The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.~~

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Construction Manager to the Owner and Architect (1) is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of Sections 7.1.8 and 7.1.9 and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.3.2.4 The Construction Manager shall schedule and conduct meetings at which the Owner, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

§ 2.3.2.5 Promptly after the Owner's acceptance of the Guaranteed Maximum Price proposal, the Construction Manager shall prepare a schedule in accordance with Section 3.10 of A201™-1997, including the Owner's occupancy requirements.

§ 2.3.2.6 The Construction Manager shall provide monthly written reports to the Owner and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.3.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals.

#### § 2.4 PROFESSIONAL SERVICES

Section 3.12.10 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### § 2.5 HAZARDOUS MATERIALS

Section 10.3 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.



## **ARTICLE 3 OWNER'S RESPONSIBILITIES**

### **§ 3.1 INFORMATION AND SERVICES**

§ 3.1.1 The Owner shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Owner's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

§ 3.1.2 The Owner shall, at the written request of the Construction Manager prior to commencement of the Construction Phase and thereafter, furnish to the Construction Manager reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.3 The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies for changes in the Work and other costs which are the responsibility of the Owner.

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### **§ 3.1.4 STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS**

In the Preconstruction Phase, the Owner shall furnish the following with reasonable promptness and at the Owner's expense. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely upon the accuracy of any such information, reports, surveys, drawings and tests described in Sections 3.1.4.1 through 3.1.4.4 but shall exercise customary precautions relating to the performance of the Work.

§ 3.1.4.1 Reports, surveys, drawings and tests concerning the conditions of the site which are required by law.

§ 3.1.4.2 Surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a project benchmark.

§ 3.1.4.3 The services of a geotechnical engineer when such services are requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials; ground corrosion and resistivity tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate professional recommendations.

§ 3.1.4.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.

§ 3.1.4.5 The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.

### **§ 3.2 OWNER'S DESIGNATED REPRESENTATIVE**

The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. This representative shall have the authority to make decisions on behalf of the Owner concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201™-1997, the Architect does not have such authority.

### **§ 3.3 ARCHITECT**

The Owner shall retain an Architect to provide Basic Services, including normal structural, mechanical and electrical engineering services, other than cost estimating services. The Owner shall authorize and cause the Architect to provide Additional Services, requested by the Construction Manager which must necessarily be provided by the Architect for the Preconstruction and Construction Phases of the Work. Such services shall be

provided in accordance with time schedules agreed to by the Owner, Architect and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect, from which compensation provisions may be deleted.

#### § 3.4 LEGAL REQUIREMENTS

The Owner shall determine and advise the Architect and Construction Manager of any special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project. The Owner shall furnish such legal services as are necessary to provide the information and services required under Section 3.1.

### ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

The Owner shall compensate and make payments to the Construction Manager for Preconstruction Phase services as follows:

#### § 4.1 COMPENSATION

§ 4.1.1 For the services described in Sections 2.1 and 2.2, the Construction Manager's compensation shall be calculated as follows:

The Construction Manager's fee for Preconstruction Phase Services shall be Seven Thousand Dollars (\$7,000), in accordance with Weis's 1/22/03 letter of intent.

*(State basis of compensation, whether a stipulated sum, multiple of Direct Personnel Expense, actual cost, etc. Include a statement of reimbursable cost items as applicable.)*

§ 4.1.2 Compensation for Preconstruction Phase Services shall be equitably adjusted if such services extend beyond April 1, 2004 in accordance with Weis's 12/22/03 letter of intent.

§ 4.1.3 If compensation is based on a multiple of Direct Personnel Expense, Direct Personnel Expense is defined as the direct salaries of the Construction Manager's personnel engaged in the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

#### § 4.2 PAYMENTS

§ 4.2.1 Payments shall be made monthly following presentation of the Construction Manager's invoice and, where applicable, shall be in proportion to services performed.

§ 4.2.2 Payments are due and payable Thirty ( 30 ) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear interest at the rate entered below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon.)*

Interest rate shall be 4% above US Bancorp Prime Rate.

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

### ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

The Owner shall compensate the Construction Manager for Construction Phase services as follows:

### § 5.1 COMPENSATION

§ 5.1.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager in current funds the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Construction Manager's Fee determined as follows:

Base Fee will be Three percent (3.0%) of the Cost of the Work as defined in Article 6. For changes in the Work not associated with any "Resident Upgrade Packages" that are to be offered on a unit-by-unit basis, the fee for additive changes will be 3.0% and for deductive changes the fee will be 0.0%.

#### 5.1.2

In addition to the basic fees in 4.1.1 and 5.1.1 above, the Owner shall pay the Construction Manager a Resident Upgrade Fee equal to 15% of the cost of the work, together with such reasonable administrative costs that the Construction Manager will incur directly related to the performance of such work, associated with the Resident Upgrade Packages that the Owner is planning to offer. It is the intent that a limited number of such Upgrade packages will be offered by the Owner, and that once the scope and cost for the upgrades being considered is established, the Owner and Construction Manager will incorporate by Amendment to this Contract the terms and conditions pursuant to which the Construction Manager shall perform such work. It is intended that the Construction Manager will establish a lump sum price per unit type for each Upgrade Package to be offered, and that said lump sum price shall include the fee and administrative costs described above, as well as define the date for each unit by which the Owner must direct the Construction Manager to proceed with the Upgrade. Unit upgrades for which direction to proceed is given after the agreed upon date, or which reflect a deviation in scope from the defined Upgrade Packages will be evaluated separately, and a cost and time adjustment proposed, by the Construction Manager.

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

### § 5.2 GUARANTEED MAXIMUM PRICE

§ 5.2.1 The sum of the Cost of the Work and the Construction Manager's Fee are guaranteed by the Construction Manager not to exceed the amount provided in Amendment No. 1, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum as adjusted by approved changes in the Work is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner. At time of Final Completion, any costs savings shall be returned 100% to the Owner and 0% to the Construction Manager.

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

### § 5.3 CHANGES IN THE WORK

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of Amendment No. 1 may be determined by any of the methods listed in Section 7.3.3 of A201™-1997.

§ 5.3.2 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of A201™-1997 and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Section 7.3.6 of A201™-1997 shall have the meanings assigned to them in that document and shall not be modified by this Article 5. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.3 In calculating adjustments to the Contract, the terms "cost" and "costs" as used in the above-referenced provisions of A201™-1997 shall mean the Cost of the Work as defined in Article 6 of this Agreement, and the term "and a reasonable allowance for overhead and profit" shall mean the Construction Manager's Fee as defined in Section 5.1.1 of this Agreement.

§ 5.3.4 If no specific provision is made in Section 5.1.1 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.1 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

"Article 5.4: Commencement and Completion has been added. See Exhibit A."

#### ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

##### § 6.1 COSTS TO BE REIMBURSED

§ 6.1.1 The term "Cost of the Work" shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 6.

##### § 6.1.2 LABOR COSTS

- 1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's agreement, at off-site workshops.
- 2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's agreement. To the extent that some of the Construction Manager's supervisory and administrative personnel located at the Construction Manager's main office provide service to the project, a portion of their wages and salaries will be included in the cost of work and will be reimbursed in accordance with Exhibit C.

Classification

Name

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal office or offices other than the site office shall be included in the Cost of the Work, such personnel shall be identified below.)*

- 3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.
- 4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Cost of the Work under Sections 6.1.2.1 through 6.1.2.3.

##### § 6.1.3 SUBCONTRACT COSTS

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

##### § 6.1.4 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

- 1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.
- 2 Costs of materials described in the preceding Section 6.1.4.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

##### § 6.1.5 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

- 1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed.

whether sold to others or retained by the Construction Manager. Cost for items previously used by the Construction Manager shall mean fair market value.

- 2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval.
- 3 Costs of removal of debris from the site.
- 4 Reproduction costs, costs of telegrams, facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephone at the site and reasonable petty cash expenses of the site office.
- 5 That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while travelling in discharge of duties connected with the Work.

#### § 5.1.6 MISCELLANEOUS COSTS

- 1 That portion directly attributable to this Contract of premiums for insurance and bonds.  
*(If charges for self-insurance are to be included, specify the basis of reimbursement.)*
- 2 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.
- 3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.
- 4 Fees of testing laboratories for tests required by the Contract Documents, except those related to nonconforming Work other than that for which payment is permitted by Section 6.1.8.2.
- 5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the Guaranteed Maximum Price and provided that such royalties, fees and costs are not excluded by the last sentence of Section 3.17.1 of A201™-1997 or other provisions of the Contract Documents.
- 6 Data processing costs related to the Work.
- 7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.
- 8 Legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld.
- 9 Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
- 10 All premiums (without markup) and deductibles associated with Builder's Risk Insurance provided by the Construction Manager at the Owner's request.
- 11 All premiums (without markup) and deductibles associated with providing professional liability insurance for the mechanical and electrical design services for the condominiums and IL units.

#### § 5.1.7 OTHER COSTS

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

#### § 5.1.8 EMERGENCIES AND REPAIRS TO DAMAGED OR NONCONFORMING WORK

The Cost of the Work shall also include costs described in Section 6.1.1 which are incurred by the Construction Manager except, however, where conditions requiring such action were caused by or are the result of the Construction Manager's negligence.

7. In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.6 of A201™-1997.
2. In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this agreement of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, Subcontractors or suppliers.

§ 6.1.9 The costs described in Sections 6.1.1 through 6.1.8 shall be included in the Cost of the Work notwithstanding any provision of AIA or A201™-1997 other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.2.

#### § 6.2 COSTS NOT TO BE REIMBURSED

§ 6.2.1 The Cost of the Work shall not include:

1. Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Sections 6.1.2.2 and 6.1.2.3.
2. Expenses of the Construction Manager's principal office and offices other than the site office, except as specifically provided in Section 6.1.
3. Overhead and general expenses, except as may be expressly included in Section 6.1.
4. The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
5. Rental costs of machinery and equipment, except as specifically provided in Section 6.1.5.2.
6. Except as provided in Section 6.1.8.2, costs due to the negligence of the Construction Manager or to the failure of the Construction Manager to fulfill a specific responsibility to the Owner set forth in this Agreement.
7. Costs incurred in the performance of Preconstruction Phase Services.
8. Except as provided in Section 6.1.7.1, any cost not specifically and expressly described in Section 6.1.
9. Costs which would cause the Guaranteed Maximum Price to be exceeded.

#### § 6.3 DISCOUNTS, REBATES AND REFUNDS

§ 6.3.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be secured.

§ 6.3.2 Amounts which accrue to the Owner in accordance with the provisions of Section 6.3.1 shall be credited to the Owner as a deduction from the Cost of the Work.

#### § 6.4 ACCOUNTING RECORDS

§ 6.4.1 See Exhibit A for revised Accounting Records requirements.

#### ARTICLE 7 CONSTRUCTION PHASE

##### § 7.1 PROGRESS PAYMENTS

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

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

§ 7.1.3 Provided an Application for Payment is received by the Architect not later than the 30<sup>th</sup> day of a month, the Owner shall make payment to the Construction Manager not later than the 30<sup>th</sup> day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than Thirty ( 30 ) days after the Architect receives the Application for Payment.

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager; less (2) that portion of those payments attributable to the Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire ~~Guaranteed Maximum Price among the various portions of the Work~~; except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

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

- 1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.8 of A201™-1997, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
- 2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing.
- 3 Add the Construction Manager's Fee, less retainer of Five percent ( 5.00% ). The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the two preceding Sections bears to a reasonable estimate of the probable Cost of the Work upon its completion.
- 4 Subtract the aggregate of previous payments made by the Owner.
- 5 Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accounts in such documentation.
- 6 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of A201™-1997.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than Five percent ( 5.00% ). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts.

7.1.8.1 As an alternative means of achieving the 5% retainage described in 7.1.7 and 7.1.8 above, the Construction Manager and the Subcontractors may allocate a portion of their respective contract amounts to a "Final Completion" line item within each firm's schedule of values. The portions of each contract so allocated shall be equal to the 5% retainage stipulated. Billing against any such "final completion" line item in a schedule of values will be allowed only under the same circumstances as otherwise defined in the contract documents for the reduction or release of retainage.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data, that the Architect has made exhaustive or continuous on-site inspections or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

#### § 7.2 FINAL PAYMENT

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager when (1) the Contract has been fully performed by the Construction Manager except for the Construction Manager's responsibility to correct nonconforming Work, as provided in Section 12.2.2 of A201™-1997, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Owner's accountants; and (3) a final Certificate for Payment has then been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The amount of the final payment shall be calculated as follows:

1. Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price.
2. Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of A201™-1997 or other provisions of the Contract Documents.
3. Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse this difference to the Owner.

§ 7.2.3 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of A201™-1997. The time periods stated in this Section 7.2 supersede those stated in Section 9.4.1 of A201™-1997.

§ 7.2.4 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without a further decision of the Architect. Unless agreed to otherwise, a demand for mediation or arbitration of the disputed amount shall be made by the Construction Manager within 60 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Owner's



accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.5 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1 and not excluded by Section 6.2 (1) to correct nonconforming Work or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee, if any, related thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

#### ARTICLE 8 INSURANCE AND BONDS

##### § 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in Section 11.1 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance shall be as follows:

(Paragraph deleted)

None

8.1.2 Insurance provided will be per the construction Manager's standard policy. The Construction Manager will provide the Owner with a statement of the additional premium cost (if any) associated with other insurance coverage as the Owner may want to consider. If the Owner elects to require the Construction Manager to provide other coverage or limits, then the contract will be adjusted accordingly.

##### § 8.1.3

(Paragraph deleted)

§ 8.1.4 Other coverage:

*(If Umbrella Excess Liability coverage is required over the primary insurance or retention, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be attained by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)*

##### § 8.2 INSURANCE REQUIRED OF THE OWNER

During both phases of the Project, the Owner shall purchase and maintain liability and property insurance, including waivers of subrogation, as set forth in Sections 11.2 and 11.4 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

##### § 8.2.1 Property Insurance:

\$10,000 Deductible Per Occurrence

(Paragraph deleted)

### § 8.3 PERFORMANCE BOND AND PAYMENT BOND

§ 8.3.1 The Construction Manager shall (insert "shall" or "shall not") furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work. The amount of each bond shall be equal to One hundred percent ( 100.00% ) of the Contract Sum.

§ 8.3.2 The Construction Manager shall deliver the required bonds to the Owner after the contract is executed and three days before the commencement of any Work at the Project site. Further, Construction Manager shall deliver a binding commitment for the issuance of such bonds at least two weeks prior to the estimated date for the closing on Project financing. In the event of any early start as identified in paragraph 4.2.1.1 Owner may require Construction Manager to provide such bonds. Owner shall provide Construction Manager with 10 days notice of such requirement and stipulate in such notice the time for providing same, and the amount of coverage required by owner.

## ARTICLE 9 MISCELLANEOUS PROVISIONS

### § 9.1 DISPUTE RESOLUTION

§ 9.1.1 During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201™-1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

### § 9.2 OTHER PROVISIONS

§ 9.2.1 Unless otherwise noted, the terms used in this Agreement shall have the same meaning as those in A201™-1997, *General Conditions of the Contract for Construction*.

### § 9.2.2 EXTENT OF CONTRACT

This Contract, which includes this Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and Construction Manager. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

### § 9.2.3 OWNERSHIP AND USE OF DOCUMENTS

Article 1.6 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

### § 9.2.4 GOVERNING LAW

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

### § 9.2.5 ASSIGNMENT

The Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party herein and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 13.2.2 of A201™-1997, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

## ARTICLE 10 TERMINATION OR SUSPENSION

### § 10.1 TERMINATION PRIOR TO ESTABLISHING GUARANTEED MAXIMUM PRICE

§ 10.1.1 Prior to execution by both parties of Amendment No. 1 establishing the Guaranteed Maximum Price, the Owner may terminate this Contract at any time without cause, and the Construction Manager may terminate this Contract for any of the reasons described in Section 14.1.1 of A201™-1997.

§ 10.1.2 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 prior to commencement of the Construction Phase, the Construction Manager shall be equitably compensated for

Preconstruction Phase Services performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Section 4.1.1.

§ 10.1.3 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 after commencement of the Construction Phase, the Construction Manager shall, in addition to the compensation provided in Section 10.1.2, be paid an amount calculated as follows:

1. Take the Cost of the Work incurred by the Construction Manager.
2. Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.
3. Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain, and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders.

Subcontracts, purchase orders and rental agreements entered into by the Construction Manager with the Owner's written approval prior to the execution of Amendment No. 1 shall contain provisions permitting assignment to the Owner as described above. If the Owner accepts such assignment, the Owner shall reimburse or indemnify the Construction Manager with respect to all costs arising under the subcontract, purchase order or rental agreement except those which would not have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner elects not to accept the assignment of any subcontract, purchase order or rental agreement which would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager shall terminate such subcontract, purchase order or rental agreement and the Owner shall pay the Construction Manager the costs necessarily incurred by the Construction Manager by reason of such termination.

#### § 10.2 TERMINATION SUBSEQUENT TO ESTABLISHING GUARANTEED MAXIMUM PRICE

Subsequent to execution by both parties of Amendment No. 1, the Contract may be terminated as provided in Article 14 of A201™-1997.

§ 10.2.1 In the event of such termination by the Owner, the amount payable to the Construction Manager pursuant to Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 In the event of such termination by the Construction Manager, the amount to be paid to the Construction Manager under Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, including a reasonable estimate of the Cost of the Work for Work not actually completed.

#### § 10.3 SUSPENSION

The Work may be suspended by the Owner as provided in Article 14 of A201™-1997; in such case, the Guaranteed Maximum Price, if established, shall be increased as provided in Section 14.3.2 of A201™-1997 except that the term "cost of performance of the Contract" in that Section shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1.1 and 5.3.4 of this Agreement.

### ARTICLE 11 OTHER CONDITIONS AND SERVICES

11.1 thru 11.4  
See Exhibit A

11.5

It is understood and agreed that the GMP is for the total cost of the work and that cost over-runs from one line item can be offset by cost savings from another line item.

11.6

All personnel listed in Exhibit C as a "Reimbursable as a cost of the work" shall be included in the cost of the work per Article 7.2, subject to the GMP per Article 6.1.2.2.

11.7

The following procedure is agreed to by Owner and/or Owner's lender and Title Company in the event of a lien being filed by one of the Construction Manager's Vendors and/or Vendor's Vendor(s): At the Construction Manager's sole discretion either 1. Construction Manager shall make a cash deposit equal to 150% of each lien amount in separate escrow account held by Owner's Title Company on behalf of the Construction Manager or 2. The Construction Manager may provide a lien transfer bond for the amount of the lien. Upon said deposits being made or lien bond being provided by Construction Manager, Owner and/or Owner's Lender, and Title Company shall immediately disburse to Construction Manager any monies owed to Construction Manager under the terms of this contract.

11.8

Owner and Construction Manager agree to the following punch list procedure for each phase of the project:

1. Prior to issuance of temporary or Full Certificate of Occupancy by City, Owner and/or Owner's designated representative(s) shall prepare one original interior and exterior punch list.
2. Within 7 calendar days after completion punch list work by Construction Manager, Owner and/or Owner's representative(s) will re-inspect to confirm original punch list items are complete.
3. New items will not be added to the original punch list at any time except for items which are substantial (i.e. no hot water) and thus were obviously missed during original punch list items.
4. Any item(s) not included in original punch list shall be considered warranty item(s).
5. Warranty items shall not be considered outstanding punch list items and thus shall not be subject to withholding of final payments.

11.9

If a discrepancy occurs within this Agreement and/or between this Agreement and other contract documents, it is understood and agreed that Article 11 of this Agreement, the balance of this Agreement, and Exhibits "A", "B", "C" and "D" (in that order) shall govern.

11.10

If interest costs occur per Paragraph 4.2, the cost shall be reimbursed by issuance of an Owner Change Order.

11.11

Architect shall return all submittals (i.e. shop drawings) to Contractor within 10 working days of date received from Contractor.

11.12

Modification and/or extension of project completion date due to "weather days" shall be as outlined in Exhibit "D" attached hereto.

11.13

The following Exhibits, attached hereto, form part of the Contract Documents:

Exhibit A: Modifications to the AIA C191

Exhibit B: Supplementary Conditions

Exhibit C: Personnel Billing Rates and Matrix

Exhibit D: Definition of Weather Days.  
Exhibit E: Project Scope and Budget Summary  
Exhibit F: Preliminary Divisional Cost Breakdown  
Exhibit G: Pre-Construction Phase Schedule  
Exhibit H: Preliminary Construction Phase Schedule

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

OWNER



(Signature)

DON SILVER, PRES

(Printed name and title)

April 30, 2004

Date

ATTEST

CONSTRUCTION MANAGER



(Signature)

PETER LIVINGSTON, VICE PRESIDENT

(Printed name and title)

April 28, 2004

Date

ATTEST

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit A**  
**Additional Provisions/Modifications based on the AIA A121CMC (2003 Edition)**

**5.4 COMMENCEMENT AND COMPLETION**

Add the following paragraphs:

5.4.1 The date of commencement is the date from which the Contract Time of subparagraph 5.4.2 is measured; it shall be the date of the giving of the Notice to Proceed (the "Commencement Date"). The Owner shall issue the Notice to Proceed within ten calendar days of the last to occur of all of the following (the "Conditions to Commencement"): (i) closing of financing acceptable to Owner, sufficient in an amount to satisfy the Owner's financial obligations hereunder, and (ii) receipt of all permits and approvals necessary to allow commencement and continuation of construction. In no event shall the Construction Manager commence any work on site by placing materials at the site or by conducting other work at the site until a Notice to proceed has been given.

The immediately aforementioned notwithstanding, Construction Manager and Owner acknowledge that prior to receiving a Notice to Proceed the Construction Manager may be required to enter into certain other subcontracts, issue purchase orders, or make similar commitments which, if the Project were not to proceed would result in the incurrence, by Construction Manager of certain costs, financial penalties, or other like or similar expenses. Owner agrees to reimburse Construction Manager all such costs, penalties, or similar expenses, so long as, and only to the extent that Construction Manager has received Owner's written approval prior to the incurrence of such costs, and/or the entering into such subcontracts, authorization of such purchase orders or making such similar commitments. Any activity conducted hereunder shall in no way effect the dates established for substantial completion for each phase as shall be provided for in Amendment No. 1 hereto.

5.4.2 It is anticipated that the Work is to be completed in phases so as to permit residents of the Project to move in on a phased basis (each of which shall be referred to as a "Phase").

.1 Substantial Completion of each Phase is to occur on or before an agreed date. The agreed dates for each Phase shall be established by Amendment No. 1 to this Agreement at the time the GMP is established, which shall be an agreed upon number of calendar days from the Commencement Date. Once established each of these days shall be measured from the Commencement Date and may only be extended in accordance with the Contract Documents.

.2 Each date by which Substantial Completion of a Phase must occur pursuant to the Contract Documents shall be referred to as a "Phase Completion Deadline". The period of time from the Commencement Date to the applicable Phase Completion Deadline shall be referred to as the "Phase Contract Time".

.3 The Owner and the Construction Manager acknowledge that if the Construction Manager fails to achieve substantial completion of a Phase before the applicable Phase Completion Deadline, the Owner will suffer damages which are difficult to ascertain. However, the Owner and the Construction Manager agree that the degree to which the Owner will be damaged by the Construction Manager's failure to substantially complete a particular Phase of the Project within the Phase Contract Time generally will decrease as the overall Project nears Substantial Completion. Accordingly, the Construction Manager agrees to pay the Owner as liquidated damages with respect to each particular Phase, and not as a penalty, for each calendar day that passes after the Phase Completion Deadline has expired for the particular Phase of the Project, until the date that the Construction Manager achieves Substantial Completion of that particular Phase, an amount equal to the portion of the GMP allocable to that particular Phase times the construction financing daily interest for Project (the "Stipulated Damage

Amount"). Any liquidated damages payable by the Construction Manager as to a particular Phase shall then be determined by multiplying the Stipulated Damage amount by each day of delay. The Stipulated Damage Amounts for each phase shall be established by an amendment hereto at the closing for financing on the Project.

.4 For purposes of determining that portion of the GMP allocable to a particular Phase, the following method of calculating same will be utilized:

(i) Reasonably determine that amount of the total GMP which generally applies to construction of the Project (as a whole) by adding the sum of the following amounts contained within the GMP: (Specific amounts to be determined when GMP is established by Amendment to the Contract.)

|                            |          |
|----------------------------|----------|
| Site Development           | \$ _____ |
| General Conditions         | \$ _____ |
| Construction Manager's Fee | \$ _____ |
| Other                      | \$ _____ |

---

|       |          |
|-------|----------|
| Total | \$ _____ |
|-------|----------|

(ii) Subtract total in (i) above from the total GMP to determine the "remaining GMP".

(iii) Utilize the approved Schedule of Values and construction costing information to calculate the percentage of the cost of a particular Phase to the "remaining GMP" amount as determined in (ii) above.

(iv) Apply the percentage from (iii) above for the particular Phase(s) to the GMP.

.5 The Stipulated Damage amount for each Phase is intended to be cumulative of the other Phases. Accordingly, if the Phase Completion Deadline for more than one (1) Phase shall have elapsed without the applicable Phases having been substantially completed, then the Stipulated Damage Amount for each Phase not so substantially complete shall be due and owing by the Construction Manager to the Owner. The Owner may collect the Stipulated Damage Amounts by withholding them from payments due the Construction Manager or by separate demand. The Stipulated Damage Amounts provided herein shall be in lieu of all other claims, costs, losses, damages and/or expenses that the Owner might otherwise have against the Construction Manager by reason of its failure to achieve Substantial Completion before the relevant Phase completion Deadline; whether arising from contract or tort, or actual, direct, indirect or consequential damages, and the Owner hereby releases the Construction Manager therefrom.

.6

.1 The Construction Manager agrees that final completion of each Phase of the Work shall occur as soon as possible after Substantial Completion of the Phase, but no later than thirty (30) calendar days after the date on which Substantial Completion of that Phase has occurred, as evidenced by the Architect's Certificate of Substantial Completion. Final payment as to a Phase shall be due upon final completion of such Phase.

.2 Owner acknowledges that there may be certain items which may be on order that, through no fault of the Construction Manager, may not arrive and/or otherwise be available for incorporation into the Work within said thirty (30) day period. To the extent that Owner, in Owner's sole discretion, accepts a Phase as having achieved final completion, even though such items remain outstanding, Owner may, (a) acknowledge such acceptance, and (b) withhold up to one and one half (1.5) times the total cost (as determined by the Construction Manager) for each Phase, or \$5000 for each Phase (whichever is greater), of such Work which remains incomplete or unincorporated.

.3 Further, it is the intent that outstanding items described in 5.4.2.6.2 are to be secured and installed as quickly as possible -- preferably within five (5) days after the Construction Manager receives those items. It is acknowledged that some items may be more significant than others in terms of the operation or marketability of the project. It is also acknowledged that unless determined otherwise, the costs incurred by the Construction Manager for procuring, expediting and installing the items covered by 5.4.2.6.2 are reimbursable costs as defined under Article 6 of the Contract. Accordingly, it may be less costly for the Owner, and less disruptive to the operation of the facility, to have several items accumulated and installed at one time rather than have each item installed as it is delivered. Therefore, for each item outstanding as of Substantial Completion, within five (5) days the Construction Manager shall provide the Owner, in writing, with a proposed plan indicating the expected delivery date and proposed installation date for each item. The Owner and Construction Manager will jointly review (and revise as needed) said plan and reach an agreement on the plan. The Construction Manager will report to the Owner on a weekly basis of the status of the items remaining to be installed, and immediately notify the Owner of any change in delivery date or installation date due to unforeseen procurement or delivery problems. ~~If after receiving an outstanding item the Construction Manager fails to commence the Work within five (5) days after agreed upon commencement date, or subsequently fails to complete the Work in accordance with the agreed upon schedule, the Owner may exercise its right to carry out the work as provided in section 2.4 of the A201 General Conditions~~

.4 The provision stated above for withholding 1.5 times the cost of items outstanding at the time of Substantial Completion does not apply to any Upgrade Options Initiated by the Owner subsequent to the decision date established by the Construction Manager for each upgrade option proposed for a given residential unit.

.7 Except for the portions of the project which the Owner has requested completion and occupancy prior to the completion of the Commons Areas in the El Centro building, it is the intent that when developing the Phase Completion Deadlines described in 5.4.2.1 and 5.4.2.2 above, for the purposes of determining what, if any, stipulated damage amount may be owed by Construction Manager, no phase shall be deemed to have achieved Substantial Completion until such time as (1) the common areas (as defined in Amendment No. 1) portion of the Project shall have achieved Substantial Completion or (2) the Owner agrees to deem the phase Substantially Complete or (3) the Owner takes beneficial occupancy of all or part of the phase. Further and accordingly, when establishing the completion dates for each phase as provided for herein by amendment hereto, such amendment shall also provide that no phase shall be deemed complete for the purposes hereof unless (1) and/or until the commons area portion of the Project shall have attained substantial completion, (2) the Owner has agreed to deem the phase Substantially Complete, or (3) the Owner takes beneficial occupancy of all or part of the phase.

#### 6.4 ACCOUNTING RECORDS

6.4.1 The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to the Owner and Owner's lender. The Owner and the Owner's accountants and the lender and lender's accountant or consultants shall be afforded reasonable access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement and the Project, (collectively "the records") and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law. All Records shall be maintained in accordance with generally accepted accounting principles, consistently applied. There shall be an "open book" policy, in effect at all times with regard to all Records relative to the project



maintained by either the Construction Manager or the Owner, or anyone on their behalf, and each party shall have full and complete access to said Records maintained by the other at all reasonable times. The Construction Manager shall require all Subcontractors and Sub-Subcontractors retained on a cost-plus basis to retain Records and permit the same access by Owner as is required of the Construction Manager under this Article 6.4.

6.4.1.1 If the Owner, Owner's accountants, Lender or Lender's accountants elect to perform an audit of "the records" maintained by Construction Manager, said audit shall be performed within six (6) months of the Final Completion of the project. This stipulation does not affect the Construction Manager's obligation to maintain "the records" for the time period noted in 6.4.1.

6.4.2 If, at any time during construction, any inspection by the Owner or the Lender of the Construction Manager's Records or any other data relating to the contract documents reveals an overcharge or undercharge by the Construction Manager as confirmed by an independent auditor, the next Application for Payment shall be appropriately adjusted by the amount of such overcharge or undercharge and related Fee.

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## **ARTICLE 7**

### **CONSTRUCTION PHASE**

#### **7.1 PROGRESS PAYMENTS**

Add the following:

7.1.11 To the extent of payments received by the Construction Manager from the Owner, the Construction Manager warrants the real property on which the Project is located will remain free of any legitimate and proper claims of lien arising from the Work performed by or through the Construction Manager. If any such liens are properly recorded, the Construction Manager shall have fifteen (15) business days from its receipt of written notice by the Owner or Owner's agent (including Title company) of such recording within which to discharge or secure by cash deposit or by construction lien transfer bond any such claims of lien. If the Construction Manager fails to discharge or otherwise secure such claim of lien within said time period, the Owner shall be entitled to satisfy the lien or take whatever action it deems appropriate to remove the lien from its property. All reasonable expenses and costs, including reasonable attorney's fees, incurred by the Owner after the abovementioned fifteen (15) day period to effect the discharge, securing and/or removal of any such claims of lien shall be promptly reimbursed to the Owner by the Construction Manager.

7.1.12 Concurrently with each Application for Payment, Construction Manager will deliver to Owner lien waivers (which may be conditioned upon payment) waiving all lien rights in respect of the Project, executed by Construction Manager, and executed by Subcontractors and suppliers covering amounts paid on their account or to be paid with funds received from such Application for Payment. All lien waivers shall be in form and substance satisfactory to Owner and the Owners Lender(s). Additionally, the Construction Manager shall provide further evidence regarding application of each progress payment to payment of all Subcontractors and suppliers providing services or material in respect of the Project, and shall comply with such other reasonable requirements as the Owners Lender(s) may impose with respect to obtaining advances of funds be applied to each Application for Payment."

**ARTICLE 9**  
**MISCELLANEOUS PROVISIONS**

**9.1 DISPUTE RESOLUTION**

Add the following the following subparagraphs to 9.1.1:

.1 Claims between the parties to this Agreement shall be resolved as set forth below. At all times, the parties shall approach the dispute resolution process in good faith.

.2 In the event of a Claim between the parties, the parties shall promptly meet in good faith to resolve the Claim informally before invoking the dispute resolution procedures outlined elsewhere in the Contract Documents, including the A201 General Conditions and Supplementary Conditions, and below. If the parties are not able to quickly resolve the claim, either party may request participation by the Architect. Both parties shall promptly submit a written summary of its position to the Architect. Upon receipt of both summaries, the Architect shall immediately convene a formal meeting with the parties to further discuss the Claim. If the Claim is not resolved within three business days after the commencement of such meeting, either party may then commence the dispute resolution process defined in the Contract Documents.

.3 If the informal dispute resolution efforts outlined in 9.1.1.2 are not successful, then the dispute resolution procedures outlined in the balance of the Contract Documents. Any mediation conducted pursuant to this Paragraph 9.1 shall be held in Santa Fe, unless the parties mutually agree otherwise.

.4 Intentionally omitted

.5 Intentionally omitted

.6 Consent to arbitration involving an additional person or entity shall not constitute agreement to arbitration of a dispute not described in such consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

.7 Intentionally omitted

.8 The arbitration shall be held in Santa Fe.

.9 Notwithstanding anything herein to the contrary, if (1) the Claims involve a proposed, net aggregate payment or reimbursement in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose, an "interested person or entity" means any person or entity if (a) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (b) the interested person or entity is so situated that the disposition of the claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law.

**ARTICLE 11**  
**OTHER CONDITIONS AND SERVICES**

11.1 The Construction Manager recognizes that any Lender involved in financing the Project will have requirements pertaining to this Agreement. The Construction Manager agrees to cooperate with and assist the Owner and the Architect in amending and supplementing the Contract Documents to conform to reasonable and customary requirements of any Lender (to the extent such requirements are acceptable to the Owner). However, the Construction Manager shall not be responsible for actually preparing amendments or supplements to the Contract Documents for any reason at any time. Such amendments or supplements may include, without limitation, provisions:

A. Naming any Lender as an additional insured on the Construction Manager's bonds and insurance policies and providing notice to any Lender of termination, cancellation or material modification of such policies.

~~B. Requiring approval of Applications for Payment by a consultant designated by a Lender prior to payment.~~

C. Agreeing not to amend Contract Documents without the reasonable and timely consent of the Lender.

D. Requiring approval of Change Orders by the Lender, provide that Lender approval will be provided on a timely basis and the Owner will use its best efforts to secure such timely approval.

E. Requiring notice of the Owner's default to the Lender, with a Lender having the right to cure, and requiring continued performance by the Construction Manager, provided that the Lender assumes all contract obligations of the Owner.

F. Subordinating any lien rights of the Construction Manager to rights of the Lender.

G. Requiring copies of all written notices to be sent to the Lender.

H. Granting the Lender the right to inspect the work and to examine records pertaining thereto.

I. Recognizing the pledge of the Owner's rights under Contract Documents to the Lender.

J. Requiring the Construction Manager to acknowledge, on the Lender's request, whether or not the Owner is in default of its obligations under the Contract.

K. Requiring the Construction Manager to assist the Owner in preparing and submitting reports and information concerning the Work as may be reasonably required by the Lender.

11.2 Nothing contained in Paragraph 11.2 or Paragraph 11.3 is intended to derogate from any other rights to terminate this Contract that may be granted the Construction Manager elsewhere in this Contract, including, but not limited to, the provisions of Article 2 and Article 14 of the General Conditions and Article 10 of this Agreement.

11.3 The Construction Manager may perform all or any part of the Work with its own forces, or through an Affiliate, provided that (1) the Construction Manager secures at least two competitive bids with respect to the work Construction Manager intends to perform (2) the Owner consents thereto in writing, which consent shall not be unreasonably withheld, after full disclosure by the Construction Manager to the Owner of the affiliation or relationship of the Affiliate to the Construction Manager and (3) any Work performed by an Affiliate shall be covered in a separate agreement between the Construction Manager

and the Affiliate, which shall satisfy all of the requirements for subcontracts as set forth in Paragraph 5.3 of the General Conditions and which shall be approved by the Owner in writing.

**11.4** Any amounts payable hereunder which are not paid when due shall thereafter accrue interest at Wall Street Journal "prime" plus one percent (1%) per annum or at the highest rate allowed under the law of the state where the Project is located, whichever is less.

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11.4

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit B**  
**Supplementary Conditions to the AIA A201 General Conditions (1997 Edition)**

1. The following Supplementary Conditions shall apply to that certain Standard Form of Agreement Between Owner and Construction Manager (the "Agreement") dated
2. For purposes of these Supplementary Conditions, capitalized terms shall have the meaning given to them in the Contract Documents (as such term is defined in Article 1 of the Agreement), unless otherwise defined in these Supplementary Conditions.

~~3. The following paragraphs supplement, modify, or amend that certain Contract Document entitled "General Conditions of the Contract for Construction," AIA Document A201, Fifteenth Edition, 1997, Articles 1 through 14 inclusive (the "General Conditions"). Where only a portion of any provision of the General Conditions is supplemented, modified, or amended, the remaining portions of that provision shall remain unaltered and in effect. In the event of any inconsistency between the General Conditions and these Supplementary Conditions, the terms of these Supplementary Conditions shall apply. Hereinafter, all references to the General Conditions shall mean the General Conditions as amended by these Supplementary Conditions.~~

A. INTENTIONALLY OMITTED

- B. PARAGRAPH 1.2.4 "Correlation and Intent of the Contract Documents" is hereby added as follows:

1.2.4 Where no explicit quality or standards for materials or workmanship are established for Work, such Work is to be of good quality for the intended use and consistent with quality of the surrounding Work and of the construction of the Project generally.

- C. PARAGRAPH 1.2.6 "Correlation and Intent of the Contract Documents" is hereby added as follows:

1.2.5 All indications or notations which apply to one of a number of similar situations, materials or processes shall be deemed to apply to all such situations, materials or processes wherever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

D. INTENTIONALLY OMITTED

- E. <sup>1.5</sup>SUBPARAGRAPH 1.5.1, add at the end of the first sentence: ", unless otherwise identified and incorporated by reference in Agreement."

- F. SUBPARAGRAPH 2.2.8 Modify Subparagraph 2.2.5 as follows:

"In addition to the sets the Construction Manager used for bidding, the Owner will furnish a to be agreed upon number of sets of black and white prints of the Drawings and copies of the Project Manual free of charge for execution of the Work. Additional sets may be purchased from the Office of the Architect."

- G. SUBPARAGRAPH 3.2.3, delete the second sentence, and add at the end: "If the Construction Manager performs Work knowing it involves such error, inconsistency, omission or difference without such notice to the Architect, the Construction Manager shall assume appropriate responsibility for such Work and shall bear the costs attributed to correction."

- H. PARAGRAPH 3.3 "SUPERVISION AND CONSTRUCTION PROCEDURES" is hereby supplemented by the addition of the following sub-paragraphs:

3.3.4. The Construction Manager shall carefully check its own work and that of Subcontractors as the Work is being performed. The Construction Manager shall ensure that incorrect or faulty Work is corrected as soon as possible but in any event in a timely manner so as not to impact the project schedule.

3.3.5 During the finishing stages of the project, the Construction Manager shall make frequent inspections of the Work in the presence of the Architect or the Owners Representative and the applicable Subcontractor(s) involved, if any, and the Architect shall identify incorrect and faulty Work. The Construction Manager shall ensure that incorrect or faulty Work is corrected in accordance with 3.3.4.

- I. PARAGRAPH 3.4 "LABOR AND MATERIALS" is hereby supplemented by addition of the following Subparagraphs 3.4.3 and 3.4.4:

3.4.4 Should the Owner make reasonable objection, based upon qualifications, fitness, behavior or temperament, to the presence of any personnel of Construction Manager or any subcontractor, such person shall not perform services on the Project site, or otherwise in connection with the Project, without written consent of the Owner.

3.4.5 The Construction Manager shall not change or replace the assigned Project Manager or Superintendent without prior written consent by the Owner.

- J. SUBPARAGRAPH 3.5.1, Add to the end: "Construction Manager's warranties shall commence upon Substantial Completion of the Work for each Phase and continue for a period of one year thereafter."

- K. PARAGRAPH 3.5 "WARRANTY" is hereby supplemented by the addition of the following sub-paragraphs:

3.5.2. In the event of a claim by the Owner against the Construction Manager under Paragraph 3.5.1. of these General Conditions (or under any other express written warranty made by the Construction Manager) for any item of Work performed under the Contract Documents, the Owner shall give notice (a "Warranty Notice") of the claim to the Architect and the Construction Manager and thereafter, the Architect or Architects authorized representative and the Construction Manager shall inspect the item(s) of Work in question. If following its inspection the Architect determines that any such item is included within the Construction Manager's warranty under the Contract Documents, then:

- (a) Upon formal notification from the Architect, the Construction Manager shall have thirty (30) days, notwithstanding any other time period specified in the Contract Documents, to either (1) complete the cure for the item or, for a Longer Cure item, commence the cure and thereafter diligently proceed to complete the cure, or (2) if the Construction Manager disputes the warranty coverage of the item, commence the

dispute resolution procedures described in Section 4.3 of the General Conditions.

- (b) if upon the expiration of the thirty (30) day period the Construction Manager has failed to satisfy the provisions of either clause (a) (1) or clause (a) (2) immediately above, then the Owner shall have the right to engage a third party Construction Manager of the Owner's sole selection to cure or complete the cure of the warranty item at the Construction Manager's expense.
- (c) If the Construction Manager fails to cure an item within the required time and if the item is finally determined by arbitration or, when permitted, judicial proceedings to be covered by any Construction Manager's warranty under the Contract Documents, then the Construction Manager shall be liable for all expenses incurred by the Owner in enforcing its warranty claim including legal and Architectural fees and expenses, an administrative charge of a percentage equal to Construction Manager's fee times the cost to cure the warranty item to cover the Owner's administrative costs to enforce the warranty claim, and, when a third party Construction Manager has been engaged by the Owner under this Paragraph 3.5.2, the costs and expenses of the third party Construction Manager.

L. INTENTIONALLY OMITTED

M. ARTICLE 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES is supplemented by the following replacement language for Subparagraph 3.12.4

3.12.4 Shop Drawings, Product Data, Samples and similar submittals which are required by the Contract Documents to be submitted for Architect's review shall become Contract Documents upon Architect's review and approval. Submittals which are not required by the Contract Documents to be submitted for Architect's review are not Contract Documents.

N. ARTICLE 3.16 "ACCESS TO WORK" is hereby supplemented by addition of the following Subparagraph:

"3.16.2 Representatives of the State Agencies shall have access at all reasonable times to the Work wherever it is in preparation or progress, and the Construction Manager shall provide proper facilities for such access and inspection."

O. PARAGRAPH 4.2.4 "COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION" is hereby supplemented by the additions of the following subparagraphs: Nothing contained herein shall prohibit the Owner's Representative from communicating directly with the Construction Manager for the purpose of receiving information and/or providing the Construction Manager with clarification as to Owner's position with regard to any matters affecting or concerning the Work.

4.2.4.1 The following definitions shall apply to construction communications:

4.2.4.1.1 Contract Document Clarifications: An answer from the Architect, in response to an inquiry from the Construction Manager, intended to make some

requirement(s) of the Drawings or plans clearly understood. Drawing/plan clarifications may be sketches, drawings, or in a narrative form and are not intended to change any requirements of the Contract Documents. Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

4.2.4.1.2 Non-Conformance Notice: A Notice issued by the Architect documenting that the Work or some portion thereof has not been performed in accordance with the requirements of the Contract Documents. Payment shall not be made on any portion of the Work for which a Non-Conformance Notice has been issued and the Work not corrected to the satisfaction of the Architect.

Upon receipt of a Non-Conformance Notice the Construction Manager shall provide a written Response to the Non-Conformance Notice within five (5) working days after receipt of the Notice. The Construction Manager's response shall state either (a) the basis of Construction Manager's determination that the Work was performed in accordance with the Contract Documents or (b) the corrective action Construction Manager intends to take, at its sole expense, to correct the non-conforming work

If the Construction Manager disputes issuance of the Notice the Architect has five (5) working days in which to respond by either (a) withdrawing the Notice of Non-Conformance or (b) directing the Construction Manager to correct the Work.

If directed to correct the Work, the Construction Manager shall do so within five (5) working days after receipt of such direction from the Architect, or such other time as may be agreed to with the Architect, without loss of rights for claim recovery or dispute resolution as may be available by the Contract.

4.2.4.1.3 Requests for Information: A written request from the Construction Manager or one of its subcontractors, to the Architect, seeking an interpretation or a clarification of some requirement of the Contract Documents. The Construction Manager shall clearly and concisely set forth the issue for which it seeks clarification or interpretation and why a response is needed from the Architect.

Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

4.2.4.1.4 Substitution/Or-Equal Submittals: A written request from the Construction Manager to substitute a material, article, device, product, fixture, form, type of construction, or process called for in the Contract Documents with another item that shall substantially equal in all respects to that so indicated or supplied. Each such request shall specifically set forth any manner in which the proposed change does not conform to the Contract Documents and Construction Manager (and any subcontractor initiating the request) warrants that the proposed substitute conforms in all respects with the contract documents except as specifically identified as non-conforming in the request.

4.2.4.1.5 Submittals/Shop Drawings: When required by any technical specification included in these Contract Documents, the Construction Manager shall transmit to the Architect technical submittals, shop drawings, or samples, including supporting catalog cuts, manufacturer's literature, sketches or drawings, calculations, and other pertinent, in sufficient detail to enable the Architect to review the information and determine that the Construction Manager clearly understands the requirements of the Contract Documents. Construction Manager (and any subcontractor initiating a submittal) warrants that all Work and materials depicted in technical submittals, shop drawings and samples shall conform in all respects to the requirements of the Contract Documents, except as otherwise specifically identified as non-conforming.



4.2.4.1.6 Schedule Submittals: When required by the Construction Schedule Specification of these Contract Documents, the Construction Manager shall submit required schedules, schedule updates, schedule revisions, time impact analysis, etc. for review.

P. INTENTIONALLY OMITTED

Q. SUBPARAGRAPH 4.3.7.2 is hereby revised (and paragraphs 4.3.7.3 and 4.3.7.4 are added) to read as follows:

4.3.7.2 Weather days: Construction Manager confirms that the Contract Time, Phased Contract Time and the agreed upon dates for same as set forth in Amendment No. 1 to this Agreement are reasonable periods to perform The Work. Construction Manager has included in the work schedule ordinary and normally anticipated lost days due to adverse weather ("weather days") and therefore Construction Manager shall not be entitled to an extension of the Contract Time or Phased Contract Time as a result of weather conditions normally experienced in the greater Santa Fe area unless (1) the Construction Manager is unable to make up for the weather delay by scheduling work for a Saturday in accordance with 4.3.7.2 below, and (2) the number of weather days lost (and not made up by Saturday work) in that calendar month exceeds the number of weather days provided for in the Contract Time.

4.3.7.3 The Construction Manager's work schedule is based upon a regular five-day work week per calendar week. It is mutually agreed that in the event of a weather day the Construction Manager, before requesting a time extension the Construction Manager will first try to make up that weather day on the next Saturday available during the following 30 calendar days. A Saturday will be considered to be "available" only if all of the following conditions are met: (1) no work has already been scheduled for that day that would interfere with the work being rescheduled, (2) it is not a national holiday, (3) working on that Saturday is allowed by local ordinance, and (4) materials and workforce equivalent to what was scheduled for the lost weekday are available on that Saturday. The Construction Manager will only be required to utilize a Saturday if either (a) the Construction Manager incurs no additional cost in rescheduling work for that Saturday, or (b) the Owner agrees to compensate the Construction Manager (by Change Order) for any additional costs (such as for labor rate differential) the Construction Manager may incur.

4.3.7.4 The requirement stated above for the Construction Manager to utilize a Saturday to make up for a weather delay only applies the number of weather days included in each calendar month as indicated in the following list of Anticipated Lost Days. For every weather day beyond the number included below, the Construction Manager shall be entitled to an equivalent number of days extension to the Contract Time. The Construction Manager may (at the CM's sole discretion) attempt to mitigate the delay utilizing additional Saturdays as outlined in 4.3.7.3, but has no obligation to do so.

For the purposes of this Paragraph the table provided below setting forth the norms/anticipated lost weather days shall be utilized by the parties in determining lost weather days:

| <u>Month</u> | <u>Anticipated Lost Days<br/>Due to Adverse Weather</u> |
|--------------|---------------------------------------------------------|
| January      | 1                                                       |
| February     | 1                                                       |
| March        | 0                                                       |
| April        | 1                                                       |
| May          | 0                                                       |
| June         | 0                                                       |
| July         | 1                                                       |
| August       | 1                                                       |
| September    | 2                                                       |
| October      | 2                                                       |
| November     | 1                                                       |
| December     | 0                                                       |

See the Exhibit D "Weather Delays" - attached to the Contract.

R. INTENTIONALLY OMITTED

S. SUBPARAGRAPH 4.6.8, add as new subparagraph:

"4.6.8 Limitations of Arbitration. Notwithstanding anything in the Contract Documents to the contrary, if (1) the Claims involve a proposed, net aggregate payment to owner or Construction Manager in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose an "interested person or entity" means any person or entity if (3) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (4) the interested person or entity is so situated that the disposition of the Claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law."

T. SUBPARAGRAPH 5.2.1, change "promptly" to "within 10 days" in lines 5 and 7.

U. PARAGRAPH 7.3 "CONSTRUCTION CHANGE DIRECTIVES"

Subparagraph 7.3.3.3 is hereby changed to read as follows:

7.3.3.3 The following fees apply to Changes to the Work:

7.3.3.3.1 INTENTIONALLY OMITTED

7.3.3.3.2 The same markup applied by the subcontractor in the subcontractors base subcontract, which shall be defined in said subcontract and subject to Owner's approval, to the cost of work performed by any subcontractor.

V. INTENTIONALLY OMITTED

W. INTENTIONALLY OMITTED

X. PARAGRAPH 9.8.1. of the General Conditions is hereby deleted in its entirety and the following is substituted in lieu thereof:

9.8.1 "Substantial Completion" of the Project shall be deemed to occur when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use and, in addition, all requirements of the Contract Documents for Substantial Completion, including the following conditions, have been fulfilled as follows:

a. A Temporary or Final Certificate of Occupancy has been issued and all construction related approvals, licenses and requirements have been obtained or satisfied for the Project such that the Project may be operated for its intended use.

b. INTENTIONALLY OMITTED

Y. PARAGRAPH 9.8.2. of the General Conditions is hereby deleted in its entirety and the following Paragraphs 9.8.2.1. through 9.8.2.6. are substituted in lieu thereof:

9.8.2.1. When the Construction Manager considers that the Work, or portion thereof which the Owner agrees to accept separately, is substantially complete, the Construction Manager shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Construction Manager shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents. Following receipt of the Construction Manager's list, the Architect will make an inspection (the "Initial Punch List Inspection") to determine whether the Work or designated portion thereof is Substantially Complete. Upon completion of its Initial Punch List Inspection, the Architect shall prepare and submit to the Construction Manager and the Owner the Architect's list (the "Punch List") of items to be completed or corrected. For the items on the Punch List, the Architect shall specify:

- a. a date (a "Punch Item Date") by which such items shall be completed, which - {Punch Item Date shall be no more than forty-five (45) days from the date of the Punch List unless the Architect determines that reasonable cause exists for a later completion date; and
- b. the cost to complete or correct the items as reasonably determined by the Architect.

The Architect shall expressly state on the Punch List what the Construction Manager must do to achieve Substantial Completion under Paragraph 9.8.1 of the General. If as a result of the Initial Punch List Inspection the Architect determines that Substantial Completion has occurred, the Architect shall prepare a Certificate of Substantial Completion pursuant to Paragraph 9.8.2.5 below.

9.8.2.2 If the Construction Manager has not given notice that the Work is substantially complete and requested inspection thereof on or before the date for Substantial Completion set by the parties in the Contract Documents, then the Owner may request the Architect to make an Initial Punch List inspection of the Work to (x) prepare the Punch List pursuant to the provisions of Paragraph 9.8.2.1. above and (y) determine if Substantial Completion has occurred.

9.8.2.3. Upon the request of the Construction Manager prior to the expiration of the relevant Punch Item Date(s) and for good cause shown, the Architect may extend any Punch Item Date(s) for a reasonable period. Following receipt of the Punch List and the Construction Manager's compliance with the requirements of Paragraph 9.8.1. above, the Construction Manager may submit a request for another inspection by the Architect, if necessary, to determine whether Substantial Completion of the Work has been achieved.

9.8.2.4. If the Construction Manager fails to satisfactorily complete any item(s) on the Punch List by the applicable Punch Item Date(s), then the Owner has the right to take over the work in accordance with Section 2.4 of the General Conditions.

9.8.2.5. When the requirements of Paragraph 9.8.1. above have been met and upon the request of either the Owner or the Construction Manager, the Architect shall prepare a Certificate of Substantial Completion, in the form set out in Paragraph 9.8.3 below, which shall establish the date of Substantial Completion and shall establish responsibilities of the Owner and the Construction Manager for security, maintenance, heat, utilities, damage to the Work, and insurance. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise specifically stated in the Contract Documents or in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Construction Manager for their written acceptance of responsibilities assigned to them in such certificate.

## **Z. INTENTIONALLY OMITTED**

**AA.** In addition to the provisions of Paragraph 9.10 Final Completion shall not have been deemed to have occurred until the date upon which all of the following have occurred:

### **a. INTENTIONALLY OMITTED**

**b.** Delivery of conditional or unconditional lien waivers from each person who performed work at or provide or fabricated materials in connection with the Work (including all subcontracts executed in connection therewith), other than from those persons whose claims are being contested by Construction Manager in good faith and for which Construction Manager has provided to Owner a bond or security in an amount reasonably acceptable to Owner, and

**c.** Issuance and obtaining of a final, unconditional certificate of occupancy and all construction-related approvals, licenses, and requirements for the Project enabling it to be occupied and operated for its intended use.

**BB.** SUBPARAGRAPH 9.10.4.1, after "Claims" add: "previously made in writing and identified by Owner as unsettled at the time of final payment."

**CC.** Paragraph 10.1.1 add the following: "Construction Manager shall prepare and submit to Owner for Owner's approval a comprehensive safety program. Further, Construction Manager shall provide written verification and certification in a form satisfactory to the

Owner, that all subcontractors have familiarized themselves with the safety program and agreed to abide by said program and training regimen thereunder.

- DD. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." In the first line of Subparagraph 11.1.1, following the work "companies," insert the following:

", acceptable to the Owner,."

- EE. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." Add the following to subparagraph 11.1.3:

"Certificates called for herein shall be furnished in duplicate and shall specifically set forth evidence of all coverage required by 11.1.2 and the Construction Manager shall furnish to the Architect copies of all endorsements that are subsequently issued amending coverage or limits."

- 
- FF. SUBPARAGRAPH 13.4.3, add as a new subparagraph:

"In the event of any litigation between the parties, the prevailing party shall be entitled to reimbursements for all reasonable attorneys' fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party to the extent allowed by law."

- GG. PARAGRAPH 13.5 "TESTS AND INSPECTIONS" is hereby supplemented by the addition of the following subparagraph:

"13.5.7 When work has been installed contrary to any Contract requirements and the Construction Manager requests the privilege of testing in lieu of removal, such testing shall be at the Construction Manager's expense."

- HH. INTENTIONALLY OMITTED

- II. Add the following new Article:

#### ARTICLE 15: REQUESTS FOR INFORMATION

15.1.1 In the event that the Construction Manager or its subcontractor, at any tier, determines that some portion of the Drawings, Specifications, or other Contract Documents requires clarification or interpretation by the Architect, the Construction Manager shall submit a Request for Information in writing to the Architect. Requests for Information may only be submitted by the Construction Manager and shall be only submitted on the Request for Information Forms provided by the Architect. The Construction Manager shall clearly and concisely set forth the issue for which clarification and interpretation is sought and why a response is needed from the Architect. If the Request for Information is being used to request confirmation of an interpretation or understanding of a requirement, the Construction Manager shall set forth that interpretation or understanding of the requirement along with reasons why such an understanding was reached.

15.1.2 The Architect will review all Requests for Information to determine whether they are Requests for Information within the meaning of this term. If the Architect determines

that the document is not a Request for Information, it will be returned to the Construction Manager, unreviewed as to content, for resubmittal on the proper form and in the proper manner. In either case, the Architect must reply to RFI in writing within the time requested by the Construction Manager, or three (3) working days, whichever is earlier.

15.1.3 Responses from the Architect are not intended to change any requirement of the Contract Documents. In the event the Construction Manager believes that a response to a Request for Information will cause a change to the requirements of the Contract Document, the Construction Manager shall immediately give written notice to the Architect in accordance with Section 4 of the General Conditions stating that the Construction Manager considers the response to be a change in the scope of work or a change to the project schedule.

**END OF SUPPLEMENTARY CONDITIONS**

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15.1.3

**RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit "C"**

**Weather Delays**

1. A "Work Day" is defined at Monday thru Friday, 7:30 am– 4:00 pm.
2. The occurrence of one or more of the following will constitute a weather delay as indicated:
  - a. 0.25" of rain during the workday constitutes one lost workday
  - b. 2.0" of snow during the workday constitutes one lost workday
  - c. 12" of snow in a 24-hour period constitutes two lost workdays.
  - d. Temperature of 5 degrees below zero (Fahrenheit) constitutes one lost workday.
  - e. Any drying time required for soil stabilization (as directed by the geotechnical engineer) due to rain or snow will constitute lost work day(s).
3. Weather days will be included in the final schedule approved as part of the GMP proposal to be incorporated into the contract by amendment. The number of weather days included will be in accordance with Section 3.P of Exhibit B. Adjustments to the contract completion dates due to adverse weather will be made in accordance with Section 3.P of Exhibit B.

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit "D"**  
**Personnel Billing Rates**

| <u>Position</u>                               | <u>Reimbursable<br/>as a Cost of<br/>the Work<br/>(w/in GMP)</u> | <u>Included<br/>In Fee</u> | <u>Notes</u> | <u>Expected<br/>to be<br/>Full or Part<br/>Time</u> | <u>Billing<br/>Rate<br/>(\$/hr)</u> |
|-----------------------------------------------|------------------------------------------------------------------|----------------------------|--------------|-----------------------------------------------------|-------------------------------------|
| <b><u>Field Staff Stationed on Site</u></b>   |                                                                  |                            |              |                                                     |                                     |
| Superintendent                                | X                                                                |                            | 1            | Full                                                | \$70                                |
| Project Engineer, QA/QC                       | X                                                                |                            | 1            | Full                                                | \$80                                |
| Carpenter                                     | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| Laborer                                       | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| <b><u>Personnel Not Stationed on Site</u></b> |                                                                  |                            |              |                                                     |                                     |
| Vice President                                |                                                                  | X                          |              |                                                     |                                     |
| CFO                                           |                                                                  | X                          |              |                                                     |                                     |
| Project Manager                               | X                                                                |                            | 3            | Part                                                | \$75                                |
| General Superintendent                        | X                                                                |                            | 3            | Part                                                | \$75                                |
| Project Coordinator                           |                                                                  | X                          |              |                                                     |                                     |
| Safety Director                               | X                                                                |                            | 3            | Part                                                | \$50                                |
| Project Accountant                            |                                                                  | X                          |              |                                                     |                                     |
| <b><u>Pre-Construction Personnel</u></b>      |                                                                  |                            |              |                                                     |                                     |
| Senior Estimator/Pre-Con Services M           | X                                                                |                            | 4            | Part                                                | \$90                                |
| Assistant Estimator                           | X                                                                |                            | 4            | Part                                                | \$80                                |

**Notes:**

- 1 Field staff on project site.
- 2 It is expected that all trade work will be subcontracted. Trade labor rates shown only if need for Gen Conditions.
- 3 Billed only for time spent on site and traveling to project
- 4 Billed only for time during pre-construction phase, subject to Pre-construction services billing cap (see Exhibit F).



**RainbowVision Santa Fe/Wals Contract Agreement**  
**Exhibit E**  
**Project Scope & Budget Summary**

- The Scope of the project includes:
  - 40 Single-story Condominium living units
  - 80 Single-level Independent Living units built in a series of two-story buildings
  - 26 Assisted Living apartments (and related support spaces) constructed on the 2<sup>nd</sup> level of the central services building
  - Central services building (El Centro) containing commercial kitchen, dining spaces, activity spaces, administrative and marketing offices, retail spaces, and a spa/wellness center.
  - ~~○ 13 acres of site development, with some off site, public improvements~~
  - Total building area is approximately 183,000 sf.
- Based on a preliminary site plan and building design commissioned by the Owner, the Construction Manager prepared a detailed, preliminary cost report and presented that report to the Owner on February 1, 2004. Based on that scope and cost report, the Owner has established a construction budget of \$20,540,000, based on the Preliminary Divisional Cost Breakdown shown in Exhibit F.
- The Owner has contracted with the Architect to complete the design of the project in accordance with the budget stated above. The completion of the design, and related activities is proceeding in accordance with the Preconstruction Phase Schedule prepared and updated regularly by the Construction Manager. See Exhibit G.
- The Construction Manager has also prepared a Preliminary Construction Schedule. See Exhibit H. A final Construction Schedule will be included in the GMP report and made part of the contract by amendment.
- The Owner, Architect and Construction Manager are working together to monitor the completion of the design to ensure meeting the Construction Budget.
- Upon receipt of the Design Development documents, the Construction Manager will, in accordance with contract Section 2.2 prepare a GMP report that will include all of the elements outlined in Section 2.2.4. Prior to submitting the final GMP report, the Construction Manager will review the preliminary cost estimates with the Owner and Architect to determine if any adjustments to scope are required in order to achieve the construction budget stated above. Upon approval by the Owner, the GMP will be incorporated into the contract by amendment, in accordance with Section 2.2.
- During the completion of the design The Construction Manager will continue to meet regularly with the Owner and Architect, and will regularly review the Architect's work in progress to monitor the design as a means to ensure conformance to the construction budget.

**RainbowVision Santa Fe/Weis Contract Agreement  
EXHIBIT F**

**Preliminary Divisional Cost Breakdown**

| <b>C.S.I. SYSTEMS BREAKDOWN</b>            | <b>Total<br/>Costs</b> | <b>%</b>            |
|--------------------------------------------|------------------------|---------------------|
| Division 1 - General Conditions            | \$1,047,401            | 5.9%                |
| Division 1 - Building Permit Allowance     | \$184,820              | 1.0%                |
| Division 2 - Site Construction             | \$1,534,319            | 8.7%                |
| Division 3 - Concrete                      | \$965,149              | 5.5%                |
| Division 4 - Masonry                       | \$488,608              | 2.8%                |
| Division 5 - Metals                        | \$439,822              | 2.5%                |
| Division 8 - Woods & Plastics              | \$2,609,476            | 14.8%               |
| Division 7 - Thermal & Moisture Protection | \$968,353              | 5.5%                |
| Division 8 - Doors & Windows               | \$771,105              | 4.4%                |
| Division 9 - Finishes                      | \$3,286,198            | 18.6%               |
| Division 10 - Specialties                  | \$592,969              | 3.4%                |
| Division 11 - Equipment (See Note 1)       | \$445,320              | 2.5%                |
| Division 12 - Furnishings (See Note 2)     | \$49,196               | 0.3%                |
| Division 14 - Conveying                    | \$230,919              | 1.3%                |
| Division 15 - Mechanical                   | \$2,410,820            | 13.7%               |
| Division 16 - Electrical                   | \$1,638,100            | 9.3%                |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    | <b>100%</b>         |
| Escalation - For 2004                      | 0.0%                   | -                   |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    |                     |
| Est./Const Contingency - El Centro         | 5.0%                   | \$243,521           |
| Est./Const Contingency - Balance           | 3.0%                   | \$383,726           |
| <b>Sub-Total</b>                           | <b>\$18,288,523</b>    |                     |
| Builders Risk Insurance                    | 0.8%                   | \$146,309           |
| Liability Insurance                        | 0.85%                  | \$156,696           |
|                                            |                        | <b>\$18,591,527</b> |
| Construction Manager Fee                   | 3.00%                  | \$557,748           |
| <b>Sub-Total</b>                           | <b>\$19,149,273</b>    |                     |
| Performance and Payment Bond               |                        | \$108,393           |
| NM Gross Receipts Tax                      |                        | \$1,284,062         |
| <b>Project Totals</b>                      |                        | <b>\$20,539,728</b> |

**Notes:**

1. "Equipment" includes residential appliances, commercial kitchen and laundry equipment.
2. "Furnishings" does not include FF&E - which is being designed and purchased by the Owner under a separate contract.

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit G**  
**Preconstruction Phase Schedule**

Refer to the "Preconstruction Schedule" dated \_\_\_\_\_ (filename: RVSF007), attached separately but made a part of this Exhibit by reference.

---

11/11

**RainbowVision Santa Fe/Wais Contract Agreement**  
**Exhibit H**  
**Preliminary Construction Phase Schedule**

Refer to the "Preliminary Construction Schedule" dated \_\_\_\_\_ (filename: \_\_\_\_\_),  
attached separately but made a part of this Exhibit by reference.

---

Amendment No. 1  
(Revised December 15, 2004)  
To Contract Agreement Between  
RainbowVision Santa Fe, LLC and Weis Builders, Inc

In accordance with article 2.2.9 of the Contract Agreement, the Guaranteed Maximum Price (GMP) and Project Schedule are hereby modified to reflect the following:

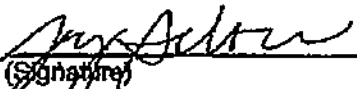
- The Guaranteed Maximum Price will be Twenty-One Million Five Hundred Thirty Nine Thousand, Seven Hundred Twenty-Eight Dollars (\$21,539,728).
- 
- The Construction Start date will be January 3, 2005. Based on that start date:
  - The Substantial Completion date for Buildings 16, 17, 18, 19, and 20 will be October 28, 2005.
  - The Substantial Completion date for the balance of the project will be April 26, 2006.

Accordingly, the GMP Divisional Cost Breakdown (Exhibit F) shall be modified as per the attached revision, dated September 30, 2004. The revised GMP is based on the following:

- Weis September 15, 2004 "Confirmation of GMP" letter (with attachments)
- Weis September 30, 2004 "Summary of Approved Enhancements"

The Construction Schedule (Exhibit H) shall be as shown in the attached update, dated December 15, 2004.

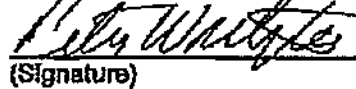
For:  
RainbowVision Santa Fe, LLC

  
(Signature)

JAY SILVER, PRESIDENT  
(Printed Name and Title)  
RAINBOWVISION PROJECTS, INC.

MANAGING MEMBER  
(Date)

For:  
Weis Builders Inc.

  
(Signature)

PETER WORTHINGTON, VICE PRESIDENT  
(Printed Name and Title)

Dec-15, 2004  
(Date)

| Aud ID | Description                            | Dur     | Early Start | Early Finish |
|--------|----------------------------------------|---------|-------------|--------------|
| 1050   | Resolve Utilities Permit               | 0       | 05AUG04 A   |              |
| 1120   | Receive Grading Permit                 | 0       | 05AUG04 A   |              |
| 1080   | Receive Bid Package #2 Building Permit | 0       | 02NOV04 A   |              |
| 1090   | Lotus Closing                          | 0       | 22DEC04     |              |
| 1065   | Notice to Proceed                      | 0       | 22DEC04     |              |
| 1100   | Receive Bid Package #3 Building Permit | 0       | 22DEC04     |              |
| 1010   | SBA Construction Start                 | 0       | 02JAN05     |              |
| 1020   | Building Construction Start            | 0       | 02JAN05     |              |
| 2165   | OSJAND5                                | 05FEB05 |             |              |
| 117    | 18JAN05                                | 28JUN05 |             |              |
| 130    | 28JAN05                                | 23JUL05 |             |              |
| 144    | 04FEB05                                | 30AUG05 |             |              |
| 159    | 21FEB05                                | 22SEP05 |             |              |
| 171    | 08MAY05                                | 19OCT05 |             |              |
| 226    | 28JAN05                                | 20FEB06 |             |              |
| 180    | 03FEB05                                | 19OCT05 |             |              |
| 185    | 08FEB05                                | 14NOV05 |             |              |
| 147    | 21FEB05                                | 14SEP05 |             |              |
| 160    | 05MAR05                                | 12OCT05 |             |              |
| 201    | 08APR05                                | 14DEC05 |             |              |

**Flanigan Vision Performance Community**  
**Santa Fe, New Mexico**  
**Wala Builders, Inc.**

SFC CLERK RECORDED 02/02/2007

### CLAIM OF LIEN

To RainbowVision Santa Fe, LLC owner or reputed owner of the premises hereinafter described, and to all who may be concerned:

The Claimant, Weis Builders Inc. claims a lien in the sum One Million, Five Hundred Twenty-Two Thousand, Three Hundred Nineteen dollars (\$1,522,319) plus legal fees, costs and interest, upon the following described property, to-wit:

RainbowVision Santa Fe (excluding Buildings #1, 2, 3, 4, 5, 11, 12, 14, 15, 16, 17, 18, 19, 20) located at 500 Rodeo Road, Santa Fe, New Mexico, more particularly described as:

Township 16 N, Range 9 E, Section 11, L.C.E. for RainbowVision condominiums, per Plat 605/24, and bearing uniform property code number 1-053-095-353-509 (excluding Buildings # 1, 2, 3, 4, 5, 11, 12, 14, 15, 16, 17, 18, 19, 20),

together with all improvements thereon, for labor/services performed and materials furnished by the claimant in the construction, alteration and repair, of a certain multi-building resort retirement community consisting of nineteen (19) one and two story residential buildings and a combination commercial/residential building (El Centro) situated on the property described above.

After deducting all just credits and offsets claimant's demands are: Unpaid amounts invoiced, including retainage (\$1,168,362), unpaid contract balance (\$15,685), and unpaid change order requests (\$338,272).

The name of the owner or reputed owner of said property is RainbowVision Santa Fe, LLC and the name of the person with whom claimant contracted, for whom claimant performed services or to whom claimant furnished the said materials is RainbowVision Santa Fe, LLC.

The terms, time given and condition of claimant's contract are as shown in the contract documents attached hereto and marked Exhibit "I" and made a part of this claim.

Wherefore, claimant claims a lien upon said property and improvements thereon in the amount stated.

Weis Builders Inc.

By

*Peter Worthington*

Peter Worthington, Vice President

EXHIBIT

2



SFC CLERK RECORDED 02/02/2007

STATE OF MINNESOTA )  
 ) ss  
COUNTY OF HENNEPIN )

Verification

Peter Worthington, of lawful age and upon being duly sworn upon his/her oath, states and verifies as follows: that he/she has read the foregoing Claim of Lien and understands the contents thereof; that the matters and things contained therein are true and correct to the best of his/her knowledge, information and belief.

SUBSCRIBED AND SWORN TO before me this 30 day of Jan, 2007

My Commission Expires:  
1/31/08

*Mary F Klein*  
Notary Public  
MARY F KLEIN  
Notary Public  
Minnesota  
My Commission Expires 01/31/2008

COUNTY OF SANTA FE ) CLAIM OF LIEN  
STATE OF NEW MEXICO ) ss PAGES: 43

Hereby Certify That This Instrument Was Filed for  
Record On The 2ND Day Of February, A D., 2007 at 11.45  
And Was Duly Recorded as Instrument # 1469481  
In The Records Of Santa Fe County

Witness My Hand And Seal Of Office  
Valerie Espinoza  
Deputy \_\_\_\_\_ County Clerk, Santa Fe, NM



# **AIA Document A121™CMc – 2003 and AGC Document 565**

**Standard Form of Agreement Between Owner and Construction Manager  
where the Construction Manager is Also the Constructor**

## **AGREEMENT**

made as of the Twenty Eighth day of April in the year of Two Thousand and Four

*(In words, indicate day, month and year)*

## **BETWEEN the Owner:**

*(Name and address)*

RainbowVision Santa Fe LLC  
4001 Office Court Road,  
Suite 403  
Santa Fe, NM 87505

## **and the Construction Manager:**

*(Name and address)*

Weis Builders, Inc.  
7645 Lyndale Avenue South  
Minneapolis, MN 55423

## **The Project is:**

*(Name, address and brief description)*

RainbowVision Santa Fe Retirement Community  
500 Roden Road at Antigua  
Santa Fe, NM 87505

## **The Architect is:**

*(Name and address)*

Lloyd & Associates Architects  
301 N. Guadalupe Suite 104  
Santa Fe, NM 87501

The Owner and Construction Manager agree as set forth below:

## **ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An Additions and Deletions Report that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The 1997 Edition of AIA® Document A201™, General Conditions of the Contract for Construction, is referred to herein. This Agreement requires modification if other general conditions are utilized.

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- § 1.2 General Conditions

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**ARTICLE 1 GENERAL PROVISIONS****§ 1.1 RELATIONSHIP OF PARTIES**

The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services and use the Construction Manager's best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Construction Manager and other persons or entities employed by the Owner for the Project.

**§ 1.2 GENERAL CONDITIONS**

For the Construction Phase, the General Conditions of the contract shall be the AIA® Document A201™-1997, General Conditions of the Contract for Construction, which is incorporated herein by reference. For the Preconstruction Phase, or in the event that the Preconstruction and Construction Phases proceed concurrently, A201™-1997 shall apply to the Preconstruction Phase only as specifically provided in this Agreement. The term "Contractor" as used in A201™-1997 shall mean the Construction Manager.

**ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES**

The Construction Manager shall perform the services described in this Article. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction Phase services. If the Owner and Construction Manager agree, after consultation with the Architect, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

**§ 2.1 PRECONSTRUCTION PHASE****§ 2.1.1 PRELIMINARY EVALUATION**

The Construction Manager shall provide a preliminary evaluation of the Owner's program and Project budget requirements, each in terms of the other.

**§ 2.1.2 CONSULTATION**

The Construction Manager with the Architect shall jointly schedule and attend regular meetings with the Owner. The Construction Manager shall consult with the Owner and Architect regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.

**§ 2.1.3 PRELIMINARY PROJECT SCHEDULE**

When Project requirements described in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare, and periodically update, a preliminary Project schedule for the Architect's review and the Owner's approval. The Construction Manager shall obtain the Architect's approval of the portion of the preliminary Project schedule relating to the performance of the Architect's services. The Construction Manager shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect and Construction Manager. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed date of Substantial Completion. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

**§ 2.1.4 PHASED CONSTRUCTION**

The Construction Manager shall make recommendations to the Owner and Architect regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economies, time of performance, availability of labor and materials, and provisions for temporary facilities.

**§ 2.1.5 PRELIMINARY COST ESTIMATES**

**§ 2.1.5.1** When the Owner has sufficiently identified the Project requirements and the Architect has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a preliminary cost estimate utilizing area, volume or similar conceptual estimating techniques.

**§ 2.1.5.2** When Schematic Design Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the Design Development Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

**§ 2.1.5.3** When Design Development Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare a detailed estimate with supporting data for review by the Architect and approval by the Owner. During the preparation of the Construction Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

**§ 2.1.5.4** If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

**§ 2.1.6 SUBCONTRACTORS AND SUPPLIERS**

The Construction Manager shall seek to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors, including suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner know of any objection to such subcontractor or supplier. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the Owner or Architect later to object to or reject any proposed subcontractor or supplier.

**§ 2.1.7 LONG-LEAD-TIME ITEMS**

The Construction Manager shall recommend to the Owner and Architect a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager. The Construction Manager shall expedite the delivery of long-lead-time items.

**§ 2.1.8 EXTENT OF RESPONSIBILITY**

The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Owner and the Owner's professional consultants. It is not the Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Drawings and Specifications are at variance therewith, the Construction Manager shall promptly notify the Architect and Owner in writing.

**§ 2.1.9 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION**

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

**§ 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL AND CONTRACT TIME**

**§ 2.2.1** When the Drawings and Specifications are sufficiently complete, the Construction Manager shall propose a Guaranteed Maximum Price, which shall be the sum of the estimated Cost of the Work and the Construction Manager's Fee.

**§ 2.2.2** As the Drawings and Specifications may not be finished at the time the Guaranteed Maximum Price proposal is prepared, the Construction Manager shall provide in the Guaranteed Maximum Price for further development of

the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The estimated Cost of the Work shall include the Construction Manager's contingency, a sum established by the Construction Manager for the Construction Manager's exclusive use to cover costs arising under Section 2.2.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order.

#### § 2.2.4 BASIS OF GUARANTEED MAXIMUM PRICE

The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include:

1. A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Guaranteed Maximum Price proposal.
2. A list of allowances and a statement of their basis.
3. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
4. The proposed Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the Fee that comprise the Guaranteed Maximum Price.
5. The Date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents issuance dates upon which the date of Substantial Completion is based.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discovers any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by the Construction Manager.

§ 2.2.7 Prior to the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing.

§ 2.2.8 Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis shall be set forth in Amendment No. 1. The Guaranteed Maximum Price shall be subject to additions and deductions by a change in the Work as provided in the Contract Documents, and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 2.2.9 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in Amendment No. 1. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

§ 2.2.10 The Guaranteed Maximum Price shall include in the Cost of the Work only those taxes which are enacted at the time the Guaranteed Maximum Price is established.

#### § 2.3 CONSTRUCTION PHASE

##### § 2.3.1 GENERAL

§ 2.3.1.1 The Construction Phase shall commence on the earlier of:

- (1) the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, or
- (2) the Owner's first authorization to the Construction Manager to:
  - (a) award a subcontract, or
  - (b) undertake construction Work with the Construction Manager's own forces, or
  - (c) issue a purchase order for materials or equipment required for the Work.

#### § 2.3.2 ADMINISTRATION

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated to a special design for the Work from the list previously reviewed and, after analyzing such bids, shall deliver such bids to the Owner and Architect. The Owner will then determine, with the advice of the Construction Manager and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the Construction Manager shall obtain bids; however, if the Guaranteed Maximum Price has been established, the Owner may not prohibit the Construction Manager from obtaining bids from other qualified bidders. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Construction Manager to the Owner and Architect (1) is recommended to the Owner by the Construction Manager; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of Sections 7.1.8 and 7.1.9 and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.3.2.4 The Construction Manager shall schedule and conduct meetings at which the Owner, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

§ 2.3.2.5 Promptly after the Owner's acceptance of the Guaranteed Maximum Price proposal, the Construction Manager shall prepare a schedule in accordance with Section 3.10 of A201™-1997, including the Owner's occupancy requirements.

§ 2.3.2.6 The Construction Manager shall provide monthly written reports to the Owner and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.3.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals.

#### § 2.4 PROFESSIONAL SERVICES

Section 3.12.10 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### § 2.5 HAZARDOUS MATERIALS

Section 10.3 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

### ARTICLE 3 OWNER'S RESPONSIBILITIES

#### § 3.1 INFORMATION AND SERVICES

§ 3.1.1 The Owner shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Owner's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

§ 3.1.2 The Owner shall, at the written request of the Construction Manager prior to commencement of the Construction Phase and thereafter, furnish to the Construction Manager reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.3 The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies for changes in the Work and other costs which are the responsibility of the Owner.

#### § 3.1.4 STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS

In the Preconstruction Phase, the Owner shall furnish the following with reasonable promptness and at the Owner's expense. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely upon the accuracy of any such information, reports, surveys, drawings and tests described in Sections 3.1.4.1 through 3.1.4.5 but shall exercise customary precautions relating to the performance of the Work.

§ 3.1.4.1 Reports, surveys, drawings and tests concerning the conditions of the site which are required by law.

§ 3.1.4.2 Surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a project benchmark.

§ 3.1.4.3 The services of a geotechnical engineer when such services are requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate professional recommendations.

§ 3.1.4.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.

§ 3.1.4.5 The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.

#### § 3.2 OWNER'S DESIGNATED REPRESENTATIVE

The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. This representative shall have the authority to make decisions on behalf of the Owner concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201™-1997, the Architect does not have such authority.

#### § 3.3 ARCHITECT

The Owner shall retain an Architect to provide Basic Services, including normal structural, mechanical and electrical engineering services, other than cost estimating services. The Owner shall authorize and cause the Architect to provide Additional Services, requested by the Construction Manager which need necessarily be provided by the Architect for the Preconstruction and Construction Phases of the Work. Such services shall be



provided in accordance with time schedules agreed to by the Owner, Architect and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect, from which compensation provisions may be deleted.

#### § 3.4 LEGAL REQUIREMENTS

The Owner shall determine and advise the Architect and Construction Manager of any special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project. The Owner shall furnish such legal services as are necessary to provide the information and services required under Section 3.1.

#### ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

The Owner shall compensate and make payments to the Construction Manager for Preconstruction Phase services as follows:

##### § 4.1 COMPENSATION

§ 4.1.1 For the services described in Sections 2.1 and 2.2, the Construction Manager's compensation shall be calculated as follows:

The Construction Manager's fee for Preconstruction Phase Services shall be Seven Thousand Dollars (\$7,000), in accordance with Weis's 1/22/03 letter of intent.

*(State basis of compensation, whether a stipulated sum, multiple of Direct Personnel Expense, actual cost, etc. Include a statement of reimbursable cost items as applicable.)*

§ 4.1.2 Compensation for Preconstruction Phase Services shall be equitably adjusted if such services extend beyond April 1, 2004 in accordance with Weis's 12/22/03 letter of intent.

§ 4.1.3 If compensation is based on a multiple of Direct Personnel Expense, Direct Personnel Expense is defined as the direct salaries of the Construction Manager's personnel engaged in the Project and the portion of the cost of their mandatory and customary contributions and benefits related therein, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

##### § 4.2 PAYMENTS

§ 4.2.1 Payments shall be made monthly following presentation of the Construction Manager's invoice and, where applicable, shall be in proportion to services performed.

§ 4.2.2 Payments are due and payable Thirty ( 30 ) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear interest at the rate entered below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon.)*

Interest rate shall be 4% above US Bancorp Prime Rate.

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

#### ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

The Owner shall compensate the Construction Manager for Construction Phase services as follows:

**§ 5.1 COMPENSATION**

§ 5.1.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager in current funds the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Construction Manager's Fee determined as follows:

Base Fee will be Three percent (3.0%) of the Cost of the Work as defined in Article 6. For changes in the Work not associated with any "Resident Upgrade Packages" that are to be offered on a unit-by-unit basis, the fee for additive changes will be 3.0% and for deductive changes the fee will be 0.0%.

**5.1.2**

In addition to the basic fees in 4.1.1 and 5.1.1 above, the Owner shall pay the Construction Manager a Resident Upgrade Fee equal to 15% of the cost of the work, together with such reasonable administrative costs that the Construction Manager will incur directly related to the performance of such work, associated with the Resident Upgrade Packages that the Owner is planning to offer. It is the intent that a limited number of such Upgrade packages will be offered by the Owner, and that once the scope and cost for the upgrades being considered is established, the Owner and Construction Manager will incorporate by Amendment to this Contract the terms and conditions pursuant to which the Construction Manager shall perform such work. It is intended that the Construction Manager will establish a lump sum price per unit type for each Upgrade Package to be offered, and that said lump sum price shall include the fee and administrative costs described above, as well as define the date for each unit by which the Owner must direct the Construction Manager to proceed with the Upgrade. Unit upgrades for which direction to proceed is given after the agreed upon date, or which reflect a deviation in scope from the defined Upgrade Packages will be evaluated separately, and a cost and time adjustment proposed, by the Construction Manager.

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

**§ 5.2 GUARANTEED MAXIMUM PRICE**

§ 5.2.1 The sum of the Cost of the Work and the Construction Manager's Fee are guaranteed by the Construction Manager not to exceed the amount provided in Amendment No. 1, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum as adjusted by approved changes in the Work is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner. At time of Final Completion, any costs savings shall be returned 100% to the Owner and 0% to the Construction Manager.

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

**§ 5.3 CHANGES IN THE WORK**

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of Amendment No. 1 may be determined by any of the methods listed in Section 7.3.3 of A201™-1997.

§ 5.3.2 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of A201™-1997 and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Section 7.3.6 of A201™-1997 shall have the meanings assigned to them in that document and shall not be modified by this Article 5. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.3 In calculating adjustments to the Contract, the terms "cost" and "costs" as used in the above-referenced provisions of A201™-1997 shall mean the Cost of the Work as defined in Article 6 of this Agreement, and the term "and a reasonable allowance for overhead and profit" shall mean the Construction Manager's Fee as defined in Section 5.1.1 of this Agreement.

§ 6.2.4 If no specific provision is made in Section 5.1.1 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.1 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

"Article 5.4: Commencement and Completion has been added. See Exhibit A."

#### ARTICLE 5 COST OF THE WORK FOR CONSTRUCTION PHASE

##### § 6.1 COSTS TO BE REIMBURSED

§ 6.1.1 The term "Cost of the Work" shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 6.

##### § 6.1.2 LABOR COSTS

- 1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's agreement, at off-site workshops.
- 2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's agreement. To the extent that some of the Construction Manager's supervisory and administrative personnel located at the Construction Manager's main office provide service to the project, a portion of their wages and salaries will be included in the cost of work and will be reimbursed in accordance with Exhibit C.

###### Classification

###### Name

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal office or offices other than the site office shall be included in the Cost of the Work, such personnel shall be identified below.)*

- 3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.
- 4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Cost of the Work under Sections 6.1.2.1 through 6.1.2.3.

##### § 6.1.3 SUBCONTRACT COSTS

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

##### § 6.1.4 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

- 1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.
- 2 Costs of materials described in the preceding Section 6.1.4.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

##### § 6.1.5 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

- 1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed.

whether sold to others or retained by the Construction Manager. Cost for items previously used by the Construction Manager shall mean fair market value.

- .2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval.
- .3 Costs of removal of debris from the site.
- .4 Reproduction costs, costs of telegrams, facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephone at the site and reasonable petty cash expenses of the site office.
- .5 That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while traveling in discharge of duties connected with the Work.

#### § 6.1.6 MISCELLANEOUS COSTS

- .1 That portion directly attributable to this Contract of premiums for insurance and bonds. *(If charges for self-insurance are to be included, specify the basis of reimbursement.)*
- .2 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.
- .3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.
- .4 Fees of testing laboratories for tests required by the Contract Documents, except those related to nonconforming Work other than that for which payment is permitted by Section 6.1.8.2.
- .5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the Guaranteed Maximum Price and provided that such royalties, fees and costs are not excluded by the last sentence of Section 3.17.1 of A201™-1997 or other provisions of the Contract Documents.
- .6 Data processing costs related to the Work.
- .7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.
- .8 Legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld.
- .9 Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
- .10 All premiums (without markup) and deductibles associated with Builder's Risk insurance provided by the Construction Manager at the Owner's request.
- .11 All premiums (without markup) and deductibles associated with providing professional liability insurance for the mechanical and electrical design services for the condominiums and R units.

#### § 6.1.7 OTHER COSTS

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

#### § 6.1.8 EMERGENCIES AND REPAIRS TO DAMAGED OR NONCONFORMING WORK

The Cost of the Work shall also include costs described in Section 6.1.1 which are incurred by the Construction Manager except, however, where conditions requiring such action were caused by or are the result of the Construction Manager's negligence.

- .1 In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.6 of A201™-1997.
- .2 In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this agreement of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, Subcontractors or suppliers.

§ 6.1.9 The costs described in Sections 6.1.1 through 6.1.8 shall be included in the Cost of the Work notwithstanding any provision of AIA or A201™-1997 other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.2.

#### § 6.2 COSTS NOT TO BE REIMBURSED

§ 6.2.1 The Cost of the Work shall not include:

- .1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Sections 6.1.2.2 and 6.1.2.3.
- .2 Expenses of the Construction Manager's principal office and offices other than the site office, except as specifically provided in Section 6.1.
- .3 Overhead and general expenses, except as may be expressly included in Section 6.1.
- .4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
- .5 Rental costs of machinery and equipment, except as specifically provided in Section 6.1.5.2.
- .6 Except as provided in Section 6.1.8.2, costs due to the negligence of the Construction Manager or to the failure of the Construction Manager to fulfill a specific responsibility to the Owner set forth in this Agreement.
- .7 Costs incurred in the performance of Preconstruction Phase Services.
- .8 Except as provided in Section 6.1.7.1, any cost not specifically and expressly described in Section 6.1.
- .9 Costs which would cause the Guaranteed Maximum Price to be exceeded.

#### § 6.3 DISCOUNTS, REBATES AND REFUNDS

§ 6.3.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be secured.

§ 6.3.2 Amounts which accrue to the Owner in accordance with the provisions of Section 6.3.1 shall be credited to the Owner as a deduction from the Cost of the Work.

#### § 6.4 ACCOUNTING RECORDS

§ 6.4.1 See Exhibit A for revised Accounting Records requirements.

### ARTICLE 7 CONSTRUCTION PHASE

#### § 7.1 PROGRESS PAYMENTS

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

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

§ 7.1.3 Provided an Application for Payment is received by the Architect not later than the 30<sup>th</sup> day of a month, the Owner shall make payment to the Construction Manager not later than the 30<sup>th</sup> day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than Thirty ( 30 ) days after the Architect receives the Application for Payment.

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager; less (2) that portion of those payments attributable to the Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

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

1. Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.8 of A201™-1997, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
2. Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and initially stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, initially stored off the site at a location agreed upon in writing.
3. Add the Construction Manager's Fee, less retentions of Five percent ( 5.00% ). The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the two preceding Sections bears to a reasonable estimate of the probable Cost of the Work upon its completion.
4. Subtract the aggregate of previous payments made by the Owner.
5. Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation.
6. Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of A201™-1997.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than Five percent ( 5.00% ). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontractors.

7.1.8.1 As an alternative means of achieving the 5% retainage described in 7.1.7 and 7.1.8 above, the Construction Manager and the Subcontractors may allocate a portion of their respective contract amounts to a "Final Completion" line item within each firm's schedule of values. The portions of each contract so allocated shall be equal to the 5% retainage stipulated. Billing against any such "final completion" line item in a schedule of values will be allowed only under the same circumstances as otherwise defined in the contract documents for the induction or release of retainage.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data, that the Architect has made exhaustive or continuous on-site inspections or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

#### § 7.2 FINAL PAYMENT

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager when (1) the Contract has been fully performed by the Construction Manager except for the Construction Manager's responsibility to correct nonconforming Work, as provided in Section 12.2.2 of A201™-1997, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Owner's accountants; and (3) a final Certificate for Payment has then been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The amount of the final payment shall be calculated as follows:

1. Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price.
2. Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of A201™-1997 or other provisions of the Contract Documents.
3. Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.

§ 7.2.3 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of A201™-1997. The time periods stated in this Section 7.2 supersede those stated in Section 9.4.1 of A201™-1997.

§ 7.2.4 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without a further decision of the Architect. Unless agreed to otherwise, a demand for mediation or arbitration of the disputed amount shall be made by the Construction Manager within 60 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Owner's

accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's Final Certificate for Payment.

§ 12.5 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1 and not excluded by Section 6.2 (1) to correct nonconforming Work or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee, if any, related thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

#### ARTICLE 8 INSURANCE AND BONDS

##### § 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in Section 11.1 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance shall be as follows:

*(Paragraph deleted)*

None

8.1.2 Insurance provided will be per the construction Manager's standard policy. The Construction Manager will provide the Owner with a statement of the additional premium cost (if any) associated with other insurance coverage as the Owner may want to consider. If the Owner elects to require the Construction Manager to provide other coverage or limits, then the contract will be adjusted accordingly.

##### § 8.1.3

*(Paragraph deleted)*

§ 8.1.4 Other coverage:

*(If Umbrella Excess Liability coverage is required over the primary insurance or retention, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be achieved by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)*

##### § 8.2 INSURANCE REQUIRED OF THE OWNER

During both phases of the Project, the Owner shall purchase and maintain liability and property insurance, including waiver of subrogation, as set forth in Sections 11.2 and 11.4 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

##### § 8.2.1 Property Insurance:

\$10,000 Deductible Per Occurrence



(Paragraph deleted)

### § 8.3 PERFORMANCE BOND AND PAYMENT BOND

§ 8.3.1 The Construction Manager shall (insert "shall" or "shall not") furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work. The amount of each bond shall be equal to One hundred percent ( 100.00% ) of the Contract Sum.

§ 8.3.2 The Construction Manager shall deliver the required bonds to the Owner after the contract is executed and three days before the commencement of any Work at the Project site. Further, Construction Manager shall deliver a binding commitment for the issuance of such bonds at least two weeks prior to the estimated date for the closing on Project financing. In the event of any early start as identified in paragraph 4.2.1, Owner may require Construction Manager to provide such bonds. Owner shall provide Construction Manager with 10 days notice of such requirement and stipulate in such notice the time for providing same, and the amount of coverage required by owner.

### ARTICLE 9 MISCELLANEOUS PROVISIONS

#### § 9.1 DISPUTE RESOLUTION

§ 9.1.1 During both the Preconstruction and Construction Phases, claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201™-1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

#### § 9.2 OTHER PROVISIONS

§ 9.2.1 Unless otherwise noted, the terms used in this Agreement shall have the same meaning as those in A201™-1997, *General Conditions of the Contract for Construction*.

#### § 9.2.2 EXTENT OF CONTRACT

This Contract, which includes this Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between the Owner and the Construction Manager and supercedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and Construction Manager. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

#### § 9.2.3 OWNERSHIP AND USE OF DOCUMENTS

Article 1.6 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### § 9.2.4 GOVERNING LAW

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

#### § 9.2.5 ASSIGNMENT

The Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 13.2.2 of A201™-1997, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

### ARTICLE 10 TERMINATION OR SUSPENSION

#### § 10.1 TERMINATION PRIOR TO ESTABLISHING GUARANTEED MAXIMUM PRICE

§ 10.1.1 Prior to execution by both parties of Amendment No. 1 establishing the Guaranteed Maximum Price, the Owner may terminate this Contract at any time without cause, and the Construction Manager may terminate this Contract for any of the reasons described in Section 14.1.1 of A201™-1997.

§ 10.1.2 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 prior to commencement of the Construction Phase, the Construction Manager shall be equitably compensated for

Preconstruction Phase Services performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Section 4.1.1.

§ 10.1.3 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 after commencement of the Construction Phase, the Construction Manager shall, in addition to the compensation provided in Section 10.1.2, be paid an amount calculated as follows:

1. Take the Cost of the Work incurred by the Construction Manager.
2. Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.
3. Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders.

Subcontracts, purchase orders and rental agreements entered into by the Construction Manager with the Owner's written approval prior to the execution of Amendment No. 1 shall contain provisions permitting assignment to the Owner as described above. If the Owner accepts such assignment, the Owner shall reimburse or indemnify the Construction Manager with respect to all costs arising under the subcontract, purchase order or rental agreement except those which would not have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner elects not to accept the assignment of any subcontract, purchase order or rental agreement which would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager shall terminate such subcontract, purchase order or rental agreement and the Owner shall pay the Construction Manager the costs necessarily incurred by the Construction Manager by reason of such termination.

#### § 10.2 TERMINATION SUBSEQUENT TO ESTABLISHING GUARANTEED MAXIMUM PRICE

Subsequent to execution by both parties of Amendment No. 1, the Contract may be terminated as provided in Article 14 of A201™-1997.

§ 10.2.1 In the event of such termination by the Owner, the amount payable to the Construction Manager pursuant to Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 In the event of such termination by the Construction Manager, the amount to be paid to the Construction Manager under Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, including a reasonable estimate of the Cost of the Work for Work not actually completed.

#### § 10.3 SUSPENSION

The Work may be suspended by the Owner as provided in Article 14 of A201™-1997; in such case, the Guaranteed Maximum Price, if established, shall be increased as provided in Section 14.3.3 of A201™-1997 except that the term "cost of performance of the Contract" in that Section shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1.1 and 5.3.4 of this Agreement.

#### ARTICLE 11 OTHER CONDITIONS AND SERVICES

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User Name:

(267643001)

11.1 thru 11.4  
See Exhibit A

11.5

It is understood and agreed that the OMP is for the total cost of the work and that cost overruns from one line item can be offset by cost savings from another line item.

11.6

All personnel listed in Exhibit C as a "Reimbursable as a cost of the work" shall be included in the cost of the work per Article 7.2, subject to the GMP per Article 6.1.2.2.

11.7

The following procedure is agreed to by Owner and/or Owner's lender and Title Company in the event of a lien being filed by one of the Construction Manager's Vendors and/or Vendor's Vendor(s): At the Construction Manager's sole discretion either 1. Construction Manager shall make a cash deposit equal to 150% of each lien amount in separate escrow account held by Owner's Title Company on behalf of the Construction Manager or 2. The Construction Manager may provide a lien transfer bond for the amount of the lien. Upon said deposit being made or lien bond being provided by Construction Manager, Owner and/or Owner's Lender, and Title Company shall immediately disburse to Construction Manager any monies owed to Construction Manager under the terms of this contract.

11.8

Owner and Construction Manager agree to the following punch list procedure for each phase of the project:

1. Prior to issuance of temporary or Full Certificate of Occupancy by City, Owner and/or Owner's designated representative(s) shall prepare one original interior and exterior punch list.
2. Within 7 calendar days after completion punch list work by Construction Manager, Owner and/or Owner's representative(s) will re-inspect to confirm original punch list items are complete.
3. New items will not be added to the original punch list at any time except for items which are substantial (i.e. no hot water) and thus were obviously missed during original punch list items.
4. Any item(s) not included in original punch list shall be considered warranty item(s).
5. Warranty items shall not be considered outstanding punch list items and thus shall not be subject to withholding of final payments.

11.9

If a discrepancy occurs within this Agreement and/or between this Agreement and other contract documents, it is understood and agreed that Article 11 of this Agreement, the balance of this Agreement, and Exhibits "A", "B", "C" and "D" (in that order) shall govern.

11.10

If interest costs occur per Paragraph 4.2, the cost shall be reimbursed by issuance of an Owner Change Order.

11.11

Architect shall return all submittals (i.e. shop drawings) to Contractor within 10 working days of date received from Contractor.

11.12

Modification and/or extension of project completion date due to "weather days" shall be as outlined in Exhibit "D" attached hereto.

11.13

The following Exhibits, attached hereto, form part of the Contract Documents:  
Exhibit A: Modifications to the A121CM  
Exhibit B: Supplementary Conditions  
Exhibit C: Personnel Billing Rates and Matrix

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(257045200)

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Exhibit D: Definition of Weather Days.  
Exhibit E: Project Scope and Budget Summary  
Exhibit F: Preliminary Divisional Cost Breakdown  
Exhibit G: Pre-Construction Phase Schedule  
Exhibit H: Preliminary Construction Phase Schedule

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

OWNER

*[Signature]*  
(Signature)  
JOE SILVER PRESIDENT  
(Printed name and title)  
MAY 1, 2004  
Date  
*[Signature]*  
ATTNEY

CONSTRUCTION MANAGER

*[Signature]*  
(Signature)  
PETER WAGNER, VICE PRESIDENT  
(Printed name and title)  
APRIL 29, 2004  
Date  
*[Signature]*  
ATTNEY

**RainbowVision Santa Fe/Weis Contract Agreement**  
**Exhibit A**  
**Additional Provisions/Modifications based on the AIA A121CMC (2003 Edition)**

**5.4 COMMENCEMENT AND COMPLETION**

Add the following paragraphs:

5.4.1 The date of commencement is the date from which the Contract Time of subparagraph 5.4.2 is measured; it shall be the date of the giving of the Notice to Proceed (the "Commencement Date"). The Owner shall issue the Notice to Proceed within ten calendar days of the last to occur of all of the following (the "Conditions to Commencement"): (i) closing of financing acceptable to Owner, sufficient in an amount to satisfy the Owner's financial obligations hereunder, and (ii) receipt of all permits and approvals necessary to allow commencement and continuation of construction. In no event shall the Construction Manager commence any work on site by placing materials at the site or by conducting other Work at the site until a Notice to proceed has been given.

The immediately aforementioned notwithstanding, Construction Manager and Owner acknowledge that prior to receiving a Notice to Proceed the Construction Manager may be required to enter into certain other subcontracts, issue purchase orders, or make similar commitments which, if the Project were not to proceed would result in the incurrence, by Construction Manager of certain costs, financial penalties, or other like or similar expenses. Owner agrees to reimburse Construction Manager all such costs, penalties, or similar expenses, so long as, and only to the extent that Construction Manager has received Owner's written approval prior to the incurrence of such costs, and/or the entering into such subcontracts, authorization of such purchase orders or making such similar commitments. Any activity conducted hereunder shall in no way effect the dates established for substantial completion for each phase as shall be provided for in Amendment No. 1 hereto.

5.4.2 It is anticipated that the Work is to be completed in phases so as to permit residents of the Project to move in on a phased basis (each of which shall be referred to as a "Phase").

1 Substantial Completion of each Phase is to occur on or before an agreed date. The agreed dates for each Phase shall established by Amendment No. 1 to this Agreement at the time the GMP is established, which shall be an agreed upon number of calendar days from the Commencement Date. Once established each of these days shall be measured from the Commencement Date and may only be extended in accordance with the Contract Documents.

2 Each date by which Substantial Completion of a Phase must occur pursuant to the Contract Documents shall be referred to as a "Phase Completion Deadline". The period of time from the Commencement Date to the applicable Phase Completion Deadline shall be referred to as the "Phase Contract Time".

3 The Owner and the Construction Manager acknowledge that if the Construction Manager fails to achieve substantial completion of a Phase before the applicable Phase Completion Deadline, the Owner will suffer damages which are difficult to ascertain. However, the Owner and the Construction Manager agree that the degree to which the Owner will be damaged by the Construction Manager's failure to substantially complete a particular Phase of the Project within the Phase Contract Time generally will decrease as the overall Project nears Substantial Completion. Accordingly, the Construction Manager agrees to pay the Owner as liquidated damages with respect to each particular Phase, and not as a penalty, for each calendar day that passes after the Phase Completion Deadline has expired for the particular Phase of the Project, until the date that the Construction Manager achieves Substantial Completion of that particular Phase, an amount equal to the portion of the GMP allocable to that particular Phase times the construction financing daily interest for Project (the "Stipulated Damage

Amount"). Any liquidated damages payable by the Construction Manager as to a particular Phase shall then be determined by multiplying the Stipulated Damage amount by each day of delay. The Stipulated Damage Amounts for each phase shall be established by an amendment hereto at the closing for financing on the Project.

.4 For purposes of determining that portion of the GMP allocable to a particular Phase, the following method of calculating same will be utilized:

(i) Reasonably determine that amount of the total GMP which generally applies to construction of the Project (as a whole) by adding the sum of the following amounts contained within the GMP: (Specific amounts to be determined when GMP is established by Amendment to the Contract.)

|                            |    |
|----------------------------|----|
| Site Development           | \$ |
| General Conditions         | \$ |
| Construction Manager's Fee | \$ |
| Other                      | \$ |
| Total                      | \$ |

(ii) Subtract total in (i) above from the total GMP to determine the "remaining GMP".

(iii) Utilize the approved Schedule of Values and construction costing information to calculate the percentage of the cost of a particular Phase to the "remaining GMP" amount as determined in (ii) above.

(iv) Apply the percentage from (iii) above for the particular Phase(s) to the GMP.

.5 The Stipulated Damage amount for each Phase is intended to be cumulative of the other Phases. Accordingly, if the Phase Completion Deadline for more than one (1) Phase shall have elapsed without the applicable Phases having been substantially completed, then the Stipulated Damage Amount for each Phase not so substantially complete shall be due and owing by the Construction Manager to the Owner. The Owner may collect the Stipulated Damage Amounts by withholding them from payments due the Construction Manager or by separate demand. The Stipulated Damage Amounts provided herein shall be in lieu of all other claims, costs, losses, damages and/or expenses that the Owner might otherwise have against the Construction Manager by reason of its failure to achieve Substantial Completion before the relevant Phase completion Deadline, whether arising from contract or tort, or actual, direct, indirect or consequential damages, and the Owner hereby releases the Construction Manager therefrom.

.6

.1 The Construction Manager agrees that final completion of each Phase of the Work shall occur as soon as possible after Substantial Completion of the Phase, but no later than thirty (30) calendar days after the date on which Substantial Completion of that Phase has occurred, as evidenced by the Architect's Certificate of Substantial Completion. Final payment as to a Phase shall be due upon final completion of such Phase.

.2 Owner acknowledges that there may be certain items which may be on order that, through no fault of the Construction Manager, may not arrive and/or otherwise be available for incorporation into the Work within said thirty (30) day period. To the extent that Owner, in Owner's sole discretion, accepts a Phase as having achieved final completion, even though such items remain outstanding, Owner may, (a) acknowledge such acceptance, and (b) withhold up to one and one half (1.5) times the total cost (as determined by the Construction Manager) for each Phase, or \$5000 for each Phase (whichever is greater), of such Work which remains incomplete or unincorporated.

3 Further, it is the intent that outstanding items described in 5.4.2.6.2 are to be secured and installed as quickly as possible - preferably within five (5) days after the Construction Manager receives those items. It is acknowledged that some items may be more significant than others in terms of the operation or marketability of the project. It is also acknowledged that unless determined otherwise, the costs incurred by the Construction Manager for procuring, expediting and installing the items covered by 5.4.2.6.2 are reimbursable costs as defined under Article 8 of the Contract. Accordingly, it may be less costly for the Owner, and less disruptive to the operation of the facility, to have several items accumulated and installed at one time rather than have each item installed as it is delivered. Therefore, for each item outstanding as of Substantial Completion, within five (5) days the Construction Manager shall provide the Owner, in writing, with a proposed plan indicating the expected delivery date and proposed installation date for each item. The Owner and Construction Manager will jointly review (and revise as needed) said plan and reach an agreement on the plan. The Construction Manager will report to the Owner on a weekly basis of the status of the items remaining to be installed, and immediately notify the Owner of any change in delivery date or installation date due to unforeseen procurement or delivery problems. If after receiving an outstanding item the Construction Manager fails to commence the Work within five (5) days after agreed upon commencement date, or subsequently fails to complete the Work in accordance with the agreed upon schedule, the Owner may exercise its right to carry out the work as provided in section 2.4 of the A201 General Conditions.

4 The provision stated above for withholding 1.5 times the cost of items outstanding at the time of Substantial Completion does not apply to any Upgrade Options initiated by the Owner subsequent to the decision date established by the Construction Manager for each upgrade option proposed for a given residential unit.

7 Except for the portions of the project which the Owner has requested completion and occupancy prior to the completion of the Commons Areas in the El Centro building, it is the intent that when developing the Phase Completion Deadlines described in 5.4.2.1 and 5.4.2.2 above, for the purposes of determining what, if any, stipulated damage amount may be owed by Construction Manager, no phase shall be deemed to have achieved Substantial Completion until such time as (1) the common areas (as defined in Amendment No. 1) portion of the Project shall have achieved Substantial Completion or (2) the Owner agrees to deem the phase Substantially Complete or (3) the Owner takes beneficial occupancy of all or part of the phase. Further and accordingly, when establishing the completion dates for each phase as provided for herein by amendment hereto, such amendment shall also provide that no phase shall be deemed complete for the purposes hereof unless (1) and/or until the commons area portion of the Project shall have attained substantial completion, (2) the Owner has agreed to deem the phase Substantially Complete, or (3) the Owner takes beneficial occupancy of all or part of the phase.

#### 6.4 ACCOUNTING RECORDS

6.4.1 The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to the Owner and Owner's lender. The Owner and the Owner's accountants and the lender and lender's accountant or consultants shall be afforded reasonable access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement and the Project, (collectively "the records") and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law. All Records shall be maintained in accordance with generally accepted accounting principles, consistently applied. There shall be an "open book" policy, in effect at all times with regard to all Records relative to the project.

maintained by either the Construction Manager or the Owner, or anyone on their behalf, and each party shall have full and complete access to said Records maintained by the other at all reasonable times. The Construction Manager shall require all Subcontractors and Sub-Subcontractors retained on a cost-plus basis to retain Records and permit the same access by Owner as is required of the Construction Manager under this Article 6.4.

6.4.1.1 If the Owner, Owner's accountants, Lender or Lender's accountants elect to perform an audit of "the records" maintained by Construction Manager, said audit shall be performed within six (6) months of the Final Completion of the project. This stipulation does not affect the Construction Manager's obligation to maintain "the records" for the time period noted in 6.4.1.

6.4.2 If, at any time during construction, any inspection by the Owner or the Lender of the Construction Manager's Records or any other data relating to the contract documents reveals an overcharge or undercharge by the Construction Manager as confirmed by an independent auditor, the next Application for Payment shall be appropriately adjusted by the amount of such overcharge or undercharge and related Fee.

## ARTICLE 7 CONSTRUCTION PHASE

### 7.1 PROGRESS PAYMENTS

Add the following:

7.1.11 To the extent of payments received by the Construction Manager from the Owner, the Construction Manager warrants the real property on which the Project is located will remain free of any legitimate and proper claims of lien arising from the Work performed by or through the Construction Manager. If any such liens are properly recorded, the Construction Manager shall have fifteen (15) business days from its receipt of written notice by the Owner or Owner's agent (including Title company) of such recording within which to discharge or secure by cash deposit or by construction lien transfer bond any such claims of lien. If the Construction Manager fails to discharge or otherwise secure such claim of lien within said time period, the Owner shall be entitled to satisfy the lien or take whatever action it deems appropriate to remove the lien from its property. All reasonable expenses and costs, including reasonable attorney's fees, incurred by the Owner after the abovementioned fifteen (15) day period to effect the discharge, securing and/or removal of any such claims of lien shall be promptly reimbursed to the Owner by the Construction Manager.

7.1.12 Concurrently with each Application for Payment, Construction Manager will deliver to Owner lien waivers (which may be conditioned upon payment) waiving all lien rights in respect of the Project, executed by Construction Manager, and executed by Subcontractors and suppliers covering amounts paid on their account or to be paid with funds received from such Application for Payment. All lien waivers shall be in form and substance satisfactory to Owner and the Owners Lender(s). Additionally, the Construction Manager shall provide further evidence regarding application of each progress payment to payment of all Subcontractors and suppliers providing services or material in respect of the Project, and shall comply with such other reasonable requirements as the Owners Lender(s) may impose with respect to obtaining advances of funds be applied to each Application for Payment."



**ARTICLE 9  
MISCELLANEOUS PROVISIONS**

**9.1 DISPUTE RESOLUTION**

Add the following the following subparagraphs to 9.1.1:

.1 Claims between the parties to this Agreement shall be resolved as set forth below. At all times, the parties shall approach the dispute resolution process in good faith.

.2 In the event of a Claim between the parties, the parties shall promptly meet in good faith to resolve the Claim informally before invoking the dispute resolution procedures outlined elsewhere in the Contract Documents, including the A201 General Conditions and Supplementary Conditions, and below. If the parties are not able to quickly resolve the claim, either party may request participation by the Architect. Both parties shall promptly submit a written summary of its position to the Architect. Upon receipt of both summaries, the Architect shall immediately convene a formal meeting with the parties to further discuss the Claim. If the Claim is not resolved within three business days after the commencement of such meeting, either party may then commence the dispute resolution process defined in the Contract Documents.

.3 If the informal dispute resolution efforts outlined in 9.1.1.2 are not successful, then the dispute resolution procedures outlined in the balance of the Contract Documents. Any mediation conducted pursuant to this Paragraph 9.1 shall be held in Santa Fe, unless the parties mutually agree otherwise.

.4 Intentionally omitted

.5 Intentionally omitted

.6 Consent to arbitration involving an additional person or entity shall not constitute agreement to arbitration of a dispute not described in such consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

.7 Intentionally omitted

.8 The arbitration shall be held in Santa Fe.

.9 Notwithstanding anything herein to the contrary, if (1) the Claims involve a proposed, net aggregate payment or reimbursement in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose, an "interested person or entity" means any person or entity if (a) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (b) the interested person or entity is so situated that the disposition of the claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law.

**ARTICLE 11  
OTHER CONDITIONS AND SERVICES**

11.1 The Construction Manager recognizes that any Lender involved in financing the Project will have requirements pertaining to this Agreement. The Construction Manager agrees to cooperate with and assist the Owner and the Architect in amending and supplementing the Contract Documents to conform to reasonable and customary requirements of any Lender (to the extent such requirements are acceptable to the Owner). However, the Construction Manager shall not be responsible for actually preparing amendments or supplements to the Contract Documents for any reason at any time. Such amendments or supplements may include, without limitation, provisions:

- A. Naming any Lender as an additional insured on the Construction Manager's bonds and insurance policies and providing notice to any Lender of termination, cancellation or material modification of such policies.
- B. Requiring approval of Applications for Payment by a consultant designated by a Lender prior to payment.
- C. Agreeing not to amend Contract Documents without the reasonable and timely consent of the Lender.
- D. Requiring approval of Change Orders by the Lender, provide that Lender approval will be provided on a timely basis and the Owner will use its best efforts to secure such timely approval.
- E. Requiring notice of the Owner's default to the Lender, with a Lender having the right to cure, and requiring continued performance by the Construction Manager, provided that the Lender assumes all contract obligations of the Owner.
- F. Subordinating any lien rights of the Construction Manager to rights of the Lender.
- G. Requiring copies of all written notices to be sent to the Lender.
- H. Granting the Lender the right to inspect the work and to examine records pertaining thereto,
- I. Recognizing the pledge of the Owner's rights under Contract Documents to the Lender.
- J. Requiring the Construction Manager to acknowledge, on the Lender's request, whether or not the Owner is in default of its obligations under the Contract.
- K. Requiring the Construction Manager to assist the Owner in preparing and submitting reports and information concerning the Work as may be reasonably required by the Lender.

11.2 Nothing contained in Paragraph 11.2 or Paragraph 11.3 is intended to derogate from any other rights to terminate this Contract that may be granted the Construction Manager elsewhere in this Contract, including, but not limited to, the provisions of Article 2 and Article 14 of the General Conditions and Article 10 of this Agreement.

11.3 The Construction Manager may perform all or any part of the Work with its own forces, or through an Affiliate, provided that (1) the Construction Manager secures at least two competitive bids with respect to the work Construction Manager intends to perform (2) the Owner consents thereto in writing, which consent shall not be unreasonably withheld, after full disclosure by the Construction Manager to the Owner of the affiliation or relationship of the Affiliate to the Construction Manager and (3) any Work performed by an Affiliate shall be covered in a separate agreement between the Construction Manager

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and the Affiliate, which shall satisfy all of the requirements for subcontracts as set forth in Paragraph 5.3 of the General Conditions and which shall be approved by the Owner in writing.

11.4 Any amounts payable hereunder which are not paid when due shall thereafter accrue interest at Wall Street Journal "prime" plus one percent (1%) per annum or at the highest rate allowed under the law of the state where the Project is located, whichever is less.

**Rainbow/Vision Santa Fe/Wels Contract Agreement  
Exhibit B  
Supplementary Conditions to the AIA A201 General Conditions (1997 Edition)**

1. The following Supplementary Conditions shall apply to that certain Standard Form of Agreement Between Owner and Construction Manager (the "Agreement") dated
2. For purposes of these Supplementary Conditions, capitalized terms shall have the meaning given to them in the Contract Documents (as such term is defined in Article 1 of the Agreement), unless otherwise defined in these Supplementary Conditions.
3. The following paragraphs supplement, modify, or amend that certain Contract Document entitled "General Conditions of the Contract for Construction," AIA Document A201, Fifteenth Edition, 1997, Articles 1 through 14 inclusive (the "General Conditions"). Where only a portion of any provision of the General Conditions is supplemented, modified, or amended, the remaining portions of that provision shall remain unaltered and in effect. In the event of any inconsistency between the General Conditions and these Supplementary Conditions, the terms of these Supplementary Conditions shall apply. Hereinafter, all references to the General Conditions shall mean the General Conditions as amended by these Supplementary Conditions.

**A. INTENTIONALLY OMITTED**

- B. PARAGRAPH 1.2.4 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.4 Where no explicit quality or standards for materials or workmanship are established for Work, such Work is to be of good quality for the intended use and consistent with quality of the surrounding Work and of the construction of the Project generally.

- C. PARAGRAPH 1.2.5 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.5 All indications or notations which apply to one of a number of similar situations, materials or processes shall be deemed to apply to all such situations, materials or processes wherever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

**D. INTENTIONALLY OMITTED**

- E. SUBPARAGRAPH 1.5.1, add at the end of the first sentence: ", unless otherwise identified and incorporated by reference in Agreement."**

- F. SUBPARAGRAPH 2.2.6 Modify Subparagraph 2.2.5 as follows:**

"In addition to the sets the Construction Manager used for bidding, the Owner will furnish a to be agreed upon number of sets of black and white prints of the Drawings and copies of the Project Manual free of charge for execution of the Work. Additional sets may be purchased from the Office of the Architect."

- G. SUBPARAGRAPH 3.2.3, delete the second sentence, and add at the end: "If the Construction Manager performs Work knowing it involves such error, inconsistency, omission or difference without such notice to the Architect, the Construction Manager shall assume appropriate responsibility for such Work and shall bear the costs attributed to correction."
- H. PARAGRAPH 3.3 "SUPERVISION AND CONSTRUCTION PROCEDURES" is hereby supplemented by the addition of the following sub-paragraphs:
  - 3.3.4. The Construction Manager shall carefully check its own work and that of Subcontractors as the Work is being performed. The Construction Manager shall ensure that incorrect or faulty Work is corrected as soon as possible but in any event in a timely manner so as not to impact the project schedule.
  - 3.3.5 During the finishing stages of the project, the Construction Manager shall make frequent inspections of the Work in the presence of the Architect or the Owners Representative and the applicable Subcontractor(s) involved, if any, and the Architect shall identify incorrect and faulty Work. The Construction Manager shall ensure that incorrect or faulty Work is corrected in accordance with 3.3.4.
- I. PARAGRAPH 3.4 "LABOR AND MATERIALS" is hereby supplemented by addition of the following Subparagraphs 3.4.3 and 3.4.4:
  - 3.4.4 Should the Owner make reasonable objection, based upon qualifications, fitness, behavior or temperament, to the presence of any personnel of Construction Manager or any subcontractor, such person shall not perform services on the Project site, or otherwise in connection with the Project, without written consent of the Owner.
  - 3.4.5 The Construction Manager shall not change or replace the assigned Project Manager or Superintendent without prior written consent by the Owner.
- J. SUBPARAGRAPH 3.5.1, Add to the end: "Construction Manager's warranties shall commence upon Substantial Completion of the Work for each Phase and continue for a period of one year thereafter."
- K. PARAGRAPH 3.5 "WARRANTY" is hereby supplemented by the addition of the following sub-paragraphs:
  - 3.5.2. In the event of a claim by the Owner against the Construction Manager under Paragraph 3.5.1. of these General Conditions (or under any other express written warranty made by the Construction Manager) for any item of Work performed under the Contract Documents, the Owner shall give notice (a "Warranty Notice") of the claim to the Architect and the Construction Manager and thereafter, the Architect or Architects authorized representative and the Construction Manager shall inspect the item(s) of Work in question. If following its inspection the Architect determines that any such item is included within the Construction Manager's warranty under the Contract Documents, then:
    - (a) Upon formal notification from the Architect, the Construction Manager shall have thirty (30) days, notwithstanding any other time period specified in the Contract Documents, to either (1) complete the cure for the item or, for a Longer Cure Item, commence the cure and thereafter diligently proceed to complete the cure, or (2) if the Construction Manager disputes the warranty coverage of the item, commence the

dispute resolution procedures described in Section 4.3 of the General Conditions.

- (b) If upon the expiration of the thirty (30) day period the Construction Manager has failed to satisfy the provisions of either clause (a) (1) or clause (a) (2) immediately above, then the Owner shall have the right to engage a third party Construction Manager of the Owner's sole selection to cure or complete the cure of the Warranty Item at the Construction Manager's expense.
- (c) If the Construction Manager fails to cure an item within the required time and if the item is finally determined by arbitration or, when permitted, judicial proceedings to be covered by any Construction Manager's warranty under the Contract Documents, then the Construction Manager shall be liable for all expenses incurred by the Owner in enforcing its warranty claim including legal and Architectural fees and expenses, an administrative charge of a percentage equal to Construction Manager's fee times the cost to cure the warranty item to cover the Owner's administrative costs to enforce the warranty claim, and, when a third party Construction Manager has been engaged by the Owner under this Paragraph 3.5.2, the costs and expenses of the third party Construction Manager.

L. INTENTIONALLY OMITTED

M. ARTICLE 3.12 SHOP DRAWINGS, PRODUCT DATA, AND SAMPLES is supplemented by the following replacement language for Subparagraph 3.12.4

3.12.4 Shop Drawings, Product Data, Samples and similar submittals which are required by the Contract Documents to be submitted for Architect's review shall become Contract Documents upon Architect's review and approval. Submittals which are not required by the Contract Documents to be submitted for Architect's review are not Contract Documents.

N. ARTICLE 3.18 "ACCESS TO WORK" is hereby supplemented by addition of the following Subparagraph:

"3.18.2 Representatives of the State Agencies shall have access at all reasonable times to the Work wherever it is in preparation or progress, and the Construction Manager shall provide proper facilities for such access and inspection."

O. PARAGRAPH 4.2.4 "COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION" is hereby supplemented by the additions of the following subparagraphs: Nothing contained herein shall prohibit the Owner's Representative from communicating directly with the Construction Manager for the purpose of receiving information and/or providing the Construction Manager with clarification as to Owner's position with regard to any matters affecting or concerning the Work.

4.2.4.1 The following definitions shall apply to construction communications:

4.2.4.1.1 Contract Document Clarifications: An answer from the Architect, in response to an inquiry from the Construction Manager, intended to make some

requirement(s) of the Drawings or plans clearly understood. Drawing/plan clarifications may be sketches, drawings, or in a narrative form and are not intended to change any requirements of the Contract Documents. Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.2 Non-Conformance Notice:** A Notice issued by the Architect documenting that the Work or some portion thereof has not been performed in accordance with the requirements of the Contract Documents. Payment shall not be made on any portion of the Work for which a Non-Conformance Notice has been issued and the Work not corrected to the satisfaction of the Architect.

Upon receipt of a Non-Conformance Notice the Construction Manager shall provide a written Response to the Non-Conformance Notice within five (5) working days after receipt of the Notice. The Construction Manager's response shall state either (a) the basis of Construction Manager's determination that the Work was performed in accordance with the Contract Documents or (b) the corrective action Construction Manager intends to take, at its sole expense, to correct the non-conforming work.

If the Construction Manager disputes issuance of the Notice the Architect has five (5) working days in which to respond by either (a) withdrawing the Notice of Non-Conformance or (b) directing the Construction Manager to correct the Work.

If directed to correct the Work, the Construction Manager shall do so within five (5) working days after receipt of such direction from the Architect, or such other time as may be agreed to with the Architect, without loss of rights for claim recovery or dispute resolution as may be available by the Contract.

**4.2.4.1.3 Requests for Information:** A written request from the Construction Manager or one of its subcontractors, to the Architect, seeking an interpretation or a clarification of some requirement of the Contract Documents. The Construction Manager shall clearly and concisely set forth the issue for which it seeks clarification or interpretation and why a response is needed from the Architect.

Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.4 Substitution/Or-Equal Submittals:** A written request from the Construction Manager to substitute a material, article, device, product, fixture, form, type of construction, or process called for in the Contract Documents with another item that shall substantially equal in all respects to that so indicated or supplied. Each such request shall specifically set forth any manner in which the proposed change does not conform to the Contract Documents and Construction Manager (and any subcontractor initiating the request) warrants that the proposed substitute conforms in all respects with the contract documents except as specifically identified as non-conforming in the request.

**4.2.4.1.5 Submittals/Shop Drawings:** When required by any technical specification included in these Contract Documents, the Construction Manager shall transmit to the Architect technical submittals, shop drawings, or samples, including supporting catalog cuts, manufacturer's literature, sketches or drawings, calculations, and other pertinent, in sufficient detail to enable the Architect to review the information and determine that the Construction Manager clearly understands the requirements of the Contract Documents. Construction Manager (and any subcontractor initiating a submittal) warrants that all Work and materials depicted in technical submittals, shop drawings and samples shall conform in all respects to the requirements of the Contract Documents, except as otherwise specifically identified as non-conforming.

4.2.4.1.8 Schedule Submittals: When required by the Construction Schedule Specification of these Contract Documents, the Construction Manager shall submit required schedules, schedule updates, schedule revisions, time impact analysis, etc. for review.

P. INTENTIONALLY OMITTED

Q. SUBPARAGRAPH 4.3.7.2 is hereby revised (and paragraphs 4.3.7.3 and 4.3.7.4 are added) to read as follows:

4.3.7.2 Weather days: Construction Manager confirms that the Contract Time, Phased Contract Time and the agreed upon dates for same as set forth in Amendment No. 1 to this Agreement are reasonable periods to perform The Work. Construction Manager has included in the work schedule ordinary and normally anticipated lost days due to adverse weather ("weather days") and therefore Construction Manager shall not be entitled to an extension of the Contract Time or Phased Contract Time as a result of weather conditions normally experienced in the greater Santa Fe area unless (1) the Construction Manager is unable to make up for the weather delay by scheduling work for a Saturday in accordance with 4.3.7.2 below, and (2) the number of weather days lost (and not made up by Saturday work) in that calendar month exceeds the number of weather days provided for in the Contract Time.

4.3.7.3 The Construction Manager's work schedule is based upon a regular five-day work week per calendar week. It is mutually agreed that in the event of a weather day the Construction Manager, before requesting a time extension the Construction Manager will first try to make up that weather day on the next Saturday available during the following 30 calendar days. A Saturday will be considered to be "available" only if all of the following conditions are met: (1) no work has already been scheduled for that day that would interfere with the work being rescheduled, (2) it is not a national holiday, (3) working on that Saturday is allowed by local ordinance, and (4) materials and workforce equivalent to what was scheduled for the lost weekday are available on that Saturday. The Construction Manager will only be required to utilize a Saturday if either (a) the Construction Manager incurs no additional cost in rescheduling work for that Saturday, or (b) the Owner agrees to compensate the Construction Manager (by Change Order) for any additional costs (such as for labor rate differential) the Construction Manager may incur.

4.3.7.4 The requirement stated above for the Construction Manager to utilize a Saturday to make up for a weather delay only applies the number of weather days included in each calendar month as indicated in the following list of Anticipated Lost Days. For every weather day beyond the number included below, the Construction Manager shall be entitled to an equivalent number of days extension to the Contract Time. The Construction Manager may (at the CM's sole discretion) attempt to mitigate the delay utilizing additional Saturdays as outlined in 4.3.7.3, but has no obligation to do so.

For the purposes of this Paragraph the table provided below setting forth the norms/anticipated lost weather days shall be utilized by the parties in determining lost weather days:



| <u>Month</u> | <u>Anticipated Lost Days<br/>Due to Adverse Weather</u> |
|--------------|---------------------------------------------------------|
| January      | 1                                                       |
| February     | 1                                                       |
| March        | 0                                                       |
| April        | 1                                                       |
| May          | 0                                                       |
| June         | 0                                                       |
| July         | 1                                                       |
| August       | 1                                                       |
| September    | 2                                                       |
| October      | 2                                                       |
| November     | 1                                                       |
| December     | 0                                                       |

See the Exhibit D "Weather Delays" - attached to the Contract.

R. INTENTIONALLY OMITTED

S. SUBPARAGRAPH 4.6.8, add as new subparagraph :

"4.6.8 Limitations of Arbitration. Notwithstanding anything in the Contract Documents to the contrary, if (1) the Claims involve a proposed, net aggregate payment to owner or Construction Manager in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose an "interested person or entity" means any person or entity if (3) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (4) the interested person or entity is so situated that the disposition of the Claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law."

T. SUBPARAGRAPH 5.2.1, change "promptly" to "within 10 days" in lines 5 and 7.

U. PARAGRAPH 7.3 "CONSTRUCTION CHANGE DIRECTIVES"

Subparagraph 7.3.3.3 is hereby changed to read as follows:

7.3.3.3 The following fees apply to Changes to the Work:

7.3.3.3.1 INTENTIONALLY OMITTED

7.3.3.2 The same markup applied by the subcontractor in the subcontractors base subcontract, which shall be defined in said subcontract and subject to Owner's approval, to the cost of work performed by any subcontractor.

V. INTENTIONALLY OMITTED

W. INTENTIONALLY OMITTED

X. PARAGRAPH 9.8.1. of the General Conditions is hereby deleted in its entirety and the following is substituted in lieu thereof:

9.8.1 "Substantial Completion" of the Project shall be deemed to occur when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use and, in addition, all requirements of the Contract Documents for Substantial Completion, including the following conditions, have been fulfilled as follows:

a. A Temporary or Final Certificate of Occupancy has been issued and all construction related approvals, licenses and requirements have been obtained or satisfied for the Project such that the Project may be operated for its intended use.

b. INTENTIONALLY OMITTED

Y. PARAGRAPH 9.8.2. of the General Conditions is hereby deleted in its entirety and the following Paragraphs 9.8.2.1. through 9.8.2.8. are substituted in lieu thereof:

9.8.2.1. When the Construction Manager considers that the Work, or portion thereof which the Owner agrees to accept separately, is substantially complete, the Construction Manager shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Construction Manager shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents. Following receipt of the Construction Manager's list, the Architect will make an inspection (the "Initial Punch List Inspection") to determine whether the Work or designated portion thereof is Substantially Complete. Upon completion of its Initial Punch List Inspection, the Architect shall prepare and submit to the Construction Manager and the Owner the Architect's list (the "Punch List") of items to be completed or corrected. For the items on the Punch List, the Architect shall specify:

- a. a date (a "Punch Item Date") by which such items shall be completed, which Punch Item Date shall be no more than forty-five (45) days from the date of the Punch List unless the Architect determines that reasonable cause exists for a later completion date; and
- b. the cost to complete or correct the items as reasonably determined by the Architect.

The Architect shall expressly state on the Punch List what the Construction Manager must do to achieve Substantial Completion under Paragraph 9.8.1 of the General. If as a result of the Initial Punch List Inspection the Architect determines that Substantial Completion has occurred, the Architect shall prepare a Certificate of Substantial Completion pursuant to Paragraph 9.8.2.5 below.

9.8.2.2 If the Construction Manager has not given notice that the Work is substantially complete and requested inspection thereof on or before the date for Substantial Completion set by the parties in the Contract Documents, then the Owner may request the Architect to make an Initial Punch List inspection of the Work to (x) prepare the Punch List pursuant to the provisions of Paragraph 9.8.2.1. above and (y) determine if Substantial Completion has occurred.

9.8.2.3. Upon the request of the Construction Manager prior to the expiration of the relevant Punch Item Date(s) and for good cause shown, the Architect may extend any Punch Item Date(s) for a reasonable period. Following receipt of the Punch List and the Construction Manager's compliance with the requirements of Paragraph 9.8.1. above, the Construction Manager may submit a request for another inspection by the Architect, if necessary, to determine whether Substantial Completion of the Work has been achieved.

9.8.2.4. If the Construction Manager fails to satisfactorily complete any item(s) on the Punch List by the applicable Punch Item Date(s), then the Owner has the right to take over the work in accordance with Section 2.4 of the General Conditions.

9.8.2.5. When the requirements of Paragraph 9.8.1. above have been met and upon the request of either the Owner or the Construction Manager, the Architect shall prepare a Certificate of Substantial Completion, in the form set out in Paragraph 9.8.3 below, which shall establish the date of Substantial Completion and shall establish responsibilities of the Owner and the Construction Manager for security, maintenance, heat, utilities, damage to the Work, and insurance. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise specifically stated in the Contract Documents or in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Construction Manager for their written acceptance of responsibilities assigned to them in such certificate.

**Z. INTENTIONALLY OMITTED**

**AA.** In addition to the provisions of Paragraph 9.10 Final Completion shall not have been deemed to have occurred until the date upon which all of the following have occurred:

**a. INTENTIONALLY OMITTED**

**b.** Delivery of conditional or unconditional lien waivers from each person who performed work or provide or fabricated materials in connection with the Work (including all subcontracts executed in connection therewith), other than from those persons whose claims are being contested by Construction Manager in good faith and for which Construction Manager has provided to Owner a bond or security in an amount reasonably acceptable to Owner, and

**c.** Issuance and obtaining of a final, unconditional certificate of occupancy and all construction-related approvals, licenses, and requirements for the Project enabling it to be occupied and operated for its intended use.

**BB.** SUBPARAGRAPH 9.10.4.1, after "Claims" add: "previously made in writing and identified by Owner as unsettled at the time of final payment."

**CC.** Paragraph 10.1.1 add the following: "Construction Manager shall prepare and submit to Owner for Owner's approval a comprehensive safety program. Further, Construction Manager shall provide written verification and certification in a form satisfactory to the

Owner, that all subcontractors have familiarized themselves with the safety program and agreed to abide by said program and training regimen thereunder.

- DD. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." In the first line of Subparagraph 11.1.1, following the work "companies," insert the following:

" , acceptable to the Owner. "

- EE. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." Add the following to subparagraph 11.1.3:

"Certificates called for herein shall be furnished in duplicate and shall specifically set forth evidence of all coverage required by 11.1.2 and the Construction Manager shall furnish to the Architect copies of all endorsements that are subsequently issued amending coverage or limits."

- FF. SUBPARAGRAPH 13.4.3, add as a new subparagraph:

"In the event of any litigation between the parties, the prevailing party shall be entitled to reimbursements for all reasonable attorneys' fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party to the extent allowed by law."

- GG. PARAGRAPH 13.5 "TESTS AND INSPECTIONS" is hereby supplemented by the addition of the following subparagraph: "

"13.5.7 When work has been installed contrary to any Contract requirements and the Construction Manager requests the privilege of testing in lieu of removal, such testing shall be at the Construction Manager's expense."

- HH. INTENTIONALLY OMITTED

- II. Add the following new Article:

#### ARTICLE 16: REQUESTS FOR INFORMATION

15.1.1 In the event that the Construction Manager or its subcontractor, at any tier, determines that some portion of the Drawings, Specifications, or other Contract Documents requires clarification or interpretation by the Architect, the Construction Manager shall submit a Request for Information in writing to the Architect. Requests for Information may only be submitted by the Construction Manager and shall be only submitted on the Request for Information Forms provided by the Architect. The Construction Manager shall clearly and concisely set forth the issue for which clarification and interpretation is sought and why a response is needed from the Architect. If the Request for Information is being used to request confirmation of an interpretation or understanding of a requirement, the Construction Manager shall set forth that interpretation or understanding of the requirement along with reasons why such an understanding was reached.

15.1.2 The Architect will review all Requests for Information to determine whether they are Requests for Information within the meaning of this term. If the Architect determines

that the document is not a Request for Information, it will be returned to the Construction Manager, unreviewed as to content, for resubmission on the proper form and in the proper manner. In either case, the Architect must reply to RFI in writing within the time requested by the Construction Manager, or three (3) working days, whichever is earlier.

15.1.3 Responses from the Architect are not intended to change any requirement of the Contract Documents. In the event the Construction Manager believes that a response to a Request for Information will cause a change to the requirements of the Contract Document, the Construction Manager shall immediately give written notice to the Architect in accordance with Section 4 of the General Conditions stating that the Construction Manager considers the response to be a change in the scope of work or a change to the project schedule.

END OF SUPPLEMENTARY CONDITIONS

**RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit "C"**

**Weather Delays**

1. A "Work Day" is defined as Monday thru Friday, 7:30 am- 4:00 pm.
2. The occurrence of one or more of the following will constitute a weather delay as indicated:
  - a. 0.25" of rain during the workday constitutes one lost workday
  - b. 2.0" of snow during the workday constitutes one lost workday
  - c. 12" of snow in a 24-hour period constitutes two lost workdays.
  - d. Temperature of 5 degrees below zero (Fahrenheit) constitutes one lost workday.
  - e. Any drying time required for soil stabilization (as directed by the geotechnical engineer) due to rain or snow will constitute lost work day(s).
3. Weather days will be included in the final schedule approved as part of the GMP proposal to be incorporated into the contract by amendment. The number of weather days included will be in accordance with Section 3.P of Exhibit B. Adjustments to the contract completion dates due to adverse weather will be made in accordance with Section 3.P of Exhibit B.

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**RainbowVision Santa Fe/West Contract Agreement  
Exhibit "D"  
Personnel Billing Rates**

| Position                               | Reimbursable<br>as a Cost of<br>the Work<br>(w/in GMP) | Included<br>In Fee | Notes | Expected<br>to be<br>Full or Part<br>Time | Billing<br>Rate<br>(\$/hr) |
|----------------------------------------|--------------------------------------------------------|--------------------|-------|-------------------------------------------|----------------------------|
| <b>Field Staff Stationed on Site</b>   |                                                        |                    |       |                                           |                            |
| Superintendent                         | X                                                      |                    | 1     | Full                                      | \$70                       |
| Project Engineer, QA/QC                | X                                                      |                    | 1     | Full                                      | \$80                       |
| Carpenter                              | X                                                      |                    | 2     | Full                                      | Varies - local rate        |
| Laborer                                | X                                                      |                    | 2     | Full                                      | Varies - local rate        |
| <b>Personnel Not Stationed on Site</b> |                                                        |                    |       |                                           |                            |
| Vice President                         |                                                        | X                  |       |                                           |                            |
| CFD                                    |                                                        | X                  |       |                                           |                            |
| Project Manager                        | X                                                      |                    | 3     | Part                                      | \$75                       |
| General Superintendent                 | X                                                      |                    | 3     | Part                                      | \$75                       |
| Project Coordinator                    |                                                        | X                  |       |                                           |                            |
| Safety Director                        | X                                                      |                    | 3     | Part                                      | \$50                       |
| Project Accountant                     |                                                        | X                  |       |                                           |                            |
| <b>Pre-Construction Personnel</b>      |                                                        |                    |       |                                           |                            |
| Senior Estimator/Pre-Con Services M    | X                                                      |                    | 4     | Part                                      | \$90                       |
| Assistant Estimator                    | X                                                      |                    | 4     | Part                                      | \$60                       |

**Notes:**

- 1 Field staff on project site.
- 2 It is expected that all trade work will be subcontracted. Trade labor rates shown only if need for Gen Conditions.
- 3 Billed only for time spent on site and travelling to project
- 4 Billed only for time during pre-construction phase, subject to Pre-construction services billing cap (see Exhibit F).

**RainbowVision Santa Fe/Weis Contract Agreement  
Exhibit E  
Project Scope & Budget Summary**

- The Scope of the project includes:
  - 40 Single-story Condominium living units
  - 80 Single-level Independent Living units built in a series of two-story buildings
  - 26 Assisted Living apartments (and related support spaces) constructed on the 2<sup>nd</sup> level of the central services building
  - Central services building (E Centro) containing commercial kitchen, dining spaces, activity spaces, administrative and marketing offices, retail spaces, and a spa/wellness center.
  - 13 acres of site development, with some off-site, public improvements
  - Total building area is approximately 183,000 sf.
- Based on a preliminary site plan and building design commissioned by the Owner, the Construction Manager prepared a detailed, preliminary cost report and presented that report to the Owner on February 1, 2004. Based on that scope and cost report, the Owner has established a construction budget of \$20,540,000, based on the Preliminary Divisional Cost Breakdown shown in Exhibit F.
- The Owner has contracted with the Architect to complete the design of the project in accordance with the budget stated above. The completion of the design, and related activities is proceeding in accordance with the Preconstruction Phase Schedule prepared and updated regularly by the Construction Manager. See Exhibit G.
- The Construction Manager has also prepared a Preliminary Construction Schedule. See Exhibit H. A final Construction Schedule will be included in the GMP report and made part of the contract by amendment.
- The Owner, Architect and Construction Manager are working together to monitor the completion of this design to ensure meeting the Construction Budget.
- Upon receipt of the Design Development documents, the Construction Manager will, in accordance with contract Section 2.2 prepare a GMP report that will include all of the elements outlined in Section 2.2.4. Prior to submitting the final GMP report, the Construction Manager will review the preliminary cost estimates with the Owner and Architect to determine if any adjustments to scope are required in order to achieve the construction budget stated above. Upon approval by the Owner, the GMP will be incorporated into the contract by amendment, in accordance with Section 2.2.
- During the completion of the design The Construction Manager will continue to meet regularly with the Owner and Architect, and will regularly review the Architect's work in progress to monitor the design as a means to ensure conformance to the construction budget.



**Rainbow/Vision Santa Fe/Weta Contract Agreement  
EXHIBIT F**

**Preliminary Divisional Cost Breakdown**

| <b>C.S.I. SYSTEMS BREAKDOWN</b>            |       | <b>Total<br/>Costs</b> | <b>%</b>    |
|--------------------------------------------|-------|------------------------|-------------|
| Division 1 - General Conditions            |       | \$1,047,401            | 5.9%        |
| Division 1 - Building Permit Allowance     |       | \$184,620              | 1.0%        |
| Division 2 - Site Construction             |       | \$1,534,319            | 8.7%        |
| Division 3 - Concrete                      |       | \$985,149              | 5.5%        |
| Division 4 - Masonry                       |       | \$488,508              | 2.8%        |
| Division 5 - Metals                        |       | \$439,822              | 2.5%        |
| Division 6 - Woods & Plastics              |       | \$2,609,478            | 14.8%       |
| Division 7 - Thermal & Moisture Protection |       | \$989,353              | 5.5%        |
| Division 8 - Doors & Windows               |       | \$771,105              | 4.4%        |
| Division 9 - Finishes                      |       | \$3,286,198            | 18.6%       |
| Division 10 - Specialties                  |       | \$592,989              | 3.4%        |
| Division 11 - Equipment (See Note 1)       |       | \$445,320              | 2.5%        |
| Division 12 - Furnishings (See Note 2)     |       | \$46,196               | 0.3%        |
| Division 14 - Conveying                    |       | \$230,919              | 1.3%        |
| Division 15 - Mechanical                   |       | \$2,410,820            | 13.7%       |
| Division 16 - Electrical                   |       | \$1,636,100            | 9.3%        |
| <b>Sub-Total</b>                           |       | <b>\$17,661,276</b>    | <b>100%</b> |
| Escalation - For 2004                      | 0.0%  | -                      |             |
| <b>Sub-Total</b>                           |       | <b>\$17,661,276</b>    |             |
| Est./Const Contingency - El Centro         | 5.0%  | \$243,521              |             |
| Est./Const Contingency - Balance           | 3.0%  | \$383,726              |             |
| <b>Sub-Total</b>                           |       | <b>\$18,288,523</b>    |             |
| Builders Risk Insurance                    | 0.8%  | \$148,308              |             |
| Liability Insurance                        | 0.85% | \$156,686              |             |
|                                            |       | <b>\$18,591,627</b>    |             |
| Construction Manager Fee                   | 3.00% | \$567,746              |             |
| <b>Sub-Total</b>                           |       | <b>\$19,149,273</b>    |             |
| Performance and Payment Bond               |       | \$108,393              |             |
| NM Gross Receipts Tax                      |       | \$1,284,082            |             |
| <b>Project Totals</b>                      |       | <b>\$20,539,728</b>    |             |

**Notes:**

1. "Equipment" includes residential appliances, commercial kitchen and laundry equipment.
2. "Furnishings" does not include FF&E - which is being designed and purchased by the Owner under a separate contract.

**: RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit G  
Preconstruction Phase Schedule**

Refer to the "Preconstruction Schedule" dated  
separately but made a part of this Exhibit by reference.

(filename: RV3FD07), attached

SFC CLERK RECORDED 02/02/2007

**1 RainbowVision Santa Fe/Vets Contract Agreement  
Exhibit H  
Preliminary Construction Phase Schedule**

Refer to the "Preliminary Construction Schedule" dated  
attached separately but made a part of this Exhibit by reference.

(filename:

),

SFC CLERK RECORDED 02/02/2007

SFC CLERK RECORDED 02/02/2007

Amendment No. 1  
(Revised December 15, 2004)  
To Contract Agreement Between  
RainbowVision Santa Fe, LLC and Wels Builders, Inc

in accordance with article 2.2.9 of the Contract Agreement, the Guaranteed Maximum Price (GMP) and Project Schedule are hereby modified to reflect the following:

- The Guaranteed Maximum Price will be Twenty-One Million Five Hundred Thirty Nine Thousand, Seven Hundred Twenty-Eight Dollars (\$21,539,728).
- The Construction Start date will be January 3, 2005. Based on that start date:
- The Substantial Completion date for Buildings 16, 17, 18, 19, and 20 will be October 28, 2005.
- The Substantial Completion date for the balance of the project will be April 26, 2006.

Accordingly, the GMP Divisional Cost Breakdown (Exhibit F) shall be modified as per the attached revision, dated September 30, 2004. The revised GMP is based on the following:

- Wels September 15, 2004 "Confirmation of GMP" letter (with attachments)
- Wels September 30, 2004 "Summary of Approved Enhancements"

The Construction Schedule (Exhibit H) shall be as shown in the attached update, dated December 15, 2004.

For:  
RainbowVision Santa Fe, LLC

(Signature)

(Printed Name and Title)

(Date)

For:  
Wels Builders Inc.

*Peter Worthington*  
(Signature)

PETER WORTHINGTON, VICE PRESIDENT  
(Printed Name and Title)

Dec. 15, 2004  
(Date)

# EXHIBIT E

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

RAINBOWVISION SANTA FE, LLC,

Plaintiff,

vs.

NO. D-0101-CV 2007-00010

WEIS BUILDERS, INC.,  
PCI CONTRACTORS, INC., and RLA, INC.

Defendants.

and

WEIS BUILDERS, INC.

Third Party Plaintiff,

vs.

HSH NORDBANK AG,  
SIMS RAINBOWVISION LLC,  
LOS ALAMOS NATIONAL BANK,  
VALLEY NATIONAL BANK,  
LES FILE DRYWALL, INC.,  
RODGERS PLUMBING AND HEATING CO. INC.,  
DOMINGUEZ CARPET AND TILE, INC.,  
EKER BROTHERS, INC.,  
T L C COMPANY, INC.,  
EMCO, Inc.,  
SUPERIOR CONTRACTING CORPORATION, D/B/A AMERICAN NATIONAL  
INSULATION AND SEALANTS,  
BMCW SOUTHCENTRAL, L.P. D/B/A BMC CONSTRUCTION,  
BBD CONSTRUCTION, L.P., as successor in interest to or assignee of  
BMC CONSTRUCTION,  
MAVERICK FRAMING, INC., as successor in interest to or assignee of  
BMC CONSTRUCTION, and  
RLA, Inc.

Third Party Defendants.

**SECOND AMENDED THIRD PARTY COMPLAINT**

ENDORSED  
First Judicial District Court

MAR 07 2008

Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2288  
Santa Fe, NM 87504-2288

Wels Builders Inc. ("WBI") as Third Party Plaintiff, makes this Second Amended Third Party Complaint.

1. WBI is a Minnesota corporation duly and validly licensed in the State of New Mexico.
2. HSH Nordbank AG is a lending institution located in New York, NY.
3. Los Alamos National Bank is a banking institution in Los Alamos, New Mexico organized and existing under the laws of the United States of America.
4. Valley National Bank is a banking institution in Espanola, New Mexico organized and existing under the laws of the United States of America.
5. Les File Drywall is a New Mexico corporation with its principal place of business in Albuquerque, New Mexico.
6. Rodgers Plumbing and Heating Co., Inc. is a New Mexico corporation with its principal place of business in Albuquerque, New Mexico.
7. Dominguez Carpet And Tile, Inc. is a New Mexico corporation with its principal place of business in Santa Fe, New Mexico.
8. Eker Brothers, Inc. is a New Mexico Corporation with its principal address in Santa Fe, New Mexico, and its registered agent in Albuquerque, New Mexico.
9. T L C Company, Inc. is a New Mexico Corporation with its principal place of business in Albuquerque, New Mexico.
10. Upon information and belief EMCO, Inc. is a New Mexico Corporation with a place of business in Santa Fe, New Mexico and licensed to do business in the State of Mexico.
11. Upon information and belief, Superior Contracting Corporation, D/B/A American National Insulation And Sealants is New Mexico Corporation with a place of business in

Albuquerque, New Mexico and licensed to do business in the State of Mexico.

12. Upon information and belief, BMCW Southcentral, L.P. D/B/A BMC Construction is a Texas Company doing business in the state of New Mexico.

13. Upon information and belief, BBD Construction, L.P., is Texas Limited Partnership doing business in the state of New Mexico and is a successor in interest to or assignee of BMC Construction.

14. Upon information and belief, Maverick Framing, Inc., is a Texas corporation registered to do business in the state of New Mexico that is the assignee of the subcontract or a successor in interest to BMC Construction regarding BMC's work on the Project.

15. Upon information and belief, RLA, Inc. is a New Mexico Corporation with its principal place of business in Bernalillo County, New Mexico.

16. On or about April 28, 2004, WBI and RainbowVision Santa Fe, LLC ("RVSF") entered into a contract under which WBI agreed to provide certain construction services, labor, and materials for work specified in the contract (the "Contract") for the RainbowVision Santa Fe Retirement Community (the "Project"), in Santa Fe, New Mexico, in return for compensation for its services. A true and correct copy of the Contract is being served with this pleading as Exhibit 1 pursuant to Rule 1-009(I) NMRA.

17. RVSF has improperly withheld payment from WBI.

18. RVSF has not paid the retainage to WBI.

19. An unpaid balance of at least \$1,522,319, (reduced by partial payments since the original filing to \$ 730,403.77) which includes, among other things, the unpaid Contract balance (including retainage) and additional contract adjustments is currently owed to



WBI for the reasonable value of its improvements to the Property, together with interest, costs, disbursements, and reasonable attorneys' fees.

20. On or about February 2, 2007, WBI filed a Claim of Lien in the sum of \$1,522,319.00, plus legal fees, costs, and interest upon the Property for amounts owed WBI for its improvements to the Property), which Claim of Lien was recorded as Instrument #1469461 in the records of Santa Fe County. A true and correct copy of WBI's Claim of Lien is being served with this pleading as Exhibit 2 pursuant to Rule 1-009(D) NMRA.

21. The Project is located on real property located at 500 Rodeo Road, Santa Fe New Mexico (the "Property") and more particularly described as:

That certain tract of land within Section 11, Township 16 North, Range 9 East, NMPM per plat 605/24 bearing uniform property code number 1-053-095-353-509

22. WBI specifically excepts from its Claim of Lien the following condominiums:

Unit 110, Instrument No. 1437694, records of Santa Fe County, New Mexico.  
Unit 111, Instrument No. 1431907, records of Santa Fe County, New Mexico.  
Unit 112, Instrument No. 1431358, records of Santa Fe County, New Mexico.  
Unit 113, Instrument No. 1431744, records of Santa Fe County, New Mexico.  
Unit 120, Instrument No. 1438953, records of Santa Fe County, New Mexico.  
Unit 121, Instrument No. 1432827, records of Santa Fe County, New Mexico.  
Unit 122, Instrument No. 1431782, records of Santa Fe County, New Mexico.  
Unit 123, Instrument No. 1431910, records of Santa Fe County, New Mexico.  
Unit 210, Instrument No. 1434135, records of Santa Fe County, New Mexico.  
Unit 211, Instrument No. 1440074, records of Santa Fe County, New Mexico.  
Unit 220, Instrument No. 1434302, records of Santa Fe County, New Mexico.  
Unit 221, Instrument No. 1432831, records of Santa Fe County, New Mexico.  
Unit 310, Instrument No. 1433860, records of Santa Fe County, New Mexico.  
Unit 311, Instrument No. 1431746, records of Santa Fe County, New Mexico.  
Unit 312, Instrument No. 1432634, records of Santa Fe County, New Mexico.  
Unit 313, Instrument No. 1432625, records of Santa Fe County, New Mexico.  
Unit 111, Instrument No. 1431907, records of Santa Fe County, New Mexico.  
Unit 410, Instrument No. 1434300, records of Santa Fe County, New Mexico.  
Unit 411, Instrument No. 1431909, records of Santa Fe County, New Mexico.  
Unit 412, Instrument No. 1431357, records of Santa Fe County, New Mexico.  
Unit 413, Instrument No. 1432007, records of Santa Fe County, New Mexico.  
Unit 510, Instrument No. 1433009, records of Santa Fe County, New Mexico.  
Unit 511, Instrument No. 1431899, records of Santa Fe County, New Mexico.  
Unit 521, Instrument No. 1431361, records of Santa Fe County, New Mexico.

Unit 1110, Instrument No. 1433094, records of Santa Fe County, New Mexico.  
Unit 1111, Instrument No. 1435053, records of Santa Fe County, New Mexico.  
Unit 1120, Instrument No. 1438955, records of Santa Fe County, New Mexico.  
Unit 1121, Instrument No. 1432829, records of Santa Fe County, New Mexico.  
Unit 1210, Instrument No. 1431658, records of Santa Fe County, New Mexico.  
Unit 1211, Instrument No. 1432825, records of Santa Fe County, New Mexico.  
Unit 1213, Instrument No. 1434137, records of Santa Fe County, New Mexico.  
Unit 1410, Instrument No. 1431748, records of Santa Fe County, New Mexico.  
Unit 1412, Instrument No. 1434459, records of Santa Fe County, New Mexico.  
Unit 1511, Instrument No. 1431362, records of Santa Fe County, New Mexico.  
Unit 1512, Instrument No. 1434580, records of Santa Fe County, New Mexico.  
Unit 1610, Instrument No. 1406282, records of Santa Fe County, New Mexico.  
Unit 1611, Instrument No. 1405660, records of Santa Fe County, New Mexico.  
Unit 1612, Instrument No. 1405424, records of Santa Fe County, New Mexico.  
Unit 1613, Instrument No. 1405423, records of Santa Fe County, New Mexico.  
Unit 1710, Instrument No. 1405659, records of Santa Fe County, New Mexico.  
Unit 1711, Instrument No. 1406128, records of Santa Fe County, New Mexico.  
Unit 1712, Instrument No. 1405655, records of Santa Fe County, New Mexico.  
Unit 1713, Instrument No. 1406704, records of Santa Fe County, New Mexico.  
Unit 1810, Instrument No. 1405428, records of Santa Fe County, New Mexico.  
Unit 1811, Instrument No. 1405906, records of Santa Fe County, New Mexico.  
Unit 1812, Instrument No. 1405564, records of Santa Fe County, New Mexico.  
Unit 1813, Instrument No. 1405565, records of Santa Fe County, New Mexico.  
Unit 1911, Instrument No. 1406812, records of Santa Fe County, New Mexico.  
Unit 1912, Instrument No. 1405657, records of Santa Fe County, New Mexico.  
Unit 1913, Instrument No. 1420278, records of Santa Fe County, New Mexico.  
Unit 2010, Instrument No. 1405566, records of Santa Fe County, New Mexico.  
Unit 2011, Instrument No. 1405190, records of Santa Fe County, New Mexico.  
Unit 2012, Instrument No. 1405557, records of Santa Fe County, New Mexico.  
Unit 2013, Instrument No. 1405530, records of Santa Fe County, New Mexico.

23. HSH Nordbank AG claims or may claim an interest in the Property subject to the Claim of Lien by virtue of the Real Estate Mortgage with Assignment of Rents and Security Agreement and Fixture Filing recorded with the Santa Fe County Clerk December 21, 2004 as document number 1359754 and by virtue of UCC filings with the Santa Fe County Clerk December 21, 2004, as document number 1359845.

24. Los Alamos National Bank claims or may claim an interest in the Property subject to the Claim of Lien by virtue of the Line of Credit Mortgage recorded with the Santa Fe County Clerk on January 5, 2004 as document numbered 1308585 and Mortgage Modification Agreement recorded with the Santa Fe County Clerk on July 30, 2004, as document 1339736 and by virtue of the Real Estate Mortgage with Assignment

of Rents and Security Agreement and Fixture Filing recorded with the Santa Fe County Clerk December 21, 2004 as document number 1359845.

25. Sims Rainbowvision LLC claims or may claim an interest in the Property subject to the Claim of Lien by virtue of the Real Estate Mortgage with Assignment of Rents and Security Agreement and Fixture Filing recorded with the Santa Fe County Clerk December 21, 2004 as document number 1359845.

26. Los Alamos National Bank and Valley National Bank jointly claim or may claim an interest in the Property by virtue of the Mortgage recorded with the Santa Fe County Clerk on January 31, 2007 as document number 14690069 and by virtue of the Assignment of Leases and Rents recorded with the Santa Fe County Clerk on January 31, 2007 as document number 14690069.

27. Les File Drywall, Inc. claims or may claim an interest in the Property by virtue of the Claim of Lien recorded with the Santa Fe County Clerk on February 23, 2007, as document number 1472023.

28. All of the Third Party Defendants are subject to the jurisdiction and venue of the Court by virtue of their interests in real property within the County of Santa Fe.

#### **CONTRIBUTION AND INDEMNITY**

(LES FILE DRYWALL, INC.; RODGERS PLUMBING & HEATING CO. INC.; DOMINGUEZ CARPET AND TILE, INC.; EKER BROTHERS, INC.; AND T L C COMPANY, INC., EMCO, Inc., SUPERIOR CONTRACTING CORPORATION, D/B/A AMERICAN NATIONAL INSULATION AND SEALANTS, BMCW SOUTHCENTRAL, L.P. D/B/A BMC CONSTRUCTION, BBD CONSTRUCTION, L.P., as successor in interest to or assignee of BMC CONSTRUCTION, and MAVERICK FRAMING, INC., as successor in interest to or assignee of BMC CONSTRUCTION, PCI Contractors, Inc., and RLA, Inc.)

29. WBI realleges and incorporates by reference Paragraphs 1 through 27 of its Amended Third-Party Complaint.

30. WBI asserts a claim for contribution and indemnity against Les File Drywall, Inc., Rodgers Plumbing & Heating Co., Inc. Dominquez Carpet and Tile, Inc., Eker Brothers, Inc., T L C Company, Inc., EMCO, Inc., Superior Contracting Corporation, D/B/A American National Insulation And Sealants, BMCW SouthCentral, L.P. D/B/A BMC Construction, BBD Construction, L.P., as successor in interest to or assignee of BMC Construction, Maverick Framing, Inc., as successor in interest to or assignee of BMC Construction), and RLA, Inc. (collectively, the "Third-Party Complaint Indemnity Subcontractors").

31. WBI entered into separate subcontracts (collectively, the "Subcontracts") with the Third-Party Complaint Indemnity Subcontractors under which the Third-Party Complaint Indemnity Subcontractors agreed to furnish certain labor and materials in connection with the work that WBI agreed to perform for its Contract with the Owner, Rainbow Vision Santa Fe, LLC ("RVSF").

32. Pursuant to the Subcontracts, the Third-Party Complaint Indemnity Subcontractors agreed, among other things:

To save harmless the Contractor, the Owner and all other subcontractors from any and all losses or damage (including without limiting the generality of the foregoing, legal fees and disbursements paid or incurred by the Contractor to enforce the provisions of this paragraph) occasioned by the failure of the Subcontractor to carry out the provisions of this Subcontract.

(Subcontracts, ¶ 1. G.)

33. RVSF has brought a Complaint against WBI, alleging, among other things, that the work on the Project was not completed in a workmanlike manner, defective work has not been remedied, Contract warranty obligations have not been honored, and that substantial completion was not achieved within the times specified in the Contract.

34. The purported damages referred to in Plaintiff RVSF's Complaint, if any, were caused by the conduct of the Third-Party Complaint Indemnity Subcontractors insofar as the Third-Party Complaint Indemnity Subcontractors performed defective work that did not meet industry standards, failed to remedy defective work, failed to honor their warranty obligations, and failed to perform their work within the times specified in the Contract.

35. If RVSF has suffered any loss or damage as alleged in its Complaint or otherwise for work performed for the Third-Party Complaint Indemnity Subcontractors, and such liability is expressly denied by WBI, then such loss or damage was directly caused by the negligence, breach of contract, breach of warranty, products liability, or other fault or improper action of the Third-Party Complaint Indemnity Subcontractors.

36. If WBI is found to have any liability to RVSF for work performed by the Third-Party Complaint Indemnity Subcontractors, and such liability is specifically denied, then WBI is entitled to contribution or indemnity from the Third-Party Complaint Indemnity Subcontractors pursuant to equitable principles and the express and implied terms of contractual agreements.

37. WBI is entitled to entry of judgment in its favor and against the Third-Party Complaint Indemnity Subcontractors, based upon principles of contribution and indemnity, for an amount equal to any liability on RVSF's claims regarding the Third-Party Complaint Indemnity Subcontractors' work, although such liability is denied. WBI

is further entitled to entry of judgment in its favor and against the Third-Party Complaint Indemnity Subcontractors for an amount equal to the attorneys' fees and costs incurred to defend against RVSF's claims.

#### **BREACH OF CONTRACT**

(Les File Drywall, Inc.; Rodgers Plumbing & Heating Co. Inc.; Dominguez Carpet And Tile, Inc.; Eker Brothers, Inc.; T L C Company, Inc., EMCO, Inc., Superior Contracting Corporation, D/B/A American National Insulation and Sealants, BMCW SouthCentral, L.P. D/B/A BMC Construction, BBD Construction, L.P., as successor in interest to or assignee of BMC Construction, Maverick Framing, Inc., as successor in interest to or assignee of BMC Construction, PCI Contractors, Inc., and RLA, Inc. )

38. WBI realleges and incorporates by reference Paragraphs 1 through 37 of its Amended Third-Party Complaint.

39. WBI entered into valid and binding contracts with Les File Drywall, Inc.; Rodgers Plumbing & Heating Co. Inc.; Dominguez Carpet And Tile, Inc.; Eker Brothers, Inc.; T L C Company, Inc., EMCO, Inc., Superior Contracting Corporation, D/B/A American National Insulation And Sealants, BMCW SouthCentral, L.P. D/B/A BMC Construction, BBD Construction, L.P., as successor in interest to or assignee of BMC Construction, Maverick Framing, Inc., as successor in interest to or assignee of BMC Construction, PCI, Inc., and RLA, Inc. (the "Third-Party Complaint Subcontractors").

40. Pursuant to their respective Subcontracts, the Third-Party Complaint Subcontractors expressly and/or impliedly agreed, among other things:

- a. To furnish all labor, material, skill and equipment necessary or required and to perform all the work required under the Subcontract;
- b. To perform all work in a good and workmanlike manner;
- c. To timely perform all work in accordance with the Project schedule;

- d. To guarantee the Subcontract to the same extent that the Contractor is obligated to guarantee its work under the General Contract;
- e. To save harmless the Contractor and all other subcontractors from any and all losses or damage (including without limiting the generality of the foregoing, legal fees and disbursements paid or incurred by the Contractor to enforce the provisions of this paragraph) occasioned by the failure of the Subcontractor to carry out any provision of the Subcontract;
- f. To accept responsibility for all damage caused by the Subcontractor;
- g. To comply with all Federal and State laws, codes, and regulations and all municipal ordinances and regulations;
- h. To timely perform all punch list work, and
- i. To save Weis harmless from any loss.

41. The Third-Party Complaint Subcontractors have breached their respective Subcontracts including without limitation, each of the obligations described above in Paragraph 40.

42. As a result of the Third-Party Complaint Subcontractors breaches, WBI has incurred damages in an amount to be determined at trial plus interest, costs, disbursements, and attorneys' fees.

43. WBI is entitled to judgment in its favor and against each of the Third-Party Complaint Subcontractors for an amount to be determined, plus interest, costs, disbursements, and attorneys' fees.

**WHEREFORE**, Weis Builders, Inc. respectfully requests the Court to enter judgment as follows:

- a. That the Claim of Lien of WBI be adjudged a proper lien on the Property for the amounts set forth above and that it be adjudged paramount and superior to the interest of any others and the same be foreclosed.
- b. That any other persons claiming, by through or under them be barred and forever foreclosed of all right, interest, or claim in or to the Property.
- c. That the Property be sold under the direction of the Court by a Special Master appointed for such purpose and the proceeds of such sale be applied in the priority provided in the WBI's Claim of Lien and according to law, and the excess, if any, of the proceeds of the sale over the amount due to WBI, after inclusion of costs of sale including Special Master's fees, be distributed according to law and the further order of the Court.
- d. That WBI be given the right to become a purchaser at the sale, and that the purchaser at the sale be let into possession of the Property.
- e. That WBI have a deficiency judgment for the amount of any deficiency, if the proceeds of such sale are not sufficient to satisfy the amount due and owing WBI as set forth above.
- f. That WBI have judgment for all costs expended herein until the time of sale, including costs of sale of the Property pursuant to judgment of foreclosure, and such other and further relief as the Court may deem just and proper.
- g. Judgment in favor of WBI and against Les File Drywall, Inc., Rodgers Plumbing & Heating Co., Inc. Dominquez Carpet and Tile, Inc., Eker Brothers, Inc., T L C Company, Inc., EMCO, Inc., Superior Contracting Corporation, D/B/A American National Insulation And Sealants, BMCW



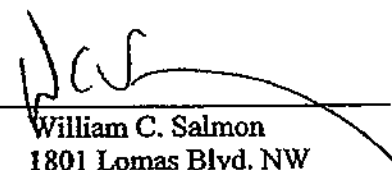
SouthCentral, L.P. D/B/A BMC Construction, BBD Construction, L.P., as successor in interest to or assignee of BMC Construction, Maverick Framing, Inc., as successor in interest to or assignee of BMC Construction, PCI, Inc., and RLA, Inc. on WBI's claim against Les File Drywall, Inc., Rodgers Plumbing & Heating Co., Inc. Dominquez Carpet and Tile, Inc., Eker Brothers, Inc., T L C Company, Inc., EMCO, Inc., Superior Contracting Corporation, D/B/A American National Insulation And Sealants, BMCW SouthCentral, L.P. D/B/A BMC Construction, BBD Construction, L.P., as successor in interest to or assignee of BMC Construction, Maverick Framing, Inc., as successor in interest to or assignee of BMC Construction, PCI, Inc., and RLA, Inc. for contribution and indemnity, including attorneys' fees and costs incurred to defend against RVSF's claims.

- h. Judgment in favor of WBI and against Les File Drywall, Inc., Rodgers Plumbing & Heating Co., Inc., Dominquez Carpet and Tile, Inc., Eker Brothers, Inc., T L C Company, Inc., EMCO, Inc., Superior Contracting Corporation, d/b/a American National Insulation And Sealants, BMCW SouthCentral, L.P. d/b/a BMC Construction, BBD Construction, L.P., as successor in interest to or assignee of BMC Construction, Maverick Framing, Inc., as successor in interest to or assignee of BMC Construction, PCI, Inc., and RLA, Inc. for breach of contract, including attorneys' fees and costs.
- i. As part of any judgment or order in favor of WBI, an award to WBI of its costs, disbursements, and attorneys' fees; and

j. Any such other legal or equitable relief as the Court deems just.

Respectfully submitted,

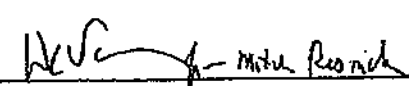
**RHODES & SALMON, P.C.**

By: 

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and

**BURCH & CRACCHIOLO, P.A.**

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**ATTORNEYS FOR THE DEFENDANT  
AND COUNTERCLAIMANT WEIS**

Certificate of Service

I certify that a copy of the foregoing was mailed to:

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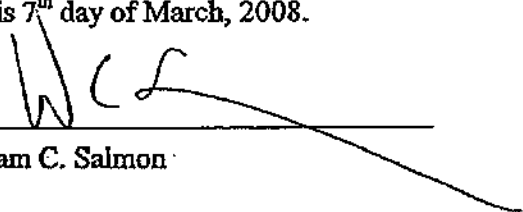
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on this 7<sup>th</sup> day of March, 2008.



William C. Salmon

RV  
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# **AIA Document A121™CMc – 2003 and AGC Document 565**

**Standard Form of Agreement Between Owner and Construction Manager  
where the Construction Manager is Also the Constructor**

## **AGREEMENT**

made as of the Twenty Eighth day of April in the year of Two Thousand and Four

*(In words, indicate day, month and year)*

**BETWEEN the Owner:**  
*(Name and address)*

RainbowVision Santa Fe LLC  
4001 Office Court Road,  
Suite 403  
Santa Fe, NM 87505

**and the Construction Manager:**  
*(Name and address)*

Weiss Builders, Inc.  
7645 Lyndale Avenue South  
Minneapolis, MN 55423

**The Project is:**  
*(Name, address and brief description)*

RainbowVision Santa Fe Retirement Community  
500 Rodeo Road at Anfigra  
Santa Fe, NM 87505

**The Architect is:**  
*(Name and address)*

Lloyd & Associates Architects  
301 N. Guadalupe Suite 104  
Santa Fe, NM 87501

The Owner and Construction Manager agree as set forth below:

## **ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The 1997 Edition of AIA® Document A201™, General Conditions of the Contract for Construction, is referred to herein. This Agreement requires modification if other general conditions are utilized.

**EXHIBIT**

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 RELATIONSHIP OF PARTIES

The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services and use the Construction Manager's best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Construction Manager and other persons or entities employed by the Owner for the Project.

### § 1.2 GENERAL CONDITIONS

For the Construction Phase, the General Conditions of the contract shall be the AIA® Document A201™-1997, General Conditions of the Contract for Construction, which is incorporated herein by reference. For the Preconstruction Phase, or in the event that the Preconstruction and Construction Phases proceed concurrently, A201™-1997 shall apply to the Preconstruction Phase only as specifically provided in this Agreement. The term "Contractor" as used in A201™-1997 shall mean the Construction Manager.

## ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager shall perform the services described in this Article. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction Phase services. If the Owner and Construction Manager agree, after consultation with the Architect, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

### § 2.1 PRECONSTRUCTION PHASE

#### § 2.1.1 PRELIMINARY EVALUATION

The Construction Manager shall provide a preliminary evaluation of the Owner's program and Project budget requirements, each in terms of the other.

#### § 2.1.2 CONSULTATION

The Construction Manager with the Architect shall jointly schedule and attend regular meetings with the Owner. The Construction Manager shall consult with the Owner and Architect regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.

#### § 2.1.3 PRELIMINARY PROJECT SCHEDULE

When Project requirements described in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare, and periodically update, a preliminary Project schedule for the Architect's review and the Owner's approval. The Construction Manager shall obtain the Architect's approval of the portion of the preliminary Project schedule relating to the performance of the Architect's services. The Construction Manager shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect and Construction Manager. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed date of Substantial Completion. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

#### § 2.1.4 PHASED CONSTRUCTION

The Construction Manager shall make recommendations to the Owner and Architect regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economies, time of performance, availability of labor and materials, and provisions for temporary facilities.



#### **§ 2.1.5 PRELIMINARY COST ESTIMATES**

§ 2.1.5.1 When the Owner has sufficiently identified the Project requirements and the Architect has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a preliminary cost estimate utilizing area, volume or similar conceptual estimating techniques.

§ 2.1.5.2 When Schematic Design Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the Design Development Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

§ 2.1.5.3 When Design Development Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare a detailed estimate with supporting data for review by the Architect and approval by the Owner. During the preparation of the Construction Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

~~§ 2.1.5.4 If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner and Architect.~~

#### **§ 2.1.6 SUBCONTRACTORS AND SUPPLIERS**

The Construction Manager shall seek to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors, including suppliers who are to furnish materials or equipment fabricated in a special design, from whom proposals will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner know of any objection to such subcontractor or supplier. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the Owner or Architect later to object to or reject any proposed subcontractor or supplier.

#### **§ 2.1.7 LONG-LEAD-TIME ITEMS**

The Construction Manager shall recommend to the Owner and Architect a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager. The Construction Manager shall expedite the delivery of long-lead-time items.

#### **§ 2.1.8 EXTENT OF RESPONSIBILITY**

The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Owner and the Owner's professional consultants. It is not the Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Drawings and Specifications are at variance therewith, the Construction Manager shall promptly notify the Architect and Owner in writing.

#### **§ 2.1.9 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION**

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

#### **§ 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL AND CONTRACT TIME**

§ 2.2.1 When the Drawings and Specifications are sufficiently complete, the Construction Manager shall propose a Guaranteed Maximum Price, which shall be the sum of the estimated Cost of the Work and the Construction Manager's Fee.

§ 2.2.2 As the Drawings and Specifications may not be finished at the time the Guaranteed Maximum Price proposal is prepared, the Construction Manager shall provide in the Guaranteed Maximum Price for further development of

the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The estimated Cost of the Work shall include the Construction Manager's contingency, a sum established by the Construction Manager for the Construction Manager's exclusive use to cover costs arising under Section 2.2.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order.

#### § 2.2.4 BASIS OF GUARANTEED MAXIMUM PRICE

The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include:

1. A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Guaranteed Maximum Price proposal.
2. A list of allowances and a statement of their basis.
3. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
4. The proposed Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the Fee that comprise the Guaranteed Maximum Price.
5. The Date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents Issuance dates upon which the date of Substantial Completion is based.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by the Construction Manager.

§ 2.2.7 Prior to the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing.

§ 2.2.8 Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis shall be set forth in Amendment No. 1. The Guaranteed Maximum Price shall be subject to additions and deductions by a change in the Work as provided in the Contract Documents, and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 2.2.9 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in Amendment No. 1. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

§ 2.2.10 The Guaranteed Maximum Price shall include in the Cost of the Work only those taxes which are enacted at the time the Guaranteed Maximum Price is established.

#### § 2.3 CONSTRUCTION PHASE

##### § 2.3.1 GENERAL

§ 2.3.1.1 The Construction Phase shall commence on the earlier of:

- (1) the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, or
- (2) the Owner's first authorization to the Construction Manager to:
  - (a) award a subcontract, or
  - (b) undertake construction Work with the Construction Manager's own forces, or
  - (c) issue a purchase order for materials or equipment required for the Work.

#### § 2.3.2 ADMINISTRATION

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated to a special design for the Work from the list previously reviewed and, after analyzing such bids, shall deliver such bids to the Owner and Architect. The Owner will then determine, with the advice of the Construction Manager and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the Construction Manager shall obtain bids; however, if the Guaranteed Maximum Price has been established, the Owner may not prohibit the Construction Manager from obtaining bids from other qualified bidders. ~~The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.~~

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Construction Manager to the Owner and Architect (1) is recommended to the Owner by the Construction Manager; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of Sections 7.1.8 and 7.1.9 and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.3.2.4 The Construction Manager shall schedule and conduct meetings at which the Owner, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

§ 2.3.2.5 Promptly after the Owner's acceptance of the Guaranteed Maximum Price proposal, the Construction Manager shall prepare a schedule in accordance with Section 3.10 of A201™-1997, including the Owner's occupancy requirements.

§ 2.3.2.6 The Construction Manager shall provide monthly written reports to the Owner and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.3.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals.

#### § 2.4 PROFESSIONAL SERVICES

Section 3.12.10 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### § 2.5 HAZARDOUS MATERIALS

Section 10.3 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

## ARTICLE 3 OWNER'S RESPONSIBILITIES

### § 3.1 INFORMATION AND SERVICES

§ 3.1.1 The Owner shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Owner's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

§ 3.1.2 The Owner shall, at the written request of the Construction Manager prior to commencement of the Construction Phase and thereafter, furnish to the Construction Manager reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.3 The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies for changes in the Work and other costs which are the responsibility of the Owner.

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### § 3.1.4 STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS

In the Preconstruction Phase, the Owner shall furnish the following with reasonable promptness and at the Owner's expense. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely upon the accuracy of any such information, reports, surveys, drawings and tests described in Sections 3.1.4.1 through 3.1.4.5 but shall exercise customary precautions relating to the performance of the Work.

§ 3.1.4.1 Reports, surveys, drawings and tests concerning the conditions of the site which are required by law.

§ 3.1.4.2 Surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a project benchmark.

§ 3.1.4.3 The services of a geotechnical engineer when such services are requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials; ground corrosion and resistivity tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate professional recommendations.

§ 3.1.4.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.

§ 3.1.4.5 The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.

### § 3.2 OWNER'S DESIGNATED REPRESENTATIVE

The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. This representative shall have the authority to make decisions on behalf of the Owner concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201™-1997, the Architect does not have such authority.

### § 3.3 ARCHITECT

The Owner shall retain an Architect to provide Basic Services, including normal structural, mechanical and electrical engineering services, other than cost estimating services. The Owner shall authorize and cause the Architect to provide Additional Services, requested by the Construction Manager which must necessarily be provided by the Architect for the Preconstruction and Construction Phases of the Work. Such services shall be

provided in accordance with time schedules agreed to by the Owner, Architect and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect, from which compensation provisions may be deleted.

#### § 3.4 LEGAL REQUIREMENTS

The Owner shall determine and advise the Architect and Construction Manager of any special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project. The Owner shall furnish such legal services as are necessary to provide the information and services required under Section 3.1.

#### ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

The Owner shall compensate and make payments to the Construction Manager for Preconstruction Phase services as follows:

##### § 4.1 COMPENSATION

§ 4.1.1 For the services described in Sections 2.1 and 2.2, the Construction Manager's compensation shall be calculated as follows:

The Construction Manager's fee for Preconstruction Phase Services shall be Seven Thousand Dollars (\$7,000), in accordance with Weis's 1/22/03 letter of intent.

*(State basis of compensation, whether a stipulated sum, multiple of Direct Personnel Expense, actual cost, etc. Include a statement of reimbursable cost items as applicable.)*

§ 4.1.2 Compensation for Preconstruction Phase Services shall be equitably adjusted if such services extend beyond April 1, 2004 in accordance with Weis's 12/22/03 letter of intent.

§ 4.1.3 If compensation is based on a multiple of Direct Personnel Expense, Direct Personnel Expense is defined as the direct salaries of the Construction Manager's personnel engaged in the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

##### § 4.2 PAYMENTS

§ 4.2.1 Payments shall be made monthly following presentation of the Construction Manager's invoice and, where applicable, shall be in proportion to services performed.

§ 4.2.2 Payments are due and payable Thirty ( 30 ) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear interest at the rate entered below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon.)*

Interest rate shall be 4% above US Bancorp Prime Rate.

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

#### ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

The Owner shall compensate the Construction Manager for Construction Phase services as follows:

#### § 5.1 COMPENSATION

§ 5.1.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager in current funds the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Construction Manager's Fee determined as follows:

Base Fee will be Three percent (3.0%) of the Cost of the Work as defined in Article 6. For changes in the Work not associated with any "Resident Upgrade Packages" that are to be offered on a unit-by-unit basis, the fee for additive changes will be 3.0% and for deductive changes the fee will be 0.0%.

#### 5.1.2

In addition to the basic fees in 4.1.1 and 5.1.1 above, the Owner shall pay the Construction Manager a Resident Upgrade Fee equal to 15% of the cost of the work, together with such reasonable administrative costs that the Construction Manager will incur directly related to the performance of such work, associated with the Resident Upgrade Packages that the Owner is planning to offer. It is the intent that a limited number of such Upgrade packages will be offered by the Owner, and that once the scope and cost for the upgrades being considered is established, the Owner and Construction Manager will incorporate by Amendment to this Contract the terms and conditions pursuant to which the Construction Manager shall perform such work. It is intended that the Construction Manager will establish a lump sum price per unit type for each Upgrade Package to be offered, and that said lump sum price shall include the fee and administrative costs described above, as well as define the date for each unit by which the Owner must direct the Construction Manager to proceed with the Upgrade. Unit upgrades for which direction to proceed is given after the agreed upon date, or which reflect a deviation in scope from the defined Upgrade Packages will be evaluated separately, and a cost and time adjustment proposed, by the Construction Manager.

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

#### § 5.2 GUARANTEED MAXIMUM PRICE

§ 5.2.1 The sum of the Cost of the Work and the Construction Manager's Fee are guaranteed by the Construction Manager not to exceed the amount provided in Amendment No. 1, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum as adjusted by approved changes in the Work is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner. At time of Final Completion, any costs savings shall be returned 100% to the Owner and 0% to the Construction Manager.

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

#### § 5.3 CHANGES IN THE WORK

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of Amendment No. 1 may be determined by any of the methods listed in Section 7.3.3 of A201™-1997.

§ 5.3.2 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of A201™-1997 and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Section 7.3.6 of A201™-1997 shall have the meanings assigned to them in that document and shall not be modified by this Article 5. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.3 In calculating adjustments to the Contract, the terms "cost" and "costs" as used in the above-referenced provisions of A201™-1997 shall mean the Cost of the Work as defined in Article 6 of this Agreement, and the term "and a reasonable allowance for overhead and profit" shall mean the Construction Manager's Fee as defined in Section 5.1.1 of this Agreement.

§ 5.3.4 If no specific provision is made in Section 5.1.1 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.1 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

"Article 5.4: Commencement and Completion has been added. See Exhibit A."

#### ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

##### § 6.1 COSTS TO BE REIMBURSED

§ 6.1.1 The term "Cost of the Work" shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 6.

##### § 6.1.2 LABOR COSTS

- .1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's agreement, at off-site workshops.
- .2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's agreement. To the extent that some of the Construction Manager's supervisory and administrative personnel located at the Construction Manager's main office provide service to the project, a portion of their wages and salaries will be included in the cost of work and will be reimbursed in accordance with Exhibit C.

##### Classification

##### Name

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal office or offices other than the site office shall be included in the Cost of the Work, such personnel shall be identified below.)*

- .3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.
- .4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Cost of the Work under Sections 6.1.2.1 through 6.1.2.3.

##### § 6.1.3 SUBCONTRACT COSTS

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

##### § 6.1.4 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

- .1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.
- .2 Costs of materials described in the preceding Section 6.1.4.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be turned over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

##### § 6.1.5 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

- .1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed.

whether sold to others or retained by the Construction Manager. Cost for items previously used by the Construction Manager shall mean fair market value.

- 2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval.
- 3 Costs of removal of debris from the site.
- 4 Reproduction costs, costs of telegrams, facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephones at the site and reasonable petty cash expenses of the site office.
- 5 That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while traveling in discharge of duties connected with the Work.

#### § 6.1.6 MISCELLANEOUS COSTS

- 1 That portion directly attributable to this Contract of premiums for insurance and bonds.  
*(If charges for self-insurance are to be included, specify the basis of reimbursement.)*
- 2 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.
- 3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.
- 4 Fees of testing laboratories for tests required by the Contract Documents, except those related to nonconforming Work other than that for which payment is permitted by Section 6.1.8.2.
- 5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the Guaranteed Maximum Price and provided that such royalties, fees and costs are not excluded by the last sentence of Section 3.17.1 of A201™-1997 or other provisions of the Contract Documents.
- 6 Data processing costs related to the Work.
- 7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.
- 8 Legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld.
- 9 Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
- 10 All premiums (without markup) and deductibles associated with Builder's Risk Insurance provided by the Construction Manager at the Owner's request.
- 11 All premiums (without markup) and deductibles associated with providing professional liability insurance for the mechanical and electrical design services for the condominiums and R. units.

#### § 6.1.7 OTHER COSTS

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

#### § 6.1.8 EMERGENCIES AND REPAIRS TO DAMAGED OR NONCONFORMING WORK

The Cost of the Work shall also include costs described in Section 6.1.1 which are incurred by the Construction Manager except, however, where conditions requiring such action were caused by or are the result of the Construction Manager's negligence:



1. In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.6 of A201™-1997.
2. In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this agreement of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, Subcontractors or suppliers.

§ 6.1.9 The costs described in Sections 6.1.1 through 6.1.8 shall be included in the Cost of the Work notwithstanding any provision of AIA or A201™-1997 other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.2.

#### § 6.2 COSTS NOT TO BE REIMBURSED

§ 6.2.1 The Cost of the Work shall not include:

1. Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Sections 6.1.2.2 and 6.1.2.3.
2. Expenses of the Construction Manager's principal office and offices other than the site office, except as specifically provided in Section 6.1.
3. Overhead and general expenses, except as may be expressly included in Section 6.1.
4. The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
5. Rental costs of machinery and equipment, except as specifically provided in Section 6.1.5.2.
6. Except as provided in Section 6.1.8.2, costs due to the negligence of the Construction Manager or to the failure of the Construction Manager to fulfill a specific responsibility to the Owner set forth in this Agreement.
7. Costs incurred in the performance of Preconstruction Phase Services.
8. Except as provided in Section 6.1.7.1, any cost not specifically and expressly described in Section 6.1.
9. Costs which would cause the Guaranteed Maximum Price to be exceeded.

#### § 6.3 DISCOUNTS, REBATES AND REFUNDS

§ 6.3.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be secured.

§ 6.3.2 Amounts which accrue to the Owner in accordance with the provisions of Section 6.3.1 shall be credited to the Owner as a deduction from the Cost of the Work.

#### § 6.4 ACCOUNTING RECORDS

§ 6.4.1 See Exhibit A for required Accounting Records requirements.

### ARTICLE 7 CONSTRUCTION PHASE

#### § 7.1 PROGRESS PAYMENTS

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

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

§ 7.1.3 Provided an Application for Payment is received by the Architect not later than the 30<sup>th</sup> day of a month, the Owner shall make payment to the Construction Manager not later than the 30<sup>th</sup> day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than Thirty ( 30 ) days after the Architect receives the Application for Payment.

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager; less (2) that portion of those payments attributable to the Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire ~~Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee~~ shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

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

- 1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.8 of A201™-1997, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
- 2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing.
- 3 Add the Construction Manager's Fee, less retainage of Five percent ( 5.00% ). The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the two preceding Sections bears to a reasonable estimate of the probable Cost of the Work upon its completion.
- 4 Subtract the aggregate of previous payments made by the Owner.
- 5 Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation.
- 6 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of A201™-1997.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than Five percent ( 5.00% ). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts.

7.1.8.1 As an alternative means of achieving the 5% retainage described in 7.1.7 and 7.1.8 above, the Construction Manager and the Subcontractors may allocate a portion of their respective contract amounts to a "Final Completion" line item within each firm's schedule of values. The portions of each contract so allocated shall be equal to the 5% retainage stipulated. Billing against any such "final completion" line item in a schedule of values will be allowed only under the same circumstances as otherwise defined in the contract documents for the reduction or release of retainage.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data, that the Architect has made exhaustive or continuous on-site inspections or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

## § 7.2 FINAL PAYMENT

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager when (1) the Contract has been fully performed by the Construction Manager except for the Construction Manager's responsibility to correct nonconforming Work, as provided in Section 12.2.2 of A201™-1997, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Owner's accountants; and (3) a final Certificate for Payment has then been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The amount of the final payment shall be calculated as follows:

- 1 Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price.
- 2 Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of A201™-1997 or other provisions of the Contract Documents.
- 3 Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.

§ 7.2.3 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of A201™-1997. The time periods stated in this Section 7.2 supersede those stated in Section 9.4.1 of A201™-1997.

§ 7.2.4 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without a further decision of the Architect. Unless agreed to otherwise, a demand for mediation or arbitration of the disputed amount shall be made by the Construction Manager within 60 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Owner's

accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.5 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1 and not excluded by Section 6.2 (1) to correct nonconforming Work or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee, if any, related thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

#### ARTICLE 8 INSURANCE AND BONDS

##### § 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in Section 1) 1 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance shall be as follows:

(Paragraph deleted)

None

8.1.2 Insurance provided will be per the construction Manager's standard policy. The Construction Manager will provide the Owner with a statement of the additional premium cost (if any) associated with other insurance coverage as the Owner may want to consider. If the Owner elects to require the Construction Manager to provide other coverage or limits, then the contract will be adjusted accordingly.

§ 8.1.3

(Paragraph deleted)

§ 8.1.4 Other coverage:

*(If Umbrella Excess Liability coverage is required over the primary insurance or retention, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be attained by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)*

##### § 8.2 INSURANCE REQUIRED OF THE OWNER

During both phases of the Project, the Owner shall purchase and maintain liability and property insurance, including waivers of subrogation, as set forth in Sections 11.2 and 11.4 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

###### § 8.2.1 Property Insurance:

\$10,000 Deductible Per Occurrence

(Paragraph deleted)

### § 8.3 PERFORMANCE BOND AND PAYMENT BOND

§ 8.3.1 The Construction Manager shall (Insert "shall" or "shall not") furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work. The amount of each bond shall be equal to One hundred percent ( 100.00% ) of the Contract Sum.

§ 8.3.2 The Construction Manager shall deliver the required bonds to the Owner after the contract is executed and three days before the commencement of any Work at the Project site. Further, Construction Manager shall deliver a binding commitment for the issuance of such bonds at least two weeks prior to the estimated date for the closing on Project financing. In the event of any early start as identified in paragraph 4.2.1.1 Owner may require Construction Manager to provide such bonds. Owner shall provide Construction Manager with 10 days notice of such requirement and stipulate in such notice the time for providing same, and the amount of coverages required by owner.

## ARTICLE 9 - MISCELLANEOUS PROVISIONS

### § 9.1 DISPUTE RESOLUTION

§ 9.1.1 During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201™-1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

### § 9.2 OTHER PROVISIONS

§ 9.2.1 Unless otherwise noted, the terms used in this Agreement shall have the same meaning as those in A201™-1997, *General Conditions of the Contract for Construction*.

### § 9.2.2 EXTENT OF CONTRACT

This Contract, which includes this Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and Construction Manager. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

### § 9.2.3 OWNERSHIP AND USE OF DOCUMENTS

Article 1.6 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

### § 9.2.4 GOVERNING LAW

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

### § 9.2.5 ASSIGNMENT

The Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 13.2.2 of A201™-1997, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

## ARTICLE 10 TERMINATION OR SUSPENSION

### § 10.1 TERMINATION PRIOR TO ESTABLISHING GUARANTEED MAXIMUM PRICE

§ 10.1.1 Prior to execution by both parties of Amendment No. 1 establishing the Guaranteed Maximum Price, the Owner may terminate this Contract at any time without cause, and the Construction Manager may terminate this Contract for any of the reasons described in Section 14.1.1 of A201™-1997.

§ 10.1.2 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 prior to commencement of the Construction Phase, the Construction Manager shall be equitably compensated for

Preconstruction Phase Services performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Section 4.1.1.

§ 10.1.3 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 after commencement of the Construction Phase, the Construction Manager shall, in addition to the compensation provided in Section 10.1.2, be paid an amount calculated as follows:

1. Take the Cost of the Work incurred by the Construction Manager.
2. Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.
3. Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain, and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders.

Subcontracts, purchase orders and rental agreements entered into by the Construction Manager with the Owner's written approval prior to the execution of Amendment No. 1 shall contain provisions permitting assignment to the Owner as described above. If the Owner accepts such assignment, the Owner shall reimburse or indemnify the Construction Manager with respect to all costs arising under the subcontract, purchase order or rental agreement except those which would not have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner elects not to accept the assignment of any subcontract, purchase order or rental agreement which would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager shall terminate such subcontract, purchase order or rental agreement and the Owner shall pay the Construction Manager the costs necessarily incurred by the Construction Manager by reason of such termination.

#### § 10.2 TERMINATION SUBSEQUENT TO ESTABLISHING GUARANTEED MAXIMUM PRICE

Subsequent to execution by both parties of Amendment No. 1, the Contract may be terminated as provided in Article 14 of A201™-1997.

§ 10.2.1 In the event of such termination by the Owner, the amount payable to the Construction Manager pursuant to Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 In the event of such termination by the Construction Manager, the amount to be paid to the Construction Manager under Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, including a reasonable estimate of the Cost of the Work for Work not actually completed.

#### § 10.3 SUSPENSION

The Work may be suspended by the Owner as provided in Article 14 of A201™-1997; in such case, the Guaranteed Maximum Price, if established, shall be increased as provided in Section 14.3.2 of A201™-1997 except that the term "cost of performance of the Contract" in that Section shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1.1 and 5.3.4 of this Agreement.

### ARTICLE 11 OTHER CONDITIONS AND SERVICES

11.1 thru 11.4

See Exhibit A

11.5

It is understood and agreed that the GMP is for the total cost of the work and that cost over-runs from one line item can be offset by cost savings from another line item.

11.6

All personnel listed in Exhibit C as a "Reimbursable as a cost of the work" shall be included in the cost of the work per Article 7.2, subject to the GMP per Article 6.1.2.2.

11.7

The following procedure is agreed to by Owner and or Owner's lender and Title Company in the event of a lien being filed by one of the Construction Manager's Vendors and/or Vendor's Vendor(s): At the Construction Manager's sole discretion either 1. Construction Manager shall make a cash deposit equal to 150% of each lien amount in separate escrow account held by Owner's Title Company on behalf of the Construction Manager or 2. The Construction Manager may provide a lien transfer bond for the amount of the lien. Upon said deposit being made or lien bond being provided by Construction Manager, Owner and or Owner's Lender, and Title Company shall immediately disburse to Construction Manager any monies owed to Construction Manager under the terms of this contract.

11.8

Owner and Construction Manager agree to the following punch list procedure for each phase of the project:

1. Prior to issuance of temporary of Full Certificate of Occupancy by City, Owner and/or Owner's designated representative(s) shall prepare one original interior and exterior punch list.
2. Within 7 calendar days after completion punch list work by Construction Manager, Owner and/or Owner's representative(s) will re-inspect to confirm original punch list items are complete.
3. New items will not be added to the original punch list at any time except for items which are substantial (i.e. no hot water) and thus were obviously missed during original punch list items.
4. Any item(s) not included in original punch list shall be considered warranty item(s).
5. Warranty items shall not be considered outstanding punch list items and thus shall not be subject to withholding of final payments.

11.9

If a discrepancy occurs within this Agreement and/or between this Agreement and other contract documents, it is understood and agreed that Article 11 of this Agreement, the balance of this Agreement, and Exhibits "A", "B", "C" and "D" (in that order) shall govern.

11.10

If interest costs occur per Paragraph 4.2, the cost shall be reimbursed by issuance of an Owner Change Order.

11.11

Architect shall return all submittals (i.e. shop drawings) to Contractor within 10 working days of date received from Contractor.

11.12

Modification and/or extension of project completion date due to "weather days" shall be as outlined in Exhibit "D" attached hereto.

11.13

The following Exhibits, attached hereto, form part of the Contract Documents:

Exhibit A: Modifications to the A121CM

Exhibit B: Supplementary Conditions

Exhibit C: Personnel Billing Rates and Matrix

Exhibit D: Definition of Weather Days.  
Exhibit E: Project Scope and Budget Summary  
Exhibit F: Preliminary Divisional Cost Breakdown  
Exhibit G: Pre-Construction Phase Schedule  
Exhibit H: Preliminary Construction Phase Schedule

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

OWNER

*[Signature]*  
(Signature)  
Don Silver, PRES  
(Printed name and title)  
April 30, 2004  
Date

ATTEST

CONSTRUCTION MANAGER

*[Signature]*  
(Signature)  
Peter Livingston, VICE PRESIDENT  
(Printed name and title)  
April 28, 2004  
Date

ATTEST



**Rainbow/Vision Santa Fe/Wels Contract Agreement**  
**Exhibit A**  
**Additional Provisions/Modifications based on the AIA A121CMC (2003 Edition)**

**5.4 COMMENCEMENT AND COMPLETION**

Add the following paragraphs:

5.4.1 The date of commencement is the date from which the Contract Time of subparagraph 5.4.2 is measured; it shall be the date of the giving of the Notice to Proceed (the "Commencement Date"). The Owner shall issue the Notice to Proceed within ten calendar days of the last to occur of all of the following (the "Conditions to Commencement"): (i) closing of financing acceptable to Owner, sufficient in an amount to satisfy the Owner's financial obligations hereunder, and (ii) receipt of all permits and approvals necessary to allow commencement and continuation of construction. In no event shall the Construction Manager commence any work on site by placing materials at the site or by conducting other work at the site until a Notice to proceed has been given.

The immediately aforementioned notwithstanding, Construction Manager and Owner acknowledge that prior to receiving a Notice to Proceed the Construction Manager may be required to enter into certain other subcontracts, issue purchase orders, or make similar commitments which, if the Project were not to proceed would result in the incurrence, by Construction Manager of certain costs, financial penalties, or other like or similar expenses. Owner agrees to reimburse Construction Manager all such costs, penalties, or similar expenses, so long as, and only to the extent that Construction Manager has received Owner's written approval prior to the incurrence of such costs, and/or the entering into such subcontracts, authorization of such purchase orders or making such similar commitments. Any activity conducted hereunder shall in no way effect the dates established for substantial completion for each phase as shall be provided for in Amendment No. 1 hereto.

5.4.2 It is anticipated that the Work is to be completed in phases so as to permit residents of the Project to move in on a phased basis (each of which shall be referred to as a "Phase").

.1 Substantial Completion of each Phase is to occur on or before an agreed date. The agreed dates for each Phase shall be established by Amendment No. 1 to this Agreement at the time the GMP is established, which shall be an agreed upon number of calendar days from the Commencement Date. Once established each of these days shall be measured from the Commencement Date and may only be extended in accordance with the Contract Documents.

.2 Each date by which Substantial Completion of a Phase must occur pursuant to the Contract Documents shall be referred to as a "Phase Completion Deadline". The period of time from the Commencement Date to the applicable Phase Completion Deadline shall be referred to as the "Phase Contract Time".

.3 The Owner and the Construction Manager acknowledge that if the Construction Manager fails to achieve substantial completion of a Phase before the applicable Phase Completion Deadline, the Owner will suffer damages which are difficult to ascertain. However, the Owner and the Construction Manager agree that the degree to which the Owner will be damaged by the Construction Manager's failure to substantially complete a particular Phase of the Project within the Phase Contract Time generally will decrease as the overall Project nears Substantial Completion. Accordingly, the Construction Manager agrees to pay the Owner as liquidated damages with respect to each particular Phase, and not as a penalty, for each calendar day that passes after the Phase Completion Deadline has expired for the particular Phase of the Project, until the date that the Construction Manager achieves Substantial Completion of that particular Phase, an amount equal to the portion of the GMP allocable to that particular Phase times the construction financing daily interest for Project (the "Stipulated Damage

Amount"). Any liquidated damages payable by the Construction Manager as to a particular Phase shall then be determined by multiplying the Stipulated Damage amount by each day of delay. The Stipulated Damage Amounts for each phase shall be established by an amendment hereto at the closing for financing on the Project.

.4 For purposes of determining that portion of the GMP allocable to a particular Phase, the following method of calculating same will be utilized:

(i) Reasonably determine that amount of the total GMP which generally applies to construction of the Project (as a whole) by adding the sum of the following amounts contained within the GMP: (Specific amounts to be determined when GMP is established by Amendment to the Contract.)

|                            |          |
|----------------------------|----------|
| Site Development           | \$ _____ |
| General Conditions         | \$ _____ |
| Construction Manager's Fee | \$ _____ |
| Other                      | \$ _____ |
| Total                      | \$ _____ |

(ii) Subtract total in (i) above from the total GMP to determine the "remaining GMP".

(iii) Utilize the approved Schedule of Values and construction costing information to calculate the percentage of the cost of a particular Phase to the "remaining GMP" amount as determined in (ii) above.

(iv) Apply the percentage from (iii) above for the particular Phase(s) to the GMP.

.5 The Stipulated Damage amount for each Phase is intended to be cumulative of the other Phases. Accordingly, if the Phase Completion Deadline for more than one (1) Phase shall have elapsed without the applicable Phases having been substantially completed, then the Stipulated Damage Amount for each Phase not so substantially complete shall be due and owing by the Construction Manager to the Owner. The Owner may collect the Stipulated Damage Amounts by withholding them from payments due the Construction Manager or by separate demand. The Stipulated Damage Amounts provided herein shall be in lieu of all other claims, costs, losses, damages and/or expenses that the Owner might otherwise have against the Construction Manager by reason of its failure to achieve Substantial Completion before the relevant Phase completion Deadline; whether arising from contract or tort, or actual, direct, indirect or consequential damages, and the Owner hereby releases the Construction Manager therefrom.

.6

.1 The Construction Manager agrees that final completion of each Phase of the Work shall occur as soon as possible after Substantial Completion of the Phase, but no later than thirty (30) calendar days after the date on which Substantial Completion of that Phase has occurred, as evidenced by the Architect's Certificate of Substantial Completion. Final payment as to a Phase shall be due upon final completion of such Phase.

.2 Owner acknowledges that there may be certain items which may be on order that, through no fault of the Construction Manager, may not arrive and/or otherwise be available for incorporation into the Work within said thirty (30) day period. To the extent that Owner, in Owner's sole discretion, accepts a Phase as having achieved final completion, even though such items remain outstanding, Owner may, (a) acknowledge such acceptance, and (b) withhold up to one and one half (1.5) times the total cost (as determined by the Construction Manager) for each Phase, or \$5000 for each Phase (whichever is greater), of such Work which remains incomplete or unincorporated.

3 Further, it is the intent that outstanding items described in 5.4.2.6.2 are to be secured and installed as quickly as possible -- preferably within five (5) days after the Construction Manager receives those items. It is acknowledged that some items may be more significant than others in terms of the operation or marketability of the project. It is also acknowledged that unless determined otherwise, the costs incurred by the Construction Manager for procuring, expediting and installing the items covered by 5.4.2.6.2 are reimbursable costs as defined under Article 6 of the Contract. Accordingly, it may be less costly for the Owner, and less disruptive to the operation of the facility, to have several items accumulated and installed at one time rather than have each item installed as it is delivered. Therefore, for each item outstanding as of Substantial Completion, within five (5) days the Construction Manager shall provide the Owner, in writing, with a proposed plan indicating the expected delivery date and proposed installation date for each item. The Owner and Construction Manager will jointly review (and revise as needed) said plan and reach an agreement on the plan. The Construction Manager will report to the Owner on a weekly basis of the status of the items remaining to be installed, and immediately notify the Owner of any change in delivery date or installation date due to unforeseen procurement or delivery problems. ~~If after receiving an outstanding item the Construction Manager fails to commence the Work within five (5) days after agreed upon commencement date, or subsequently fails to complete the Work in accordance with the agreed upon schedule, the Owner may exercise its right to carry out the work as provided in section 2.4 of the A201 General Conditions~~

4 The provision stated above for withholding 1.5 times the cost of items outstanding at the time of Substantial Completion does not apply to any Upgrade Options initiated by the Owner subsequent to the decision date established by the Construction Manager for each upgrade option proposed for a given residential unit.

7 Except for the portions of the project which the Owner has requested completion and occupancy prior to the completion of the Commons Areas in the El Centro building, it is the intent that when developing the Phase Completion Deadlines described in 5.4.2.1 and 5.4.2.2 above, for the purposes of determining what, if any, stipulated damage amount may be owed by Construction Manager, no phase shall be deemed to have achieved Substantial Completion until such time as (1) the common areas (as defined in Amendment No. 1) portion of the Project shall have achieved Substantial Completion or (2) the Owner agrees to deem the phase Substantially Complete or (3) the Owner takes beneficial occupancy of all or part of the phase. Further and accordingly, when establishing the completion dates for each phase as provided for herein by amendment hereto, such amendment shall also provide that no phase shall be deemed complete for the purposes hereof unless (1) and/or until the common area portion of the Project shall have attained substantial completion, (2) the Owner has agreed to deem the phase Substantially Complete, or (3) the Owner takes beneficial occupancy of all or part of the phase.

## 6.4 ACCOUNTING RECORDS

6.4.1 The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to the Owner and Owner's lender. The Owner and the Owner's accountants and the lender and lender's accountant or consultants shall be afforded reasonable access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement and the Project, (collectively "the records") and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law. All Records shall be maintained in accordance with generally accepted accounting principles, consistently applied. There shall be an "open book" policy, in effect at all times with regard to all Records relative to the project

maintained by either the Construction Manager or the Owner, or anyone on their behalf, and each party shall have full and complete access to said Records maintained by the other at all reasonable times. The Construction Manager shall require all Subcontractors and Sub-Subcontractors retained on a cost-plus basis to retain Records and permit the same access by Owner as is required of the Construction Manager under this Article 6.4.

6.4.1.1 If the Owner, Owner's accountants, Lender or Lender's accountants elect to perform an audit of "the records" maintained by Construction Manager, said audit shall be performed within six (6) months of the Final Completion of the project. This stipulation does not affect the Construction Manager's obligation to maintain "the records" for the time period noted in 6.4.1.

6.4.2 If, at any time during construction, any inspection by the Owner or the Lender of the Construction Manager's Records or any other data relating to the contract documents reveals an overcharge or undercharge by the Construction Manager as confirmed by an independent auditor, the next Application for Payment shall be appropriately adjusted by the amount of such overcharge or undercharge and related fees.

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## **ARTICLE 7**

### **CONSTRUCTION PHASE**

#### **7.1 PROGRESS PAYMENTS**

Add the following:

7.1.11 To the extent of payments received by the Construction Manager from the Owner, the Construction Manager warrants the real property on which the Project is located will remain free of any legitimate and proper claims of lien arising from the Work performed by or through the Construction Manager. If any such liens are properly recorded, the Construction Manager shall have fifteen (15) business days from its receipt of written notice by the Owner or Owner's agent (including Title company) of such recording within which to discharge or secure by cash deposit or by construction lien transfer bond any such claims of lien. If the Construction Manager fails to discharge or otherwise secure such claim of lien within said time period, the Owner shall be entitled to satisfy the lien or take whatever action it deems appropriate to remove the lien from its property. All reasonable expenses and costs, including reasonable attorney's fees, incurred by the Owner after the abovementioned fifteen (15) day period to effect the discharge, securing and/or removal of any such claims of lien shall be promptly reimbursed to the Owner by the Construction Manager.

7.1.12 Concurrently with each Application for Payment, Construction Manager will deliver to Owner lien waivers (which may be conditioned upon payment) waiving all lien rights in respect of the Project, executed by Construction Manager, and executed by Subcontractors and suppliers covering amounts paid on their account or to be paid with funds received from such Application for Payment. All lien waivers shall be in form and substance satisfactory to Owner and the Owners Lender(s). Additionally, the Construction Manager shall provide further evidence regarding application of each progress payment to payment of all Subcontractors and suppliers providing services or material in respect of the Project, and shall comply with such other reasonable requirements as the Owners Lender(s) may impose with respect to obtaining advances of funds be applied to each Application for Payment."

**ARTICLE 8**  
**MISCELLANEOUS PROVISIONS**

**9.1 DISPUTE RESOLUTION**

Add the following the following subparagraphs to 9.1.1:

.1 Claims between the parties to this Agreement shall be resolved as set forth below. At all times, the parties shall approach the dispute resolution process in good faith.

.2 In the event of a Claim between the parties, the parties shall promptly meet in good faith to resolve the Claim informally before invoking the dispute resolution procedures outlined elsewhere in the Contract Documents, including the A201 General Conditions and Supplementary Conditions, and below. If the parties are not able to quickly resolve the claim, either party may request participation by the Architect. Both parties shall promptly submit a written summary of its position to the Architect. Upon receipt of both summaries, the Architect shall immediately convene a formal meeting with the parties to further discuss the Claim. If the Claim is not resolved within three business days after the commencement of such meeting, either party may then commence the dispute resolution process defined in the Contract Documents.

.3 If the informal dispute resolution efforts outlined in 9.1.1.2 are not successful, then the dispute resolution procedures outlined in the balance of the Contract Documents. Any mediation conducted pursuant to this Paragraph 9.1 shall be held in Santa Fe, unless the parties mutually agree otherwise.

.4 Intentionally omitted

.5 Intentionally omitted

.6 Consent to arbitration involving an additional person or entity shall not constitute agreement to arbitration of a dispute not described in such consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

.7 Intentionally omitted

.8 The arbitration shall be held in Santa Fe.

.9 Notwithstanding anything herein to the contrary, if (1) the Claims involve a proposed, net aggregate payment or reimbursement in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose, an "interested person or entity" means any person or entity if (a) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (b) the interested person or entity is so situated that the disposition of the claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law.

## **ARTICLE 11**

### **OTHER CONDITIONS AND SERVICES**

11.1 The Construction Manager recognizes that any Lender involved in financing the Project will have requirements pertaining to this Agreement. The Construction Manager agrees to cooperate with and assist the Owner and the Architect in amending and supplementing the Contract Documents to conform to reasonable and customary requirements of any Lender (to the extent such requirements are acceptable to the Owner). However, the Construction Manager shall not be responsible for actually preparing amendments or supplements to the Contract Documents for any reason at any time. Such amendments or supplements may include, without limitation, provisions:

- A. Naming any Lender as an additional insured on the Construction Manager's bonds and insurance policies and providing notice to any Lender of termination, cancellation or material modification of such policies.
- B. Requiring approval of Applications for Payment by a consultant designated by a Lender prior to payment.
- C. Agreeing not to amend Contract Documents without the reasonable and timely consent of the Lender.
- D. Requiring approval of Change Orders by the Lender, provided that Lender approval will be provided on a timely basis and the Owner will use its best efforts to secure such timely approval.
- E. Requiring notice of the Owner's default to the Lender, with a Lender having the right to cure, and requiring continued performance by the Construction Manager, provided that the Lender assumes all contract obligations of the Owner.
- F. Subordinating any lien rights of the Construction Manager to rights of the Lender.
- G. Requiring copies of all written notices to be sent to the Lender.
- H. Granting the Lender the right to inspect the work and to examine records pertaining thereto.
- I. Recognizing the pledge of the Owner's rights under Contract Documents to the Lender.
- J. Requiring the Construction Manager to acknowledge, on the Lender's request, whether or not the Owner is in default of its obligations under the Contract.
- K. Requiring the Construction Manager to assist the Owner in preparing and submitting reports and information concerning the Work as may be reasonably required by the Lender.

11.2 Nothing contained in Paragraph 11.2 or Paragraph 11.3 is intended to derogate from any other rights to terminate this Contract that may be granted the Construction Manager elsewhere in this Contract, including, but not limited to, the provisions of Article 2 and Article 14 of the General Conditions and Article 10 of this Agreement.

11.3 The Construction Manager may perform all or any part of the Work with its own forces, or through an Affiliate, provided that (1) the Construction Manager secures at least two competitive bids with respect to the work Construction Manager intends to perform (2) the Owner consents thereto in writing, which consent shall not be unreasonably withheld, after full disclosure by the Construction Manager to the Owner of the affiliation or relationship of the Affiliate to the Construction Manager and (3) any Work performed by an Affiliate shall be covered in a separate agreement between the Construction Manager

and the Affiliate, which shall satisfy all of the requirements for subcontracts as set forth in Paragraph 5.3 of the General Conditions and which shall be approved by the Owner in writing.

11.4 Any amounts payable hereunder which are not paid when due shall thereafter accrue interest at Wall Street Journal "prime" plus one percent (1%) per annum or at the highest rate allowed under the law of the state where the Project is located, whichever is less.

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11

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit B**  
**Supplementary Conditions to the AIA A201 General Conditions (1997 Edition)**

1. The following Supplementary Conditions shall apply to that certain Standard Form of Agreement Between Owner and Construction Manager (the "Agreement") dated
2. For purposes of these Supplementary Conditions, capitalized terms shall have the meaning given to them in the Contract Documents (as such term is defined in Article 1 of the Agreement), unless otherwise defined in these Supplementary Conditions.

3. ~~The following paragraphs supplement, modify, or amend that certain Contract Document entitled "General Conditions of the Contract for Construction," AIA Document A201, Fifteenth Edition, 1997, Articles 1 through 14 inclusive (the "General Conditions"). Where only a portion of any provision of the General Conditions is supplemented, modified, or amended, the remaining portions of that provision shall remain unaltered and in effect. In the event of any inconsistency between the General Conditions and these Supplementary Conditions, the terms of these Supplementary Conditions shall apply. Hereinafter, all references to the General Conditions shall mean the General Conditions as amended by these Supplementary Conditions.~~

A. INTENTIONALLY OMITTED

- B. PARAGRAPH 1.2.4 "Correlation and Intent of the Contract Documents" is hereby added as follows:

1.2.4 Where no explicit quality or standards for materials or workmanship are established for Work, such Work is to be of good quality for the intended use and consistent with quality of the surrounding Work and of the construction of the Project generally.

- C. PARAGRAPH 1.2.5 "Correlation and Intent of the Contract Documents" is hereby added as follows:

1.2.5 All indications or notations which apply to one of a number of similar situations, materials or processes shall be deemed to apply to all such situations, materials or processes wherever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

D. INTENTIONALLY OMITTED

- E. <sup>1.5</sup>SUBPARAGRAPH 1.5.1, add at the end of the first sentence: ", unless otherwise identified and incorporated by reference in Agreement."

- F. SUBPARAGRAPH 2.2.5 Modify Subparagraph 2.2.5 as follows:

"In addition to the sets the Construction Manager used for bidding, the Owner will furnish a to be agreed upon number of sets of black and white prints of the Drawings and copies of the Project Manual free of charge for execution of the Work. Additional sets may be purchased from the Office of the Architect."



- G. SUBPARAGRAPH 3.2.3, delete the second sentence, and add at the end: "If the Construction Manager performs Work knowing it involves such error, inconsistency, omission or difference without such notice to the Architect, the Construction Manager shall assume appropriate responsibility for such Work and shall bear the costs attributed to correction."
- H. PARAGRAPH 3.3 "SUPERVISION AND CONSTRUCTION PROCEDURES" is hereby supplemented by the addition of the following sub-paragraphs:
- 3.3.4. The Construction Manager shall carefully check its own work and that of Subcontractors as the Work is being performed. The Construction Manager shall ensure that incorrect or faulty Work is corrected as soon as possible but in any event in a timely manner so as not to impact the project schedule.
- 3.3.5. During the finishing stages of the project, the Construction Manager shall make frequent inspections of the Work in the presence of the Architect or the Owners Representative and the applicable Subcontractor(s) involved, if any, and the Architect shall identify incorrect and faulty Work. The Construction Manager shall ensure that incorrect or faulty Work is corrected in accordance with 3.3.4.
- I. PARAGRAPH 3.4 "LABOR AND MATERIALS" is hereby supplemented by addition of the following Subparagraphs 3.4.3 and 3.4.4:
- 3.4.4. Should the Owner make reasonable objection, based upon qualifications, fitness, behavior or temperament, to the presence of any personnel of Construction Manager or any subcontractor, such person shall not perform services on the Project site, or otherwise in connection with the Project, without written consent of the Owner.
- 3.4.5. The Construction Manager shall not change or replace the assigned Project Manager or Superintendent without prior written consent by the Owner.
- J. SUBPARAGRAPH 3.5.1, Add to the end: "Construction Manager's warranties shall commence upon Substantial Completion of the Work for each Phase and continue for a period of one year thereafter."
- K. PARAGRAPH 3.5 "WARRANTY" is hereby supplemented by the addition of the following sub-paragraphs:
- 3.5.2. In the event of a claim by the Owner against the Construction Manager under Paragraph 3.5.1. of these General Conditions (or under any other express written warranty made by the Construction Manager) for any item of Work performed under the Contract Documents, the Owner shall give notice (a "Warranty Notice") of the claim to the Architect and the Construction Manager and thereafter, the Architect or Architects authorized representative and the Construction Manager shall inspect the item(s) of Work in question. If following its inspection the Architect determines that any such item is included within the Construction Manager's warranty under the Contract Documents, then:
- (a) Upon formal notification from the Architect, the Construction Manager shall have thirty (30) days, notwithstanding any other time period specified in the Contract Documents, to either (1) complete the cure for the item or, for a Longer Cure Item, commence the cure and thereafter diligently proceed to complete the cure, or (2) if the Construction Manager disputes the warranty coverage of the item, commence the

dispute resolution procedures described in Section 4.3 of the General Conditions.

- (b) if upon the expiration of the thirty (30) day period the Construction Manager has failed to satisfy the provisions of either clause (a) (1) or clause (a) (2) immediately above, then the Owner shall have the right to engage a third party Construction Manager of the Owner's sole selection to cure or complete the cure of the warranty item at the Construction Manager's expense.
- (c) If the Construction Manager fails to cure an item within the required time and if the item is finally determined by arbitration or, when permitted, judicial proceedings to be covered by any Construction Manager's warranty under the Contract Documents, then the Construction Manager shall be liable for all expenses incurred by the Owner in enforcing its warranty claim including legal and Architectural fees and expenses, an administrative charge of a percentage equal to Construction Manager's fee times the cost to cure the warranty item to cover the Owner's administrative costs to enforce the warranty claim, and, when a third party Construction Manager has been engaged by the Owner under this Paragraph 3.5.2, the costs and expenses of the third party Construction Manager.

L. INTENTIONALLY OMITTED

M. ARTICLE 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES is supplemented by the following replacement language for Subparagraph 3.12.4

3.12.4 Shop Drawings, Product Data, Samples and similar submittals which are required by the Contract Documents to be submitted for Architect's review shall become Contract Documents upon Architect's review and approval. Submittals which are not required by the Contract Documents to be submitted for Architect's review are not Contract Documents.

N. ARTICLE 3.16 "ACCESS TO WORK" is hereby supplemented by addition of the following Subparagraph:

"3.16.2 Representatives of the State Agencies shall have access at all reasonable times to the Work wherever it is in preparation or progress, and the Construction Manager shall provide proper facilities for such access and inspection."

O. PARAGRAPH 4.2.4 "COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION" is hereby supplemented by the additions of the following subparagraphs: Nothing contained herein shall prohibit the Owner's Representative from communicating directly with the Construction Manager for the purpose of receiving information and/or providing the Construction Manager with clarification as to Owner's position with regard to any matters affecting or concerning the Work.

4.2.4.1 The following definitions shall apply to construction communications:

4.2.4.1.1 Contract Document Clarifications: An answer from the Architect, in response to an inquiry from the Construction Manager, intended to make some

requirement(s) of the Drawings or plans clearly understood. Drawing/plan clarifications may be sketches, drawings, or in a narrative form and are not intended to change any requirements of the Contract Documents. Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.2 Non-Conformance Notice:** A Notice issued by the Architect documenting that the Work or some portion thereof has not been performed in accordance with the requirements of the Contract Documents. Payment shall not be made on any portion of the Work for which a Non-Conformance Notice has been issued and the Work not corrected to the satisfaction of the Architect.

Upon receipt of a Non-Conformance Notice the Construction Manager shall provide a written Response to the Non-Conformance Notice within five (5) working days after receipt of the Notice. The Construction Manager's response shall state either (a) the basis of Construction Manager's determination that the Work was performed in accordance with the Contract Documents or (b) the corrective action Construction Manager intends to take, at its sole expense, to correct the non-conforming work.

If the Construction Manager disputes issuance of the Notice the Architect has five (5) working days in which to respond by either (a) withdrawing the Notice of Non-Conformance or (b) directing the Construction Manager to correct the Work.

If directed to correct the Work, the Construction Manager shall do so within five (5) working days after receipt of such direction from the Architect, or such other time as may be agreed to with the Architect, without loss of rights for claim recovery or dispute resolution as may be available by the Contract.

**4.2.4.1.3 Requests for Information:** A written request from the Construction Manager or one of its subcontractors, to the Architect, seeking an interpretation or a clarification of some requirement of the Contract Documents. The Construction Manager shall clearly and concisely set forth the issue for which it seeks clarification or interpretation and why a response is needed from the Architect.

Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.4 Substitution/Or-Equal Submittals:** A written request from the Construction Manager to substitute a material, article, device, product, fixture, form, type of construction, or process called for in the Contract Documents with another item that shall substantially equal in all respects to that so indicated or supplied. Each such request shall specifically set forth any manner in which the proposed change does not conform to the Contract Documents and Construction Manager (and any subcontractor initiating the request) warrants that the proposed substitute conforms in all respects with the contract documents except as specifically identified as non-conforming in the request.

**4.2.4.1.5 Submittals/Shop Drawings:** When required by any technical specification included in these Contract Documents, the Construction Manager shall transmit to the Architect technical submittals, shop drawings, or samples, including supporting catalog cuts, manufacturer's literature, sketches or drawings, calculations, and other pertinent, in sufficient detail to enable the Architect to review the information and determine that the Construction Manager clearly understands the requirements of the Contract Documents. Construction Manager (and any subcontractor initiating a submittal) warrants that all Work and materials depicted in technical submittals, shop drawings and samples shall conform in all respects to the requirements of the Contract Documents, except as otherwise specifically identified as non-conforming.

4.2.4.1.6 Schedule Submittals: When required by the Construction Schedule Specification of these Contract Documents, the Construction Manager shall submit required schedules, schedule updates, schedule revisions, time impact analysis, etc. for review.

P. INTENTIONALLY OMITTED

Q. SUBPARAGRAPH 4.3.7.2 is hereby revised (and paragraphs 4.3.7.3 and 4.3.7.4 are added) to read as follows:

4.3.7.2 Weather days: Construction Manager confirms that the Contract Time, Phased Contract Time and the agreed upon dates for same as set forth in Amendment No. 1 to this Agreement are reasonable periods to perform The Work. Construction Manager has included in the work schedule ordinary and normally anticipated lost days due to adverse weather ("weather days") and therefore Construction Manager shall not be entitled to an extension of the Contract Time or Phased Contract Time as a result of weather conditions normally experienced in the greater Santa Fe area unless (1) the Construction Manager is unable to make up for the weather delay by scheduling work for a Saturday in accordance with 4.3.7.2 below, and (2) the number of weather days lost (and not made up by Saturday work) in that calendar month exceeds the number of weather days provided for in the Contract Time.

4.3.7.3 The Construction Manager's work schedule is based upon a regular five-day work week per calendar week. It is mutually agreed that in the event of a weather day the Construction Manager, before requesting a time extension the Construction Manager will first try to make up that weather day on the next Saturday available during the following 30 calendar days. A Saturday will be considered to be "available" only if all of the following conditions are met: (1) no work has already been scheduled for that day that would interfere with the work being rescheduled, (2) it is not a national holiday, (3) working on that Saturday is allowed by local ordinance, and (4) materials and workforce equivalent to what was scheduled for the lost weekday are available on that Saturday. The Construction Manager will only be required to utilize a Saturday if either (a) the Construction Manager incurs no additional cost in rescheduling work for that Saturday, or (b) the Owner agrees to compensate the Construction Manager (by Change Order) for any additional costs (such as for labor rate differential) the Construction Manager may incur.

4.3.7.4 The requirement stated above for the Construction Manager to utilize a Saturday to make up for a weather delay only applies the number of weather days included in each calendar month as indicated in the following list of Anticipated Lost Days. For every weather day beyond the number included below, the Construction Manager shall be entitled to an equivalent number of days extension to the Contract Time. The Construction Manager may (at the CM's sole discretion) attempt to mitigate the delay utilizing additional Saturdays as outlined in 4.3.7.3, but has no obligation to do so.

For the purposes of this Paragraph the table provided below setting forth the norms/anticipated lost weather days shall be utilized by the parties in determining lost weather days:

| <u>Month</u> | <u>Anticipated Lost Days<br/>Due to Adverse Weather</u> |
|--------------|---------------------------------------------------------|
| January      | 1                                                       |
| February     | 1                                                       |
| March        | 0                                                       |
| April        | 1                                                       |
| May          | 0                                                       |
| June         | 0                                                       |
| July         | 1                                                       |
| August       | 1                                                       |
| September    | 2                                                       |
| October      | 2                                                       |
| November     | 1                                                       |
| December     | 0                                                       |

See the Exhibit D "Weather Delays" - attached to the Contract.

R. INTENTIONALLY OMITTED

S. SUBPARAGRAPH 4.6.8, add as new subparagraph :

"4.6.8 Limitations of Arbitration. Notwithstanding anything in the Contract Documents to the contrary, if (1) the Claims involve a proposed, net aggregate payment to owner or Construction Manager in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose an "interested person or entity" means any person or entity if (3) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (4) the interested person or entity is so situated that the disposition of the Claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law."

T. SUBPARAGRAPH 5.2.1, change "promptly" to "within 10 days" in lines 5 and 7.

U. PARAGRAPH 7.3 "CONSTRUCTION CHANGE DIRECTIVES"

Supparagraph 7.3.3.3 is hereby changed to read as follows:

7.3.3.3 The following fees apply to Changes to the Work;

7.3.3.3.1 INTENTIONALLY OMITTED

7.3.3.3.2 The same markup applied by the subcontractor in the subcontractors base subcontract, which shall be defined in said subcontract and subject to Owner's approval, to the cost of work performed by any subcontractor.

V. INTENTIONALLY OMITTED

W. INTENTIONALLY OMITTED

X. PARAGRAPH 9.8.1. of the General Conditions is hereby deleted in its entirety and the following is substituted in lieu thereof:

9.8.1 "Substantial Completion" of the Project shall be deemed to occur when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use and, in addition, all requirements of the Contract Documents for Substantial Completion, including the following conditions, have been fulfilled as follows:

a. A Temporary or Final Certificate of Occupancy has been issued and all construction related approvals, licenses and requirements have been obtained or satisfied for the Project such that the Project may be operated for its intended use.

b. INTENTIONALLY OMITTED

Y. PARAGRAPH 9.8.2. of the General Conditions is hereby deleted in its entirety and the following Paragraphs 9.8.2.1. through 9.8.2.6. are substituted in lieu thereof:

9.8.2.1. When the Construction Manager considers that the Work, or portion thereof which the Owner agrees to accept separately, is substantially complete, the Construction Manager shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Construction Manager shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents. Following receipt of the Construction Manager's list, the Architect will make an inspection (the "Initial Punch List Inspection") to determine whether the Work or designated portion thereof is Substantially Complete. Upon completion of its Initial Punch List Inspection, the Architect shall prepare and submit to the Construction Manager and the Owner the Architect's list (the "Punch List") of items to be completed or corrected. For the items on the Punch List, the Architect shall specify:

- a. a date (a "Punch Item Date") by which such items shall be completed, which Punch Item Date shall be no more than forty-five (45) days from the date of the Punch List unless the Architect determines that reasonable cause exists for a later completion date; and
- b. the cost to complete or correct the items as reasonably determined by the Architect.

The Architect shall expressly state on the Punch List what the Construction Manager must do to achieve Substantial Completion under Paragraph 9.8.1 of the General. If as a result of the Initial Punch List Inspection the Architect determines that Substantial Completion has occurred, the Architect shall prepare a Certificate of Substantial Completion pursuant to Paragraph 9.8.2.5 below.

9.8.2.2 If the Construction Manager has not given notice that the Work is substantially complete and requested inspection thereof on or before the date for Substantial Completion set by the parties in the Contract Documents, then the Owner may request the Architect to make an Initial Punch List inspection of the Work to (x) prepare the Punch List pursuant to the provisions of Paragraph 9.8.2.1. above and (y) determine if Substantial Completion has occurred.

9.8.2.3. Upon the request of the Construction Manager prior to the expiration of the relevant Punch Item Date(s) and for good cause shown, the Architect may extend any Punch Item Date(s) for a reasonable period. Following receipt of the Punch List and the Construction Manager's compliance with the requirements of Paragraph 9.8.1. above, the Construction Manager may submit a request for another inspection by the Architect, if necessary, to determine whether Substantial Completion of the Work has been achieved.

9.8.2.4. If the Construction Manager fails to satisfactorily complete any item(s) on the Punch List by the applicable Punch Item Date(s), then the Owner has the right to take over the work in accordance with Section 2.4 of the General Conditions.

9.8.2.5. When the requirements of Paragraph 9.8.1. above have been met and upon the request of either the Owner or the Construction Manager, the Architect shall prepare a Certificate of Substantial Completion, in the form set out in Paragraph 9.8.3 below, which shall establish the date of Substantial Completion and shall establish responsibilities of the Owner and the Construction Manager for security, maintenance, heat, utilities, damage to the Work, and insurance. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise specifically stated in the Contract Documents or in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Construction Manager for their written acceptance of responsibilities assigned to them in such certificate.

**Z. INTENTIONALLY OMITTED**

**AA.** In addition to the provisions of Paragraph 9.10 Final Completion shall not have been deemed to have occurred until the date upon which all of the following have occurred:

**a. INTENTIONALLY OMITTED**

**b.** Delivery of conditional or unconditional lien waivers from each person who performed work at or provide or fabricated materials in connection with the Work (including all subcontracts executed in connection therewith), other than from those persons whose claims are being contested by Construction Manager in good faith and for which Construction Manager has provided to Owner a bond or security in an amount reasonably acceptable to Owner, and

**c.** Issuance and obtaining of a final, unconditional certificate of occupancy and all construction-related approvals, licenses, and requirements for the Project enabling it to be occupied and operated for its intended use.

**BB.** SUBPARAGRAPH 9.10.4.1, after "Claims" add: "previously made in writing and identified by Owner as unsettled at the time of final payment."

**CC.** Paragraph 10.1.1 add the following: "Construction Manager shall prepare and submit to Owner for Owner's approval a comprehensive safety program. Further, Construction Manager shall provide written verification and certification in a form satisfactory to the

Owner, that all subcontractors have familiarized themselves with the safety program and agreed to abide by said program and training regimen thereunder.

- DD. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." In the first line of Subparagraph 11.1.1, following the work "companies," insert the following:

" , acceptable to the Owner,."

- EE. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." Add the following to subparagraph 11.1.3:

"Certificates called for herein shall be furnished in duplicate and shall specifically set forth evidence of all coverage required by 11.1.2 and the Construction Manager shall furnish to the Architect copies of all endorsements that are subsequently issued amending coverage or limits."

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- FF. SUBPARAGRAPH 13.4.3, add as a new subparagraph:

"In the event of any litigation between the parties, the prevailing party shall be entitled to reimbursements for all reasonable attorneys' fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party to the extent allowed by law."

- GG. PARAGRAPH 13.5 "TESTS AND INSPECTIONS" is hereby supplemented by the addition of the following subparagraph:

"13.5.7 When work has been installed contrary to any Contract requirements and the Construction Manager requests the privilege of testing in lieu of removal, such testing shall be at the Construction Manager's expense."

- HH. INTENTIONALLY OMITTED

- II. Add the following new Article:

#### ARTICLE 15: REQUESTS FOR INFORMATION

15.1.1 In the event that the Construction Manager or its subcontractor, at any tier, determines that some portion of the Drawings, Specifications, or other Contract Documents requires clarification or interpretation by the Architect, the Construction Manager shall submit a Request for Information in writing to the Architect. Requests for Information may only be submitted by the Construction Manager and shall be only submitted on the Request for Information Forms provided by the Architect. The Construction Manager shall clearly and concisely set forth the issue for which clarification and interpretation is sought and why a response is needed from the Architect. If the Request for Information is being used to request confirmation of an interpretation or understanding of a requirement, the Construction Manager shall set forth that interpretation or understanding of the requirement along with reasons why such an understanding was reached.

15.1.2 The Architect will review all Requests for Information to determine whether they are Requests for Information within the meaning of this term. If the Architect determines



that the document is not a Request for Information, it will be returned to the Construction Manager, unreviewed as to content, for resubmittal on the proper form and in the proper manner. In either case, the Architect must reply to RFI in writing within the time requested by the Construction Manager, or three (3) working days, whichever is earlier.

15.1.3 Responses from the Architect are not intended to change any requirement of the Contract Documents. In the event the Construction Manager believes that a response to a Request for Information will cause a change to the requirements of the Contract Document, the Construction Manager shall immediately give written notice to the Architect in accordance with Section 4 of the General Conditions stating that the Construction Manager considers the response to be a change in the scope of work or a change to the project schedule..

END OF SUPPLEMENTARY CONDITIONS

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**RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit "C"**

**Weather Delays**

1. A "Work Day" is defined as Monday thru Friday, 7:30 am-4:400 pm.
2. The occurrence of one or more of the following will constitute a weather delay as indicated:
  - a. 0.25" of rain during the workday constitutes one lost workday
  - b. 2.0" of snow during the workday constitutes one lost workday
  - c. 12" of snow in a 24-hour period constitutes two lost workdays.
  - d. Temperature of 5 degrees below zero (Fahrenheit) constitutes one lost workday.
  - e. Any drying time required for soil stabilization (as directed by the geotechnical engineer) due to rain or snow will constitute lost work day(s).
3. Weather days will be included in the final schedule approved as part of the GMP proposal to be incorporated into the contract by amendment. The number of weather days included will be in accordance with Section 3.P of Exhibit B. Adjustments to the contract completion dates due to adverse weather will be made in accordance with Section 3.P of Exhibit B.

**RainbowVision Santa Fe/Weis Contract Agreement  
Exhibit "D"  
Personnel Billing Rates**

| <u>Position</u>                               | <u>Reimbursable<br/>as a Cost of<br/>the Work<br/>(w/in GMP)</u> | <u>Included<br/>In Fee</u> | <u>Notes</u> | <u>Expected<br/>to be<br/>Full or Part<br/>Time</u> | <u>Billing<br/>Rate<br/>(\$/hr)</u> |
|-----------------------------------------------|------------------------------------------------------------------|----------------------------|--------------|-----------------------------------------------------|-------------------------------------|
| <b><u>Field Staff Stationed on Site</u></b>   |                                                                  |                            |              |                                                     |                                     |
| Superintendent                                | X                                                                |                            | 1            | Full                                                | \$70                                |
| Project Engineer, QA/QC                       | X                                                                |                            | 1            | Full                                                | \$80                                |
| Carpenter                                     | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| Laborer                                       | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| <b><u>Personnel Not Stationed on Site</u></b> |                                                                  |                            |              |                                                     |                                     |
| Vice President                                |                                                                  | X                          |              |                                                     |                                     |
| CFO                                           |                                                                  | X                          |              |                                                     |                                     |
| Project Manager                               | X                                                                |                            | 3            | Part                                                | \$75                                |
| General Superintendent                        | X                                                                |                            | 3            | Part                                                | \$75                                |
| Project Coordinator                           |                                                                  | X                          |              |                                                     |                                     |
| Safety Director                               | X                                                                |                            | 3            | Part                                                | \$50                                |
| Project Accountant                            |                                                                  | X                          |              |                                                     |                                     |
| <b><u>Pre-Construction Personnel</u></b>      |                                                                  |                            |              |                                                     |                                     |
| Senior Estimator/Pre-Con Services M           | X                                                                |                            | 4            | Part                                                | \$90                                |
| Assistant Estimator                           | X                                                                |                            | 4            | Part                                                | \$60                                |

**Notes:**

- 1 Field staff on project site.
- 2 It is expected that all trade work will be subcontracted. Trade labor rates shown only if need for Gan Conditions.
- 3 Billed only for time spent on site and traveling to project
- 4 Billed only for time during pre-construction phase, subject to Pre-construction services billing cap (see Exhibit F).

**RainbowVision Santa Fe/Weis Contract Agreement  
Exhibit E  
Project Scope & Budget Summary**

- The Scope of the project Includes:
  - 40 Single-story Condominium living units
  - 80 Single-level Independent Living units built in a series of two-story buildings
  - 26 Assisted Living apartments (and related support spaces) constructed on the 2<sup>nd</sup> level of the central services building
  - Central services building (El Centro) containing commercial kitchen, dining spaces, activity spaces, administrative and marketing offices, retail spaces, and a spa/wellness center.
  - ~~13 acres of site development, with some off-site, public improvements~~
  - Total building area is approximately 183,000 sf.
- Based on a preliminary site plan and building design commissioned by the Owner, the Construction Manager prepared a detailed, preliminary cost report and presented that report to the Owner on February 1, 2004. Based on that scope and cost report, the Owner has established a construction budget of \$20,540,000, based on the Preliminary Divisional Cost Breakdown shown in Exhibit F.
- The Owner has contracted with the Architect to complete the design of the project in accordance with the budget stated above. The completion of the design, and related activities is proceeding in accordance with the Preconstruction Phase Schedule prepared and updated regularly by the Construction Manager. See Exhibit G.
- The Construction Manager has also prepared a Preliminary Construction Schedule. See Exhibit H. A final Construction Schedule will be included in the GMP report and made part of the contract by amendment.
- The Owner, Architect and Construction Manager are working together to monitor the completion of the design to ensure meeting the Construction Budget.
- Upon receipt of the Design Development documents, the Construction Manager will, in accordance with contract Section 2.2 prepare a GMP report that will include all of the elements outlined in Section 2.2.4. Prior to submitting the final GMP report, the Construction Manager will review the preliminary cost estimates with the Owner and Architect to determine if any adjustments to scope are required in order to achieve the construction budget stated above. Upon approval by the Owner, the GMP will be incorporated into the contract by amendment, in accordance with Section 2.2.
- During the completion of the design The Construction Manager will continue to meet regularly with the Owner and Architect, and will regularly review the Architect's work in progress to monitor the design as a means to ensure conformance to the construction budget.

**RainbowVision Santa Fe/Weis Contract Agreement  
EXHIBIT F**

**Preliminary Divisional Cost Breakdown**

| <b>C.S.I. SYSTEMS BREAKDOWN</b>            | <b>Total<br/>Costs</b> | <b>%</b>            |
|--------------------------------------------|------------------------|---------------------|
| Division 1 - General Conditions            | \$1,047,401            | 5.9%                |
| Division 1 - Building Permit Allowance     | \$184,820              | 1.0%                |
| Division 2 - Site Construction             | \$1,534,319            | 8.7%                |
| Division 3 - Concrete                      | \$966,149              | 5.5%                |
| Division 4 - Masonry                       | \$488,608              | 2.8%                |
| Division 5 - Metals                        | \$439,822              | 2.5%                |
| Division 6 - Woods & Plastics              | \$2,609,476            | 14.8%               |
| Division 7 - Thermal & Moisture Protection | \$969,353              | 5.5%                |
| Division 8 - Doors & Windows               | \$771,106              | 4.4%                |
| Division 9 - Finishes                      | \$3,286,198            | 18.6%               |
| Division 10 - Specialties                  | \$592,969              | 3.4%                |
| Division 11 - Equipment (See Note 1)       | \$445,320              | 2.5%                |
| Division 12 - Furnishings (See Note 2)     | \$49,196               | 0.3%                |
| Division 14 - Conveying                    | \$230,919              | 1.3%                |
| Division 15 - Mechanical                   | \$2,410,820            | 13.7%               |
| Division 16 - Electrical                   | \$1,638,100            | 9.3%                |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    | <b>100%</b>         |
| Escalation - For 2004                      | 0.0%                   | -                   |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    |                     |
| Est./Const Contingency - El Centro         | 5.0%                   | \$243,521           |
| Est./Const Contingency - Balance           | 3.0%                   | \$383,726           |
| <b>Sub-Total</b>                           | <b>\$18,288,523</b>    |                     |
| Builders Risk Insurance                    | 0.8%                   | \$146,308           |
| Liability Insurance                        | 0.85%                  | \$158,696           |
|                                            |                        | <b>\$18,591,527</b> |
| Construction Manager Fee                   | 3.00%                  | \$557,748           |
| <b>Sub-Total</b>                           | <b>\$19,149,273</b>    |                     |
| Performance and Payment Bond               |                        | \$108,393           |
| NM Gross Receipts Tax                      |                        | \$1,284,062         |
| <b>Project Totals</b>                      |                        | <b>\$20,538,728</b> |

**Notes:**

1. "Equipment" includes residential appliances, commercial kitchen and laundry equipment.
2. "Furnishings" does not include FF&E - which is being designed and purchased by the Owner under a separate contract.

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit G**  
**Preconstruction Phase Schedule**

Refer to the "Preconstruction Schedule" dated \_\_\_\_\_ (filename: RVSF007), attached separately but made a part of this Exhibit by reference.

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**RainbowVision Santa Fe/Weis Contract Agreement  
Exhibit H  
Preliminary Construction Phase Schedule**

Refer to the "Preliminary Construction Schedule" dated \_\_\_\_\_ (filename: \_\_\_\_\_),  
attached separately but made a part of this Exhibit by reference.

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Amendment No. 1  
(Revised December 15, 2004)  
To Contract Agreement Between  
RainbowVision Santa Fe, LLC and Weis Builders, Inc

In accordance with article 2.2.9 of the Contract Agreement, the Guaranteed Maximum Price (GMP) and Project Schedule are hereby modified to reflect the following:

- The Guaranteed Maximum Price will be Twenty-One Million Five Hundred Thirty Nine Thousand, Seven Hundred Twenty-Eight Dollars (\$21,539,728).

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- The Construction Start date will be January 3, 2005. Based on that start date:
- The Substantial Completion date for Buildings 16, 17, 18, 19, and 20 will be October 28, 2005.
- The Substantial Completion date for the balance of the project will be April 28, 2006.

Accordingly, the GMP Divisional Cost Breakdown (Exhibit F) shall be modified as per the attached revision, dated September 30, 2004. The revised GMP is based on the following:

- Weis September 15, 2004 "Confirmation of GMP" letter (with attachments)
- Weis September 30, 2004 "Summary of Approved Enhancements"

The Construction Schedule (Exhibit H) shall be as shown in the attached update, dated December 15, 2004.

For:  
RainbowVision Santa Fe, LLC

  
(Signature)

JAY SILVER, PURSUO  
(Printed Name and Title)  
RAINBOWVISION CONTRACTORS, INC.  
MANAGING MEMBER  
(Date)

For:  
Weis Builders Inc.

  
(Signature)

PETER WORTHINGTON, VICE PRESIDENT  
(Printed Name and Title)  
Dec-15, 2004  
(Date)



| Act ID                                  | Description                            | Bar | Early Start | Early Finish | 2005 | 2006     | 2007     | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 | 2024 | 2025 | 2026 | 2027 | 2028 | 2029 | 2030 |
|-----------------------------------------|----------------------------------------|-----|-------------|--------------|------|----------|----------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| 1000                                    | Receive Utility Permit                 | 0   | 05/01/04    | A            |      |          |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| 1120                                    | Receive Grading Permit                 | 0   | 05/01/04    | A            |      |          |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| 1080                                    | Receive Bid Package #2 Building Permit | 0   | 08/01/04    | A            |      |          |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| 1000                                    | Loan Closing                           | 0   | 22/01/04    |              |      |          |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| 1005                                    | Notice to Proceed                      | 0   | 22/01/04    |              |      |          |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| 1100                                    | Receive Bid Package #3 Building Permit | 0   | 22/01/04    |              |      |          |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| 1010                                    | Site Construction Start                | 0   | 03/01/05    |              |      |          |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| 1020                                    | Building Construction Start            | 0   | 03/01/05    |              |      |          |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Summary                                 |                                        |     |             |              | 285  | 03/01/05 | 08/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Condominium Building 20                 |                                        |     |             |              | 137  | 01/01/05 | 28/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Condominium Building 18                 |                                        |     |             |              | 130  | 28/01/05 | 28/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Condominium Building 19                 |                                        |     |             |              | 144  | 08/01/05 | 20/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Condominium Building 17                 |                                        |     |             |              | 156  | 21/01/05 | 28/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Condominium Building 16                 |                                        |     |             |              | 171  | 03/01/05 | 28/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Classroom/Tutoring Group 1 Condominiums |                                        |     |             |              | 0    | 28/01/05 | 28/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Classroom                               |                                        |     |             |              | 278  | 28/01/05 | 28/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Independent Living Building 1 - 8 Units |                                        |     |             |              | 166  | 03/01/05 | 13/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Independent Living Building 2 - 4 Units |                                        |     |             |              | 185  | 08/01/05 | 14/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Condominium Building 3                  |                                        |     |             |              | 147  | 21/01/05 | 14/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Condominium Building 4                  |                                        |     |             |              | 159  | 03/01/05 | 12/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Independent Living Building 5 - 4 Units |                                        |     |             |              | 201  | 03/01/05 | 14/01/05 |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
| Summary                                 |                                        |     |             |              |      |          |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |

Rainbow Villa Retirement Community  
 Santa Fe, New Mexico  
 Wells Builders, Inc.

| Asst ID | Description                               | Dur | Early Start | Early Finish | 2007     |     |     |     |     |     |     |     |     |     |     |     |
|---------|-------------------------------------------|-----|-------------|--------------|----------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
|         |                                           |     |             |              | JAN      | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
| +       | Independent Living Building 6 - 14 Units  |     | 247         | 08/05/09     | 20/04/08 |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 7 - 10 Units  |     | 242         | 08/05/05     | 18/04/08 |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 8 - 8 Units   |     | 255         | 28/05/05     | 20/03/06 |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 9 - 14 Units  |     | 220         | 22/05/04     | 14/03/06 |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 10 - 10 Units |     | 272         | 04/04/05     | 21/04/05 |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 11 - 12 Units |     |             |              |          |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 12            |     | 185         | 10/04/05     | 10/05/05 |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 13            |     | 182         | 30/04/05     | 09/05/05 |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 14            |     | 185         | 11/04/05     | 08/04/05 |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 15            |     | 239         | 18/04/05     | 18/04/05 |     |     |     |     |     |     |     |     |     |     |     |
| +       | Independent Living Building 16            |     | 346         | 22/05/04     | 20/04/05 |     |     |     |     |     |     |     |     |     |     |     |

Rainbow Vision Retirement Community  
 Suite F, New Mexico  
 White Builders, Inc.

SFC CLERK RECORDED 02/02/2007

### CLAIM OF LIEN

To RainbowVision Santa Fe, LLC owner or reputed owner of the premises hereinafter described, and to all who may be concerned:

The Claimant, Weis Builders Inc. claims a lien in the sum One Million, Five Hundred Twenty-Two Thousand, Three Hundred Nineteen dollars (\$1,522,319) plus legal fees, costs and interest, upon the following described property, to-wit:

RainbowVision Santa Fe (excluding Buildings #1, 2, 3, 4, 5, 11, 12, 14, 15, 16, 17, 18, 19, 20) located at 500 Rodeo Road, Santa Fe, New Mexico, more particularly described as:

Township 16 N, Range 9 E, Section 11, L.C.E. for RainbowVision condominiums, per Plat 605/24, and bearing uniform property code number 1-053-095-353-509 (excluding Buildings # 1, 2, 3, 4, 5, 11, 12, 14, 15, 16, 17, 18, 19, 20),

together with all improvements thereon, for labor/services performed and materials furnished by the claimant in the construction, alteration and repair, of a certain multi-building resort retirement community consisting of nineteen (19) one and two story residential buildings and a combination commercial/residential building (El Centro) situated on the property described above.

After deducting all just credits and offsets claimant's demands are: Unpaid amounts invoiced, including retainage (\$1,168,362), unpaid contract balance (\$15,685), and unpaid change order requests (\$338,272).

The name of the owner or reputed owner of said property is RainbowVision Santa Fe, LLC and the name of the person with whom claimant contracted, for whom claimant performed services or to whom claimant furnished the said materials is RainbowVision Santa Fe, LLC.

The terms, time given and condition of claimant's contract are as shown in the contract documents attached hereto and marked Exhibit "I" and made a part of this claim.

Wherefore, claimant claims a lien upon said property and improvements thereon in the amount stated.

Weis Builders Inc.

By *Peter Worthington*

Peter Worthington, Vice President

EXHIBIT

2

SFC CLERK RECORDED 02/02/2007

STATE OF MINNESOTA        )  
                                  ) ss  
COUNTY OF HENNEPIN        )

Verification

Peter Worthington, of lawful age and upon being duly sworn upon his/her oath, states and verifies as follows: that he/she has read the foregoing Claim of Lien and understands the contents thereof; that the matters and things contained therein are true and correct to the best of his/her knowledge, information and belief.

SUBSCRIBED AND SWORN TO before me this 30<sup>th</sup> day of Jan, 2007

My Commission Expires:  
1/7/08

*Mary F. Klein*  
Notary Public  
MARY F. KLEIN  
Notary Public  
Minnesota  
My Commission Expires 01/07/2008

COUNTY OF SANTA FE        )  
STATE OF NEW MEXICO       ) ss  
CLAIM OF LIEN  
PAGES: 45

Hereby Certify That This Instrument Was Filed for  
Record On The 2ND Day Of February, A D., 2007 at 11.45  
And Was Duly Recorded as Instrument # 1469461  
In The Records Of Santa Fe County

Witness My Hand And Seal Of Office  
Valerie Espinoza  
Deputy \_\_\_\_\_ County Clerk, Santa Fe, NM



# **AIA Document A121™CMc – 2003 and AGC Document 565**

**Standard Form of Agreement Between Owner and Construction Manager  
where the Construction Manager is Also the Constructor**

**AGREEMENT**

made as of the Twenty Eighth day of April in the year of Two Thousand and  
Four  
*(In words, indicate day, month and year)*

**BETWEEN the Owner:**  
*(Name and address)*

RainbowVision Santa Fe LLC  
4001 Office Court Road,  
Suite 403  
Santa Fe, NM 87505

**and the Construction Manager:**  
*(Name and address)*

Weit Builders, Inc.  
7645 Lyndale Avenue South  
Minneapolis, MN 55423

**The Project is:**  
*(Name, address and brief description)*

RainbowVision Santa Fe Retirement Community  
500 Roden Road at Antigua  
Santa Fe, NM 87505

**The Architect is:**  
*(Name and address)*

Lloyd & Associates Architects  
301 N. Guadalupe Suite 104  
Santa Fe, NM 87501

The Owner and Construction Manager agree as set forth below:

**ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The 1997 Edition of AIA® Document A201™, General Conditions of the Contract for Construction, is referred to herein. This Agreement requires modification if other general conditions are utilized.

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**ARTICLE 1 GENERAL PROVISIONS****§ 1.1 RELATIONSHIP OF PARTIES**

The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services and use the Construction Manager's best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Construction Manager and other persons or entities employed by the Owner for the Project.

**§ 1.2 GENERAL CONDITIONS**

For the Construction Phase, the General Conditions of the contract shall be the AIA® Document A201™-1997, General Conditions of the Contract for Construction, which is incorporated herein by reference. For the Preconstruction Phase, or in the event that the Preconstruction and Construction Phases proceed concurrently, A201™-1997 shall apply to the Preconstruction Phase only as specifically provided in this Agreement. The term "Contractor" as used in A201™-1997 shall mean the Construction Manager.

**ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES**

The Construction Manager shall perform the services described in this Article. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction Phase services. If the Owner and Construction Manager agree, after consultation with the Architect, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

**§ 2.1 PRECONSTRUCTION PHASE****§ 2.1.1 PRELIMINARY EVALUATION**

The Construction Manager shall provide a preliminary evaluation of the Owner's program and Project budget requirements, each in terms of the other.

**§ 2.1.2 CONSULTATION**

The Construction Manager with the Architect shall jointly schedule and attend regular meetings with the Owner. The Construction Manager shall consult with the Owner and Architect regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.

**§ 2.1.3 PRELIMINARY PROJECT SCHEDULE**

When Project requirements described in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare, and periodically update, a preliminary Project schedule for the Architect's review and the Owner's approval. The Construction Manager shall obtain the Architect's approval of the portion of the preliminary Project schedule relating to the performance of the Architect's services. The Construction Manager shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect and Construction Manager. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed date of Substantial Completion. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

**§ 2.1.4 PHASED CONSTRUCTION**

The Construction Manager shall make recommendations to the Owner and Architect regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economy, time of performance, availability of labor and materials, and provisions for temporary facilities.

**§ 2.1.5 PRELIMINARY COST ESTIMATES**

**§ 2.1.5.1** When the Owner has sufficiently identified the Project requirements and the Architect has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a preliminary cost estimate utilizing area, volume or similar conceptual estimating techniques.

**§ 2.1.5.2** When Schematic Design Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the Design Development Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

**§ 2.1.5.3** When Design Development Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare a detailed estimate with supporting data for review by the Architect and approval by the Owner. During the preparation of the Construction Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

**§ 2.1.5.4** If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

**§ 2.1.6 SUBCONTRACTORS AND SUPPLIERS**

The Construction Manager shall seek to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors, including suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner know of any objection to such subcontractor or supplier. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the Owner or Architect later to object to or reject any proposed subcontractor or supplier.

**§ 2.1.7 LONG-LEAD-TIME ITEMS**

The Construction Manager shall recommend to the Owner and Architect a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager. The Construction Manager shall expedite the delivery of long-lead-time items.

**§ 2.1.8 EXTENT OF RESPONSIBILITY**

The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Owner and the Owner's professional consultants. It is not the Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Drawings and Specifications are at variance therewith, the Construction Manager shall promptly notify the Architect and Owner in writing.

**§ 2.1.9 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION**

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

**§ 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL AND CONTRACT TIME**

**§ 2.2.1** When the Drawings and Specifications are sufficiently complete, the Construction Manager shall propose a Guaranteed Maximum Price, which shall be the sum of the estimated Cost of the Work and the Construction Manager's Fee.

**§ 2.2.2** As the Drawings and Specifications may not be finished at the time the Guaranteed Maximum Price proposal is prepared, the Construction Manager shall provide in the Guaranteed Maximum Price for further development of



the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The estimated Cost of the Work shall include the Construction Manager's contingency, a sum established by the Construction Manager for the Construction Manager's exclusive use to cover costs arising under Section 2.2.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order.

#### § 2.2.4 BASIS OF GUARANTEED MAXIMUM PRICE

The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include:

1. A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Guaranteed Maximum Price proposal.
2. A list of allowances and a statement of their basis.
3. A list of the classifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
4. The proposed Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the Fee that comprises the Guaranteed Maximum Price.
5. The Date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents issuance dates upon which the date of Substantial Completion is based.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by the Construction Manager.

§ 2.2.7 Prior to the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing.

§ 2.2.8 Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis shall be set forth in Amendment No. 1. The Guaranteed Maximum Price shall be subject to additions and deductions by a change in the Work as provided in the Contract Documents, and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 2.2.9 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in Amendment No. 1. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

§ 2.2.10 The Guaranteed Maximum Price shall include in the Cost of the Work only those taxes which are enacted at the time the Guaranteed Maximum Price is established.

#### § 2.3 CONSTRUCTION PHASE

##### § 2.3.1 GENERAL

§ 2.3.1.1 The Construction Phase shall commence on the earlier of:

- (1) the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, or
- (2) the Owner's first authorization to the Construction Manager to:
  - (a) award a subcontract, or
  - (b) undertake construction Work with the Construction Manager's own forces, or
  - (c) issue a purchase order for materials or equipment required for the Work.

#### § 2.3.2 ADMINISTRATION

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated to a special design for the Work from the list previously reviewed and, after analyzing such bids, shall deliver such bids to the Owner and Architect. The Owner will then determine, with the advice of the Construction Manager and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the Construction Manager shall obtain bids; however, if the Guaranteed Maximum Price has been established, the Owner may not prohibit the Construction Manager from obtaining bids from other qualified bidders. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Construction Manager to the Owner and Architect (1) is recommended to the Owner by the Construction Manager; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of Sections 7.1.8 and 7.1.9 and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.3.2.4 The Construction Manager shall schedule and conduct meetings at which the Owner, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

§ 2.3.2.5 Promptly after the Owner's acceptance of the Guaranteed Maximum Price proposal, the Construction Manager shall prepare a schedule in accordance with Section 3.10 of A201™-1997, including the Owner's occupancy requirements.

§ 2.3.2.6 The Construction Manager shall provide monthly written reports to the Owner and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.3.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals.

#### § 2.4 PROFESSIONAL SERVICES

Section 3.12.10 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### § 2.5 HAZARDOUS MATERIALS

Section 10.3 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

### 5.3.1 INFORMATION AND SERVICES

§ 3.1.2 The Owner shall, at the written request of the Construction Manager prior to commencement of the Construction Phase and thereafter, furnish to the Construction Manager reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.2 The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies for changes in the Work and other costs which are the responsibility of the Owner.

### § 2-1.4 STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS

**§3.1.4.1 Reports, surveys, drawings and tests concerning the conditions of the site which are required by law.**

**§ 3.1.4.2 Surveys describing physical characteristics, legal implications and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a project benchmark.**

g 3.1.4.3 The services of a geotechnical engineer when such services are requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate professional recommendations.

**§ 3.1.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.**

**§ 3.4.4.5 The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.**

### § 3.2 OWNER'S DESIGNATED REPRESENTATIVE

The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. This representative shall have the authority to make decisions on behalf of the Owner concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201™-1997, the Architect does not have such authority.

## § 3.5 ARCHITECT

The Owner shall retain an Architect to provide Basic Services, including normal structural, mechanical and electrical engineering services, other than cost estimating services. The Owner shall authorize and cause the Architect to provide Additional Services, requested by the Construction Manager which must necessarily be provided by the Architect for the Preconstruction and Construction Phases of the Work. Such services shall be

provided in accordance with time schedules agreed to by the Owner, Architect and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect, from which compensation provisions may be deleted.

#### § 3.4 LEGAL REQUIREMENTS

The Owner shall determine and advise the Architect and Construction Manager of any special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project. The Owner shall furnish such legal services as are necessary to provide the information and services required under Section 3.1.

#### ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

The Owner shall compensate and make payments to the Construction Manager for Preconstruction Phase services as follows:

##### § 4.1 COMPENSATION

§ 4.1.1 For the services described in Sections 2.1 and 2.2, the Construction Manager's compensation shall be calculated as follows:

The Construction Manager's fee for Preconstruction Phase Services shall be Seven Thousand Dollars (\$7,000), in accordance with Weis's 1/22/03 letter of intent.

*(State basis of compensation, whether a stipulated sum, multiple of Direct Personnel Expense, actual cost, etc. Include a statement of reimbursable cost items as applicable.)*

§ 4.1.2 Compensation for Preconstruction Phase Services shall be equitably adjusted if such services extend beyond April 1, 2004 in accordance with Weis's 12/22/03 letter of intent.

§ 4.1.3 If compensation is based on a multiple of Direct Personnel Expense, Direct Personnel Expense is defined as the direct salaries of the Construction Manager's personnel engaged in the Project and the portion of the cost of their mandatory and customary contributions and benefits related therein, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

##### § 4.2 PAYMENTS

§ 4.2.1 Payments shall be made monthly following presentation of the Construction Manager's invoice and, where applicable, shall be in proportion to services performed.

§ 4.2.2 Payments are due and payable Thirty ( 30 ) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear interest at the rate entered below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon.)*

Interest rate shall be 4% above US Bancorp Prime Rate.

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

#### ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

The Owner shall compensate the Construction Manager for Construction Phase services as follows:

**§ 5.1 COMPENSATION**

§ 5.1.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager in current funds the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Construction Manager's Fee determined as follows:

Base Fee will be Three percent (3.0%) of the Cost of the Work as defined in Article 6. For changes in the Work not associated with any "Resident Upgrade Packages" that are to be offered on a unit-by-unit basis, the fee for additive changes will be 3.0% and for deductive changes the fee will be 0.0%.

**5.1.2**

In addition to the basic fees in 4.1.1 and 5.1.1 above, the Owner shall pay the Construction Manager a Resident Upgrade Fee equal to 15% of the cost of the work, together with such reasonable administrative costs that the Construction Manager will incur directly related to the performance of such work, associated with the Resident Upgrade Packages that the Owner is planning to offer. It is the intent that a limited number of such Upgrade packages will be offered by the Owner, and that once the scope and cost for the upgrades being considered is established, the Owner and Construction Manager will incorporate by Amendment to this Contract the terms and conditions pursuant to which the Construction Manager shall perform such work. It is intended that the Construction Manager will establish a lump sum price per unit type for each Upgrade Package to be offered, and that said lump sum price shall include the fee and administrative costs described above, as well as define the date for each unit by which the Owner must direct the Construction Manager to proceed with the Upgrade. Unit upgrades for which direction to proceed is given after the agreed upon date, or which reflect a deviation in scope from the defined Upgrade Packages will be evaluated separately, and a cost and time adjustment proposed, by the Construction Manager.

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

**§ 5.2 GUARANTEED MAXIMUM PRICE**

§ 5.2.1 The sum of the Cost of the Work and the Construction Manager's Fee are guaranteed by the Construction Manager not to exceed the amount provided in Amendment No. 1, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum as adjusted by approved changes in the Work is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner. At time of Final Completion, any costs savings shall be returned 100% to the Owner and 0% to the Construction Manager.

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

**§ 5.3 CHANGES IN THE WORK**

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of Amendment No. 1 may be determined by any of the methods listed in Section 7.3.3 of A201™-1997.

§ 5.3.2 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of A201™-1997 and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Section 7.3.6 of A201™-1997 shall have the meanings assigned to them in that document and shall not be modified by this Article 5. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.3 In calculating adjustments to the Contract, the terms "cost" and "costs" as used in the above-referenced provisions of A201™-1997 shall mean the Cost of the Work as defined in Article 6 of this Agreement, and the term "and a reasonable allowance for overhead and profit" shall mean the Construction Manager's Fee as defined in Section 5.1.1 of this Agreement.

§ 6.3.4 If no specific provision is made in Section 5.1.1 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.1 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

"Article 5.4: Commencement and Completion has been added. See Exhibit A."

#### ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

##### § 6.1 COSTS TO BE REIMBURSED

§ 6.1.1 The term "Cost of the Work" shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 6.

##### § 6.1.2 LABOR COSTS

- 1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's agreement, at off-site workshops.
- 2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's agreement. To the extent that some of the Construction Manager's supervisory and administrative personnel located at the Construction Manager's main office provide service to the project, a portion of their wages and salaries will be included in the cost of work and will be reimbursed in accordance with Exhibit C.

Classification

Name

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal office or offices other than the site office shall be included in the Cost of the Work, such personnel shall be identified below.)*

- 3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.
- 4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Cost of the Work under Sections 6.1.2.1 through 6.1.2.3.

##### § 6.1.3 SUBCONTRACT COSTS

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

##### § 6.1.4 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

- 1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.
- 2 Costs of materials described in the preceding Section 6.1.4.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

##### § 6.1.5 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

- 1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed.

- whether sold to others or retained by the Construction Manager. Cost for items previously used by the Construction Manager shall mean fair market value.
2. Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval.
  3. Costs of removal of debris from the site.
  4. Reproduction costs, costs of telegrams, facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephone at the site and reasonable petty cash expenses of the site office.
  5. That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while traveling in discharge of duties connected with the Work.

#### § 6.1.6 MISCELLANEOUS COSTS

1. That portion directly attributable to this Contract of premiums for insurance and bonds. *(If charges for self-insurance are to be included, specify the basis of reimbursement.)*
2. Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.
3. Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.
4. Fees of testing laboratories for tests required by the Contract Documents, except those related to nonconforming Work other than that for which payment is permitted by Section 6.1.5.2.
5. Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defense, judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the Guaranteed Maximum Price and provided that such royalties, fees and costs are not excluded by the last sentence of Section 3.17.1 of A201™-1997 or other provisions of the Contract Documents.
6. Data processing costs related to the Work.
7. Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.
8. Legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld.
9. Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
10. All premiums (without markup) and deductibles associated with Builder's Risk Insurance provided by the Construction Manager at the Owner's request.
11. All premiums (without markup) and deductibles associated with providing professional liability insurance for the mechanical and electrical design services for the condominiums and II units.

#### § 6.1.7 OTHER COSTS

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

#### § 6.1.8 EMERGENCIES AND REPAIRS TO DAMAGED OR NONCONFORMING WORK

The Cost of the Work shall also include costs described in Section 6.1.1 which are incurred by the Construction Manager except, however, where conditions requiring such action were caused by or are the result of the Construction Manager's negligence.

1. In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.6 of A201™-1997.
2. In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this agreement of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, Subcontractors or suppliers.

§ 6.1.9 The costs described in Sections 6.1.1 through 6.1.8 shall be included in the Cost of the Work notwithstanding any provision of AIA or A201™-1997 other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.2.

**§ 6.2 COSTS NOT TO BE REIMBURSED**

§ 6.2.1 The Cost of the Work shall not include:

1. Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Sections 6.1.2.2 and 6.1.2.3.
2. Expenses of the Construction Manager's principal office and offices other than the site office, except as specifically provided in Section 6.1.
3. Overhead and general expenses, except as may be expressly included in Section 6.1.
4. The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
5. Rental costs of machinery and equipment, except as specifically provided in Section 6.1.5.2.
6. Except as provided in Section 6.1.8.2, costs due to the negligence of the Construction Manager or to the failure of the Construction Manager to fulfill a specific responsibility to the Owner set forth in this Agreement.
7. Costs incurred in the performance of Preconstruction Phase Services.
8. Except as provided in Section 6.1.7.1, any cost not specifically and expressly described in Section 6.1.
9. Costs which would cause the Guaranteed Maximum Price to be exceeded.

**§ 6.3 DISCOUNTS, REBATES AND REFUNDS**

§ 6.3.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be secured.

§ 6.3.2 Amounts which accrue to the Owner in accordance with the provisions of Section 6.3.1 shall be credited to the Owner as a deduction from the Cost of the Work.

**§ 6.4 ACCOUNTING RECORDS**

§ 6.4.1 See Exhibit A for revised Accounting Records requirements.

**ARTICLE 7 CONSTRUCTION PHASE**

**§ 7.1 PROGRESS PAYMENTS**

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

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



§ 7.1.3 Provided an Application for Payment is received by the Architect not later than the 30<sup>th</sup> day of a month, the Owner shall make payment to the Construction Manager not later than the 30<sup>th</sup> day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than Thirty ( 30 ) days after the Architect receives the Application for Payment.

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager; less (2) that portion of those payments attributable to the Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

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

1. Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.8 of A201™-1997, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
2. Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing.
3. Add the Construction Manager's Fee, less retainage of Five percent ( 5.00% ). The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the two preceding Sections bears to a reasonable estimate of the probable Cost of the Work upon its completion.
4. Subtract the aggregate of previous payments made by the Owner.
5. Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation.
6. Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of A201™-1997.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than Five percent ( 5.00% ). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontractors.

7.1.8.1 As an alternative means of achieving the 5% retainage described in 7.1.7 and 7.1.8 above, the Construction Manager and the Subcontractors may allocate a portion of their respective contract amounts to a "Final Completion" line item within each firm's schedule of values. The portions of each contract so allocated shall be equal to the 5% retainage stipulated. Billing against any such "final completion" line item in a schedule of values will be allowed only under the same circumstances as otherwise defined in the contract documents for the reduction or release of retainage.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data, that the Architect has made exhaustive or continuous on-site inspections or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

## § 7.2 FINAL PAYMENT

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager when (1) the Contract has been fully performed by the Construction Manager except for the Construction Manager's responsibility to correct nonconforming Work, as provided in Section 12.2.2 of A201™-1997, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Owner's accountants; and (3) a final Certificate for Payment has been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The amount of the final payment shall be calculated as follows:

1. Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price.
2. Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of A201™-1997 or other provisions of the Contract Documents.
3. Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.

§ 7.2.3 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of A201™-1997. The time periods stated in this Section 7.2 supersede those stated in Section 9.4.1 of A201™-1997.

§ 7.2.4 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without a further decision of the Architect. Unless agreed to otherwise, a demand for mediation or arbitration of the disputed amount shall be made by the Construction Manager within 60 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Owner's

accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.5 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1 and not excluded by Section 6.2 (1) to correct nonconforming Work or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee, if any, related thereby on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

#### ARTICLE 8 INSURANCE AND BONDS

##### § 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in Section 11.1 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance shall be as follows:

(Paragraph deleted)

None

8.1.2 Insurance provided will be per the construction Manager's standard policy. The Construction Manager will provide the Owner with a statement of the additional premium cost (if any) associated with other insurance coverage as the Owner may want to consider. If the Owner elects to require the Construction Manager to provide other coverage or limits, then the contract will be adjusted accordingly.

##### § 8.1.3

(Paragraph deleted)

§ 8.1.4 Other coverage:

*(If Umbrella Excess Liability coverage is required over the primary insurance or retention, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be obtained by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)*

##### § 8.2 INSURANCE REQUIRED OF THE OWNER

During both phases of the Project, the Owner shall purchase and maintain liability and property insurance, including waivers of subrogation, as set forth in Sections 11.2 and 11.4 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

##### § 8.2.1 Property Insurance:

\$10,000 Deductible Per Occurrence

(Paragraph deleted)

#### § 8.3 PERFORMANCE BOND AND PAYMENT BOND

§ 8.3.1 The Construction Manager shall (insert "shall" or "shall not") furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work. The amount of each bond shall be equal to One hundred percent ( 100.00% ) of the Contract Sum.

§ 8.3.2 The Construction Manager shall deliver the required bonds to the Owner after the contract is executed and three days before the commencement of any Work at the Project site. Further, Construction Manager shall deliver a bonding commitment for the issuance of such bonds at least two weeks prior to the estimated date for the closing on Project financing. In the event of any early start as identified in paragraph 4.2.1.1 Owner may require Construction Manager to provide such bonds. Owner shall provide Construction Manager with 10 days notice of such requirements and stipulate in such notice the time for providing same, and the amount of coverage required by owner.

#### ARTICLE 9 MISCELLANEOUS PROVISIONS

##### § 9.1 DISPUTE RESOLUTION

§ 9.1.1 During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201™-1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

##### § 9.2 OTHER PROVISIONS

§ 9.2.1 Unless otherwise noted, the terms used in this Agreement shall have the same meaning as those in A201™-1997, *General Conditions of the Contract for Construction*.

##### § 9.2.2 EXTENT OF CONTRACT

This Contract, which includes this Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and Construction Manager. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

##### § 9.2.3 OWNERSHIP AND USE OF DOCUMENTS

Article 1.6 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

##### § 9.2.4 GOVERNING LAW

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

##### § 9.2.5 ASSIGNMENT

The Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 19.2.2 of A201™-1997, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

#### ARTICLE 10 TERMINATION OR SUSPENSION

##### § 10.1 TERMINATION PRIOR TO ESTABLISHING GUARANTEED MAXIMUM PRICE

§ 10.1.1 Prior to execution by both parties of Amendment No. 1 establishing the Guaranteed Maximum Price, the Owner may terminate this Contract at any time without cause, and the Construction Manager may terminate this Contract for any of the reasons described in Section 14.1.1 of A201™-1997.

§ 10.1.2 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 prior to commencement of the Construction Phase, the Construction Manager shall be equitably compensated for

Preconstruction Phase Services performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Section 4.1.1.

§ 10.1.3 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 after commencement of the Construction Phase, the Construction Manager shall, in addition to the compensation provided in Section 10.1.2, be paid an amount calculated as follows:

1. Take the Cost of the Work incurred by the Construction Manager.
2. Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.
3. Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders.

Subcontracts, purchase orders and rental agreements entered into by the Construction Manager with the Owner's written approval prior to the execution of Amendment No. 1 shall contain provisions permitting assignment to the Owner as described above. If the Owner accepts such assignment, the Owner shall reimburse or indemnify the Construction Manager with respect to all costs arising under the subcontract, purchase order or rental agreement except those which would not have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner elects not to accept the assignment of any subcontract, purchase order or rental agreement which would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager shall terminate such subcontract, purchase order or rental agreement and the Owner shall pay the Construction Manager the costs necessarily incurred by the Construction Manager by reason of such termination.

#### § 10.2 TERMINATION SUBSEQUENT TO ESTABLISHING GUARANTEED MAXIMUM PRICE

Subsequent to execution by both parties of Amendment No. 1, the Contract may be terminated as provided in Article 14 of A201™-1997.

§ 10.2.1 In the event of such termination by the Owner, the amount payable to the Construction Manager pursuant to Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 In the event of such termination by the Construction Manager, the amount to be paid to the Construction Manager under Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, including a reasonable estimate of the Cost of the Work for Work not actually completed.

#### § 10.3 SUSPENSION

The Work may be suspended by the Owner as provided in Article 14 of A201™-1997; in such case, the Guaranteed Maximum Price, if established, shall be increased as provided in Section 14.3.2 of A201™-1997 except that the term "cost of performance of the Contract" in that Section shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1.1 and 5.3.4 of this Agreement.

### ARTICLE 11 OTHER CONDITIONS AND SERVICES

11.1 thru 11.4  
See Exhibit A

11.5

It is understood and agreed that the GMP is for the total cost of the work and that cost over-runs from one line item can be offset by cost savings from another line item.

11.6

All personnel listed in Exhibit C as a "Reimbursable as a cost of the work" shall be included in the cost of the work per Article 7.2, subject to the GMP per Article 5.1.2.2.

11.7

The following procedure is agreed to by Owner and/or Owner's lender and Title Company in the event of a lien being filed by one of the Construction Manager's Vendors and/or Vendor's Vendor(s): At the Construction Manager's sole discretion either 1. Construction Manager shall make a cash deposit equal to 150% of each lien amount in separate escrow accounts held by Owner's Title Company on behalf of the Construction Manager or 2. The Construction Manager may provide a lien transfer bond for the amount of the lien. Upon said deposit being made or lien bond being provided by Construction Manager, Owner and/or Owner's Lender, and Title Company shall immediately disburse to Construction Manager any monies owed to Construction Manager under the terms of this contract.

11.8

Owner and Construction Manager agree to the following punch list procedure for each phase of the project:

1. Prior to issuance of temporary or Full Certificate of Occupancy by City, Owner and/or Owner's designated representative(s) shall prepare one original interior and exterior punch list.
2. Within 7 calendar days after completion punch list work by Construction Manager, Owner and/or Owner's representative(s) will re-inspect to confirm original punch list items are complete.
3. New items will not be added to the original punch list at any time except for items which are substantial (i.e. no hot water) and thus were obviously missed during original punch list items.
4. Any item(s) not included in original punch list shall be considered warranty item(s).
5. Warranty items shall not be considered outstanding punch list items and thus shall not be subject to withholding of final payments.

11.9

If a discrepancy occurs within this Agreement and/or between this Agreement and other contract documents, it is understood and agreed that Article 11 of this Agreement, the balance of this Agreement, and Exhibits "A", "B", "C" and "D" (in that order) shall govern.

11.10

If interest costs occur per Paragraph 4.2, the cost shall be reimbursed by issuance of an Owner Change Order.

11.11

Architect shall return all submittals (i.e. shop drawings) to Contractor within 10 working days of date received from Contractor.

11.12

Modification and/or extension of project completion date due to "weather days" shall be as outlined in Exhibit "D" attached hereto.

11.13

The following Exhibits, attached hereto, form part of the Contract Documents:

Exhibit A: Modifications to the AIA/CES

Exhibit B: Supplementary Conditions

Exhibit C: Personnel Billing Rates and Matrix

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Exhibit D: Definition of Weather Days.  
Exhibit E: Project Scope and Budget Summary  
Exhibit F: Preliminary Divisional Cost Breakdown  
Exhibit G: Pre-Construction Phase Schedule  
Exhibit H: Preliminary Construction Phase Schedule

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

OWNER

*[Signature]*  
(Signature)  
JOE SIVIER, PRESIDENT  
(Printed name and title)  
APR 1, 2004  
(Date)  
ATTEST

CONSTRUCTION MANAGER

*[Signature]*  
(Signature)  
PETER W. WAGNER, VICE PRESIDENT  
(Printed name and title)  
APR 1, 2004  
(Date)  
ATTEST

**RainbowVision Santa Fe/Weis Contract Agreement**  
**Exhibit A**  
**Additional Provisions/Modifications based on the AIA A121CMC (2003 Edition)**

**5.4 COMMENCEMENT AND COMPLETION**

Add the following paragraphs:

5.4.1 The date of commencement is the date from which the Contract Time of subparagraph 5.4.2 is measured; it shall be the date of the giving of the Notice to Proceed (the "Commencement Date"). The Owner shall issue the Notice to Proceed within ten calendar days of the last to occur of all of the following (the "Conditions to Commencement"): (i) closing of financing acceptable to Owner, sufficient in an amount to satisfy the Owner's financial obligations hereunder, and (ii) receipt of all permits and approvals necessary to allow commencement and continuation of construction. In no event shall the Construction Manager commence any work on site by placing materials at the site or by conducting other Work at the site until a Notice to proceed has been given.

The immediately aforementioned notwithstanding, Construction Manager and Owner acknowledge that prior to receiving a Notice to Proceed the Construction Manager may be required to enter into certain other subcontracts, issue purchase orders, or make similar commitments which, if the Project were not to proceed would result in the incurring, by Construction Manager of certain costs, financial penalties, or other like or similar expenses. Owner agrees to reimburse Construction Manager all such costs, penalties, or similar expenses, so long as, and only to the extent that Construction Manager has received Owner's written approval prior to the incurring of such costs, and/or the entering into such subcontracts, authorization of such purchase orders or making such similar commitments. Any activity conducted hereunder shall in no way effect the dates established for substantial completion for each phase as shall be provided for in Amendment No. 1 hereto.

5.4.2 It is anticipated that the Work is to be completed in phases so as to permit residents of the Project to move in on a phased basis (each of which shall be referred to as a "Phase").

.1 Substantial Completion of each Phase is to occur on or before an agreed date. The agreed dates for each Phase shall be established by Amendment No. 1 to this Agreement at the time the GMP is established, which shall be an agreed upon number of calendar days from the Commencement Date. Once established each of these days shall be measured from the Commencement Date and may only be extended in accordance with the Contract Documents.

.2 Each date by which Substantial Completion of a Phase must occur pursuant to the Contract Documents shall be referred to as a "Phase Completion Deadline". The period of time from the Commencement Date to the applicable Phase Completion Deadline shall be referred to as the "Phase Contract Time".

.3 The Owner and the Construction Manager acknowledge that if the Construction Manager fails to achieve substantial completion of a Phase before the applicable Phase Completion Deadline, the Owner will suffer damages which are difficult to ascertain. However, the Owner and the Construction Manager agree that the degree to which the Owner will be damaged by the Construction Manager's failure to substantially complete a particular Phase of the Project within the Phase Contract Time generally will decrease as the overall Project nears Substantial Completion. Accordingly, the Construction Manager agrees to pay the Owner as liquidated damages with respect to each particular Phase, and not as a penalty, for each calendar day that passes after the Phase Completion Deadline has expired for the particular Phase of the Project, until the date that the Construction Manager achieves Substantial Completion of that particular Phase, an amount equal to the portion of the GMP allocable to that particular Phase times the construction financing daily interest for Project (the "Stipulated Damage



Amount"). Any liquidated damages payable by the Construction Manager as to a particular Phase shall then be determined by multiplying the Stipulated Damage amount by each day of delay. The Stipulated Damage Amounts for each phase shall be established by an amendment hereto at the closing for financing on the Project.

4 For purposes of determining that portion of the GMP allocable to a particular Phase, the following method of calculating same will be utilized:

(i) Reasonably determine that amount of the total GMP which generally applies to construction of the Project (as a whole) by adding the sum of the following amounts contained within the GMP: (Specific amounts to be determined when GMP is established by Amendment to the Contract.)

|                            |    |
|----------------------------|----|
| Site Development           | \$ |
| General Conditions         | \$ |
| Construction Manager's Fee | \$ |
| Other                      | \$ |
| Total                      | \$ |

(ii) Subtract total in (i) above from the total GMP to determine the "remaining GMP".

(iii) Utilize the approved Schedule of Values and construction costing information to calculate the percentage of the cost of a particular Phase to the "remaining GMP" amount as determined in (ii) above.

(iv) Apply the percentage from (iii) above for the particular Phase(s) to the GMP.

5 The Stipulated Damage amount for each Phase is intended to be cumulative of the other Phases. Accordingly, if the Phase Completion Deadline for more than one (1) Phase shall have elapsed without the applicable Phases having been substantially completed, then the Stipulated Damage Amount for each Phase not so substantially complete shall be due and owing by the Construction Manager to the Owner. The Owner may collect the Stipulated Damage Amounts by withholding them from payments due the Construction Manager or by separate demand. The Stipulated Damage Amounts provided herein shall be in lieu of all other claims, costs, losses, damages and/or expenses that the Owner might otherwise have against the Construction Manager by reason of its failure to achieve Substantial Completion before the relevant Phase completion Deadline, whether arising from contract or tort, or actual, direct, indirect or consequential damages, and the Owner hereby releases the Construction Manager therefrom.

6

1 The Construction Manager agrees that final completion of each Phase of the Work shall occur as soon as possible after Substantial Completion of the Phase, but no later than thirty (30) calendar days after the date on which Substantial Completion of that Phase has occurred, as evidenced by the Architect's Certificate of Substantial Completion. Final payment as to a Phase shall be due upon final completion of such Phase.

2 Owner acknowledges that there may be certain items which may be on order that, through no fault of the Construction Manager, may not arrive and/or otherwise be available for incorporation into the Work within said thirty (30) day period. To the extent that Owner, in Owner's sole discretion, accepts a Phase as having achieved final completion, even though such items remain outstanding, Owner may, (a) acknowledge such acceptance, and (b) withhold up to one and one half (1.5) times the total cost (as determined by the Construction Manager) for each Phase, or \$5000 for each Phase (whichever is greater), of such Work which remains incomplete or unincorporated.

3 Further, it is the intent that outstanding items described in 5.4.2.6.2 are to be secured and installed as quickly as possible – preferably within five (5) days after the Construction Manager receives those items. It is acknowledged that some items may be more significant than others in terms of the operation or marketability of the project. It is also acknowledged that unless determined otherwise, the costs incurred by the Construction Manager for procuring, expediting and installing the items covered by 5.4.2.6.2 are reimbursable costs as defined under Article 8 of the Contract. Accordingly, it may be less costly for the Owner, and less disruptive to the operation of the facility, to have several items accumulated and installed at one time rather than have each item installed as it is delivered. Therefore, for each item outstanding as of Substantial Completion, within five (5) days the Construction Manager shall provide the Owner, in writing, with a proposed plan indicating the expected delivery date and proposed installation date for each item. The Owner and Construction Manager will jointly review (and revise as needed) said plan and reach an agreement on the plan. The Construction Manager will report to the Owner on a weekly basis of the status of the items remaining to be installed, and immediately notify the Owner of any change in delivery date or installation date due to unforeseen procurement or delivery problems. If after receiving an outstanding item the Construction Manager fails to commence the Work within five (5) days after agreed upon commencement date, or subsequently fails to complete the Work in accordance with the agreed upon schedule, the Owner may exercise its right to carry out the work as provided in section 2.4 of the A201 General Conditions.

4 The provision stated above for withholding 1.5 times the cost of items outstanding at the time of Substantial Completion does not apply to any Upgrade Options initiated by the Owner subsequent to the decision date established by the Construction Manager for each upgrade option proposed for a given residential unit.

7 Except for the portions of the project which the Owner has requested completion and occupancy prior to the completion of the Commons Areas in the El Centro building, it is the intent that when developing the Phase Completion Deadlines described in 5.4.2.1 and 5.4.2.2 above, for the purposes of determining what, if any, stipulated damage amount may be owed by Construction Manager, no phase shall be deemed to have achieved Substantial Completion until such time as (1) the common areas (as defined in Amendment No. 1) portion of the Project shall have achieved Substantial Completion or (2) the Owner agrees to deem the phase Substantially Complete or (3) the Owner takes beneficial occupancy of all or part of the phase. Further and accordingly, when establishing the completion dates for each phase as provided for herein by amendment hereto, such amendment shall also provide that no phase shall be deemed complete for the purposes hereof unless (1) and/or until the common area portion of the Project shall have attained substantial completion, (2) the Owner has agreed to deem the phase Substantially Complete, or (3) the Owner takes beneficial occupancy of all or part of the phase.

#### 6.4 ACCOUNTING RECORDS

6.4.1 The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to the Owner and Owner's lender. The Owner and the Owner's accountants and the lender and lender's accountant or consultants shall be afforded reasonable access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement and the Project, (collectively "the records") and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law. All Records shall be maintained in accordance with generally accepted accounting principles, consistently applied. There shall be an "open book" policy, in effect at all times with regard to all Records relative to the project.

maintained by either the Construction Manager or the Owner, or anyone on their behalf, and each party shall have full and complete access to said Records maintained by the other at all reasonable times. The Construction Manager shall require all Subcontractors and Sub-Subcontractors retained on a cost-plus basis to retain Records and permit the same access by Owner as is required of the Construction Manager under this Article 6.4.

6.4.1.1 If the Owner, Owner's accountants, Lender or Lender's accountants elect to perform an audit of "the records" maintained by Construction Manager, said audit shall be performed within six (6) months of the Final Completion of the project. This stipulation does not effect the Construction Manager's obligation to maintain "the records" for the time period noted in 6.4.1.

6.4.2 If, at any time during construction, any inspection by the Owner or the Lender of the Construction Manager's Records or any other data relating to the contract documents reveals an overcharge or undercharge by the Construction Manager as confirmed by an independent auditor, the next Application for Payment shall be appropriately adjusted by the amount of such overcharge or undercharge and related Fee.

## ARTICLE 7 CONSTRUCTION PHASE

### 7.1 PROGRESS PAYMENTS

Add the following:

7.1.11 To the extent of payments received by the Construction Manager from the Owner, the Construction Manager warrants the real property on which the Project is located will remain free of any legitimate and proper claims of lien arising from the Work performed by or through the Construction Manager. If any such liens are properly recorded, the Construction Manager shall have fifteen (15) business days from its receipt of written notice by the Owner or Owner's agent (including Title company) of such recording within which to discharge or secure by cash deposit or by construction lien transfer bond any such claims of lien. If the Construction Manager fails to discharge or otherwise secure such claim of lien within said time period, the Owner shall be entitled to satisfy the lien or take whatever action it deems appropriate to remove the lien from its property. All reasonable expenses and costs, including reasonable attorney's fees, incurred by the Owner after the abovementioned fifteen (15) day period to effect the discharge, securing and/or removal of any such claims of lien shall be promptly reimbursed to the Owner by the Construction Manager.

7.1.12 Concurrently with each Application for Payment, Construction Manager will deliver to Owner lien waivers (which may be conditioned upon payment) waiving all lien rights in respect of the Project, executed by Construction Manager, and executed by Subcontractors and suppliers covering amounts paid on their account or to be paid with funds received from such Application for Payment. All lien waivers shall be in form and substance satisfactory to Owner and the Owners Lender(s). Additionally, the Construction Manager shall provide further evidence regarding application of each progress payment to payment of all Subcontractors and suppliers providing services or material in respect of the Project, and shall comply with such other reasonable requirements as the Owners Lender(s) may impose with respect to obtaining advances of funds be applied to each Application for Payment."

**ARTICLE 9  
MISCELLANEOUS PROVISIONS**

**9.1 DISPUTE RESOLUTION**

Add the following the following subparagraphs to 9.1.1:

.1 Claims between the parties to this Agreement shall be resolved as set forth below. At all times, the parties shall approach the dispute resolution process in good faith.

.2 In the event of a Claim between the parties, the parties shall promptly meet in good faith to resolve the Claim informally before invoking the dispute resolution procedures outlined elsewhere in the Contract Documents, including the A201 General Conditions and Supplementary Conditions, and below. If the parties are not able to quickly resolve the claim, either party may request participation by the Architect. Both parties shall promptly submit a written summary of its position to the Architect. Upon receipt of both summaries, the Architect shall immediately convene a formal meeting with the parties to further discuss the Claim. If the Claim is not resolved within three business days after the commencement of such meeting, either party may then commence the dispute resolution process defined in the Contract Documents.

.3 If the informal dispute resolution efforts outlined in 9.1.1.2 are not successful, then the dispute resolution procedures outlined in the balance of the Contract Documents. Any mediation conducted pursuant to this Paragraph 9.1 shall be held in Santa Fe, unless the parties mutually agree otherwise.

.4 Intentionally omitted

.5 Intentionally omitted

.6 Consent to arbitration involving an additional person or entity shall not constitute agreement to arbitration of a dispute not described in such consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

.7 Intentionally omitted

.8 The arbitration shall be held in Santa Fe.

.9 Notwithstanding anything herein to the contrary, if (1) the Claims involve a proposed, net aggregate payment or reimbursement in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose, an "interested person or entity" means any person or entity if (a) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (b) the interested person or entity is so situated that the disposition of the claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law.

**ARTICLE 11  
OTHER CONDITIONS AND SERVICES**

11.1 The Construction Manager recognizes that any Lender involved in financing the Project will have requirements pertaining to this Agreement. The Construction Manager agrees to cooperate with and assist the Owner and the Architect in amending and supplementing the Contract Documents to conform to reasonable and customary requirements of any Lender (to the extent such requirements are acceptable to the Owner). However, the Construction Manager shall not be responsible for actually preparing amendments or supplements to the Contract Documents for any reason at any time. Such amendments or supplements may include, without limitation, provisions:

- A. Naming any Lender as an additional insured on the Construction Manager's bonds and insurance policies and providing notice to any Lender of termination, cancellation or material modification of such policies.
- B. Requiring approval of Applications for Payment by a consultant designated by a Lender prior to payment.
- C. Agreeing not to amend Contract Documents without the reasonable and timely consent of the Lender.
- D. Requiring approval of Change Orders by the Lender, provide that Lender approval will be provided on a timely basis and the Owner will use its best efforts to secure such timely approval.
- E. Requiring notice of the Owner's default to the Lender, with a Lender having the right to cure, and requiring continued performance by the Construction Manager, provided that the Lender assumes all contract obligations of the Owner.
- F. Subordinating any lien rights of the Construction Manager to rights of the Lender.
- G. Requiring copies of all written notices to be sent to the Lender.
- H. Granting the Lender the right to inspect the work and to examine records pertaining thereto.
- I. Recognizing the pledge of the Owner's rights under Contract Documents to the Lender.
- J. Requiring the Construction Manager to acknowledge, on the Lender's request, whether or not the Owner is in default of its obligations under the Contract.
- K. Requiring the Construction Manager to assist the Owner in preparing and submitting reports and information concerning the Work as may be reasonably required by the Lender.

11.2 Nothing contained in Paragraph 11.2 or Paragraph 11.3 is intended to derogate from any other rights to terminate this Contract that may be granted the Construction Manager elsewhere in this Contract, including, but not limited to, the provisions of Article 2 and Article 14 of the General Conditions and Article 10 of this Agreement.

11.3 The Construction Manager may perform all or any part of the Work with its own forces, or through an Affiliate, provided that (1) the Construction Manager secures at least two competitive bids with respect to the work Construction Manager intends to perform (2) the Owner consents thereto in writing, which consent shall not be unreasonably withheld, after full disclosure by the Construction Manager to the Owner of the affiliation or relationship of the Affiliate to the Construction Manager and (3) any Work performed by an Affiliate shall be covered in a separate agreement between the Construction Manager

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and the Affiliate, which shall satisfy all of the requirements for subcontracts as set forth in Paragraph 5.3 of the General Conditions and which shall be approved by the Owner in writing.

11.4 Any amounts payable hereunder which are not paid when due shall thereafter accrue interest at Wall Street Journal "prime" plus one percent (1%) per annum or at the highest rate allowed under the law of the state where the Project is located, whichever is less.

**Rainbow/Vision Santa Fe/Wels Contract Agreement  
Exhibit B  
Supplementary Conditions to the AIA A201 General Conditions (1997 Edition)**

1. The following Supplementary Conditions shall apply to that certain Standard Form of Agreement Between Owner and Construction Manager (the "Agreement") dated
2. For purposes of these Supplementary Conditions, capitalized terms shall have the meaning given to them in the Contract Documents (as such term is defined in Article 1 of the Agreement), unless otherwise defined in these Supplementary Conditions.
3. The following paragraphs supplement, modify, or amend that certain Contract Document entitled "General Conditions of the Contract for Construction," AIA Document A201, Fifteenth Edition, 1997, Articles 1 through 14 inclusive (the "General Conditions"). Where only a portion of any provision of the General Conditions is supplemented, modified, or amended, the remaining portions of that provision shall remain unaltered and in effect. In the event of any inconsistency between the General Conditions and these Supplementary Conditions, the terms of these Supplementary Conditions shall apply. Hereinafter, all references to the General Conditions shall mean the General Conditions as amended by these Supplementary Conditions.

**A. INTENTIONALLY OMITTED**

- B. PARAGRAPH 1.2.4 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.4 Where no explicit quality or standards for materials or workmanship are established for Work, such Work is to be of good quality for the intended use and consistent with quality of the surrounding Work and of the construction of the Project generally.

- C. PARAGRAPH 1.2.5 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.5 All indications or notations which apply to one of a number of similar situations, materials or processes shall be deemed to apply to all such situations, materials or processes wherever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

**D. INTENTIONALLY OMITTED**

- E. SUBPARAGRAPH 1.5.1, add at the end of the first sentence: ", unless otherwise identified and incorporated by reference in Agreement."**

- F. SUBPARAGRAPH 2.2.5 Modify Subparagraph 2.2.5 as follows:**

"In addition to the sets the Construction Manager used for bidding, the Owner will furnish a to be agreed upon number of sets of black and white prints of the Drawings and copies of the Project Manual free of charge for execution of the Work. Additional sets may be purchased from the Office of the Architect."

- G. SUBPARAGRAPH 3.2.3, delete the second sentence, and add at the end: "If the Construction Manager performs Work knowing it involves such error, inconsistency, omission or difference without such notice to the Architect, the Construction Manager shall assume appropriate responsibility for such Work and shall bear the costs attributed to correction."
- H. PARAGRAPH 3.3 "SUPERVISION AND CONSTRUCTION PROCEDURES" is hereby supplemented by the addition of the following sub-paragraphs:
  - 3.3.4. The Construction Manager shall carefully check its own work and that of Subcontractors as the Work is being performed. The Construction Manager shall ensure that incorrect or faulty Work is corrected as soon as possible but in any event in a timely manner so as not to impact the project schedule.
  - 3.3.5 During the finishing stages of the project, the Construction Manager shall make frequent inspections of the Work in the presence of the Architect or the Owners Representative and the applicable Subcontractor(s) involved, if any, and the Architect shall identify incorrect and faulty Work. The Construction Manager shall ensure that incorrect or faulty Work is corrected in accordance with 3.3.4.
- I. PARAGRAPH 3.4 "LABOR AND MATERIALS" is hereby supplemented by addition of the following Subparagraphs 3.4.3 and 3.4.4:
  - 3.4.4 Should the Owner make reasonable objection, based upon qualifications, fitness, behavior or temperament, to the presence of any personnel of Construction Manager or any subcontractor, such person shall not perform services on the Project site, or otherwise in connection with the Project, without written consent of the Owner.
  - 3.4.5 The Construction Manager shall not change or replace the assigned Project Manager or Superintendent without prior written consent by the Owner.
- J. SUBPARAGRAPH 3.5.1, Add to the end: "Construction Manager's warranties shall commence upon Substantial Completion of the Work for each Phase and continue for a period of one year thereafter."
- K. PARAGRAPH 3.5 "WARRANTY" is hereby supplemented by the addition of the following sub-paragraphs:
  - 3.5.2. In the event of a claim by the Owner against the Construction Manager under Paragraph 3.5.1. of these General Conditions (or under any other express written warranty made by the Construction Manager) for any item of Work performed under the Contract Documents, the Owner shall give notice (a "Warranty Notice") of the claim to the Architect and the Construction Manager and thereafter, the Architect or Architects authorized representative and the Construction Manager shall inspect the item(s) of Work in question. If following its inspection the Architect determines that any such item is included within the Construction Manager's warranty under the Contract Documents, then:
    - (a) Upon formal notification from the Architect, the Construction Manager shall have thirty (30) days, notwithstanding any other time period specified in the Contract Documents, to either (1) complete the cure for the item or, for a Longer Cure Item, commence the cure and thereafter diligently proceed to complete the cure, or (2) if the Construction Manager disputes the warranty coverage of the item, commence the



dispute resolution procedures described in Section 4.3 of the General Conditions.

- (b) If upon the expiration of the thirty (30) day period the Construction Manager has failed to satisfy the provisions of either clause (a) (1) or clause (a) (2) immediately above, then the Owner shall have the right to engage a third party Construction Manager of the Owner's sole selection to cure or complete the cure of the warranty item at the Construction Manager's expense.
- (c) If the Construction Manager fails to cure an item within the required time and if the item is finally determined by arbitration or, when permitted, judicial proceedings to be covered by any Construction Manager's warranty under the Contract Documents, then the Construction Manager shall be liable for all expenses incurred by the Owner in enforcing its warranty claim including legal and Architectural fees and expenses, an administrative charge of a percentage equal to Construction Manager's fee times the cost to cure the warranty item to cover the Owner's administrative costs to enforce the warranty claim, and, when a third party Construction Manager has been engaged by the Owner under this Paragraph 3.5.2, the costs and expenses of the third party Construction Manager.

L. INTENTIONALLY OMITTED

M. ARTICLE 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES is supplemented by the following replacement language for Subparagraph 3.12.4

3.12.4 Shop Drawings, Product Data, Samples and similar submittals which are required by the Contract Documents to be submitted for Architect's review shall become Contract Documents upon Architect's review and approval. Submittals which are not required by the Contract Documents to be submitted for Architect's review are not Contract Documents.

N. ARTICLE 3.18 "ACCESS TO WORK" is hereby supplemented by addition of the following Subparagraph:

"3.18.2 Representatives of the State Agencies shall have access at all reasonable times to the Work wherever it is in preparation or progress, and the Construction Manager shall provide proper facilities for such access and inspection."

O. PARAGRAPH 4.2.4 "COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION" is hereby supplemented by the additions of the following subparagraphs: Nothing contained herein shall prohibit the Owner's Representative from communicating directly with the Construction Manager for the purpose of receiving information and/or providing the Construction Manager with clarification as to Owner's position with regard to any matters affecting or concerning the Work.

4.2.4.1 The following definitions shall apply to construction communications:

4.2.4.1.1 Contract Document Clarification: An answer from the Architect, in response to an inquiry from the Construction Manager, intended to make some

requirement(s) of the Drawings or plans clearly understood. Drawing/plan clarifications may be sketches, drawings, or in a narrative form and are not intended to change any requirements of the Contract Documents. Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.2 Non-Conformance Notice:** A Notice issued by the Architect documenting that the Work or some portion thereof has not been performed in accordance with the requirements of the Contract Documents. Payment shall not be made on any portion of the Work for which a Non-Conformance Notice has been issued and the Work not corrected to the satisfaction of the Architect.

Upon receipt of a Non-Conformance Notice the Construction Manager shall provide a written Response to the Non-Conformance Notice within five (5) working days after receipt of the Notice. The Construction Manager's response shall state either (a) the basis of Construction Manager's determination that the Work was performed in accordance with the Contract Documents or (b) the corrective action Construction Manager intends to take, at its sole expense, to correct the non-conforming work.

If the Construction Manager disputes issuance of the Notice the Architect has five (5) working days in which to respond by either (a) withdrawing the Notice of Non-Conformance or (b) directing the Construction Manager to correct the Work.

If directed to correct the Work, the Construction Manager shall do so within five (5) working days after receipt of such direction from the Architect, or such other time as may be agreed to with the Architect, without loss of rights for claim recovery or dispute resolution as may be available by the Contract.

**4.2.4.1.3 Requests for Information:** A written request from the Construction Manager or one of its subcontractors, to the Architect, seeking an interpretation or a clarification of some requirement of the Contract Documents. The Construction Manager shall clearly and concisely set forth the issue for which it seeks clarification or interpretation and why a response is needed from the Architect.

Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.4 Substitution/Or-Equal Submittals:** A written request from the Construction Manager to substitute a material, article, device, product, fixture, form, type of construction, or process called for in the Contract Documents with another item that shall substantially equal in all respects to that so indicated or supplied. Each such request shall specifically set forth any manner in which the proposed change does not conform to the Contract Documents and Construction Manager (and any subcontractor initiating the request) warrants that the proposed substitute conforms in all respects with the contract documents except as specifically identified as non-conforming in the request.

**4.2.4.1.5 Submittals/Shop Drawings:** When required by any technical specification included in these Contract Documents, the Construction Manager shall transmit to the Architect technical submittals, shop drawings, or samples, including supporting catalog cuts, manufacturer's literature, sketches or drawings, calculations, and other pertinent, in sufficient detail to enable the Architect to review the information and determine that the Construction Manager clearly understands the requirements of the Contract Documents. Construction Manager (and any subcontractor initiating a submittal) warrants that all Work and materials depicted in technical submittals, shop drawings and samples shall conform in all respects to the requirements of the Contract Documents, except as otherwise specifically identified as non-conforming.

4.2.4.1.6 Schedule Submittals: When required by the Construction Schedule Specification of these Contract Documents, the Construction Manager shall submit required schedules, schedule updates, schedule revisions, time impact analysis, etc. for review.

P. INTENTIONALLY OMITTED

Q. SUBPARAGRAPH 4.3.7.2 is hereby revised (and paragraphs 4.3.7.3 and 4.3.7.4 are added) to read as follows:

4.3.7.2 Weather days: Construction Manager confirms that the Contract Time, Phased Contract Time and the agreed upon dates for same as set forth in Amendment No. 1 to this Agreement are reasonable periods to perform The Work. Construction Manager has included in the work schedule ordinary and normally anticipated lost days due to adverse weather ("weather days") and therefore Construction Manager shall not be entitled to an extension of the Contract Time or Phased Contract Time as a result of weather conditions normally experienced in the greater Santa Fe area unless (1) the Construction Manager is unable to make up for the weather delay by scheduling work for a Saturday in accordance with 4.3.7.2 below, and (2) the number of weather days lost (and not made up by Saturday work) in that calendar month exceeds the number of weather days provided for in the Contract Time.

4.3.7.3 The Construction Manager's work schedule is based upon a regular five-day work week per calendar week. It is mutually agreed that in the event of a weather day the Construction Manager, before requesting a time extension the Construction Manager will first try to make up that weather day on the next Saturday available during the following 30 calendar days. A Saturday will be considered to be "available" only if all of the following conditions are met: (1) no work has already been scheduled for that day that would interfere with the work being rescheduled, (2) it is not a national holiday, (3) working on that Saturday is allowed by local ordinance, and (4) materials and workforce equivalent to what was scheduled for the lost weekday are available on that Saturday. The Construction Manager will only be required to utilize a Saturday if either (a) the Construction Manager incurs no additional cost in rescheduling work for that Saturday, or (b) the Owner agrees to compensate the Construction Manager (by Change Order) for any additional costs (such as for labor rate differential) the Construction Manager may incur.

4.3.7.4 The requirement stated above for the Construction Manager to utilize a Saturday to make up for a weather delay only applies the number of weather days included in each calendar month as indicated in the following list of Anticipated Lost Days. For every weather day beyond the number included below, the Construction Manager shall be entitled to an equivalent number of days extension to the Contract Time. The Construction Manager may (at the CM's sole discretion) attempt to mitigate the delay utilizing additional Saturdays as outlined in 4.3.7.3, but has no obligation to do so.

For the purposes of this Paragraph the table provided below setting forth the norms/anticipated lost weather days shall be utilized by the parties in determining lost weather days:

| <u>Month</u> | <u>Anticipated Lost Days<br/>Due to Adverse Weather</u> |
|--------------|---------------------------------------------------------|
| January      | 1                                                       |
| February     | 1                                                       |
| March        | 0                                                       |
| April        | 1                                                       |
| May          | 0                                                       |
| June         | 0                                                       |
| July         | 1                                                       |
| August       | 1                                                       |
| September    | 2                                                       |
| October      | 2                                                       |
| November     | 1                                                       |
| December     | 0                                                       |

See the Exhibit D "Weather Delays" - attached to the Contract.

R. INTENTIONALLY OMITTED

S. SUBPARAGRAPH 4.6.8, add as new subparagraph :

"4.6.8 Limitations of Arbitration. Notwithstanding anything in the Contract Documents to the contrary, if (1) the Claims involve a proposed, net aggregate payment to owner or Construction Manager in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose an "interested person or entity" means any person or entity if (3) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (4) the interested person or entity is so situated that the disposition of the Claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law."

T. SUBPARAGRAPH 5.2.1, change "promptly" to "within 10 days" in lines 5 and 7.

U. PARAGRAPH 7.3 "CONSTRUCTION CHANGE DIRECTIVES"

Subparagraph 7.3.3.3 is hereby changed to read as follows:

7.3.3.3 The following fees apply to Changes to the Work:

7.3.3.3.1 INTENTIONALLY OMITTED

7.3.3.3.2 The same markup applied by the subcontractor in the subcontractors base subcontract, which shall be defined in said subcontract and subject to Owner's approval, to the cost of work performed by any subcontractor.

V. INTENTIONALLY OMITTED

W. INTENTIONALLY OMITTED

X. PARAGRAPH 9.8.1. of the General Conditions is hereby deleted in its entirety and the following is substituted in lieu thereof:

9.8.1 "Substantial Completion" of the Project shall be deemed to occur when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use and, in addition, all requirements of the Contract Documents for Substantial Completion, including the following conditions, have been fulfilled as follows:

a. A Temporary or Final Certificate of Occupancy has been issued and all construction related approvals, licenses and requirements have been obtained or satisfied for the Project such that the Project may be operated for its intended use.

b. INTENTIONALLY OMITTED

Y. PARAGRAPH 9.8.2. of the General Conditions is hereby deleted in its entirety and the following Paragraphs 9.8.2.1. through 9.8.2.8, are substituted in lieu thereof:

9.8.2.1. When the Construction Manager considers that the Work, or portion thereof which the Owner agrees to accept separately, is substantially complete, the Construction Manager shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Construction Manager shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents. Following receipt of the Construction Manager's list, the Architect will make an inspection (the "Initial Punch List Inspection") to determine whether the Work or designated portion thereof is Substantially Complete. Upon completion of its Initial Punch List Inspection, the Architect shall prepare and submit to the Construction Manager and the Owner the Architect's list (the "Punch List") of items to be completed or corrected. For the items on the Punch List, the Architect shall specify:

- a. a date (a "Punch Item Date") by which such items shall be completed, which Punch Item Date shall be no more than forty-five (45) days from the date of the Punch List unless the Architect determines that reasonable cause exists for a later completion date; and
- b. the cost to complete or correct the items as reasonably determined by the Architect.

The Architect shall expressly state on the Punch List what the Construction Manager must do to achieve Substantial Completion under Paragraph 9.8.1 of the General. If as a result of the Initial Punch List Inspection the Architect determines that Substantial Completion has occurred, the Architect shall prepare a Certificate of Substantial Completion pursuant to Paragraph 9.8.2.5 below.

9.8.2.2 If the Construction Manager has not given notice that the Work is substantially complete and requested inspection thereof on or before the date for Substantial Completion set by the parties in the Contract Documents, then the Owner may request the Architect to make an initial Punch List inspection of the Work to (x) prepare the Punch List pursuant to the provisions of Paragraph 9.8.2.1. above and (y) determine if Substantial Completion has occurred.

9.8.2.3. Upon the request of the Construction Manager prior to the expiration of the relevant Punch Item Date(s) and for good cause shown, the Architect may extend any Punch Item Date(s) for a reasonable period. Following receipt of the Punch List and the Construction Manager's compliance with the requirements of Paragraph 9.8.1. above, the Construction Manager may submit a request for another inspection by the Architect, if necessary, to determine whether Substantial Completion of the Work has been achieved.

9.8.2.4. If the Construction Manager fails to satisfactorily complete any item(s) on the Punch List by the applicable Punch Item Date(s), then the Owner has the right to take over the work in accordance with Section 2.4 of the General Conditions.

9.8.2.5. When the requirements of Paragraph 9.8.1. above have been met and upon the request of either the Owner or the Construction Manager, the Architect shall prepare a Certificate of Substantial Completion, in the form set out in Paragraph 9.8.3 below, which shall establish the date of Substantial Completion and shall establish responsibilities of the Owner and the Construction Manager for security, maintenance, heat, utilities, damage to the Work, and insurance. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise specifically stated in the Contract Documents or in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Construction Manager for their written acceptance of responsibilities assigned to them in such certificate.

**Z. INTENTIONALLY OMITTED**

**AA.** In addition to the provisions of Paragraph 9.10 Final Completion shall not have been deemed to have occurred until the date upon which all of the following have occurred:

**a. INTENTIONALLY OMITTED**

**b.** Delivery of conditional or unconditional lien waivers from each person who performed work at or provide or fabricated materials in connection with the Work (including all subcontracts executed in connection therewith), other than from those persons whose claims are being contested by Construction Manager in good faith and for which Construction Manager has provided to Owner a bond or security in an amount reasonably acceptable to Owner, and

**c.** Issuance and obtaining of a final, unconditional certificate of occupancy and all construction-related approvals, licenses, and requirements for the Project enabling it to be occupied and operated for its intended use.

**BB.** SUBPARAGRAPH 9.10.4.1, after "Claims" add: "previously made in writing and identified by Owner as unsettled at the time of final payment."

**CC.** Paragraph 10.1.1 add the following: "Construction Manager shall prepare and submit to Owner for Owner's approval a comprehensive safety program. Further, Construction Manager shall provide written verification and certification in a form satisfactory to the

Owner, that all subcontractors have familiarized themselves with the safety program and agreed to abide by said program and training regimen thereunder.

- DD. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." In the first line of Subparagraph 11.1.1, following the work "companies," insert the following:

", acceptable to the Owner."

- EE. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." Add the following to subparagraph 11.1.3:

"Certificates called for herein shall be furnished in duplicate and shall specifically set forth evidence of all coverage required by 11.1.2 and the Construction Manager shall furnish to the Architect copies of all endorsements that are subsequently issued amending coverage or limits."

- FF. SUBPARAGRAPH 13.4.3, add as a new subparagraph:

"In the event of any litigation between the parties, the prevailing party shall be entitled to reimbursements for all reasonable attorneys' fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party to the extent allowed by law."

- GG. PARAGRAPH 13.5 "TESTS AND INSPECTIONS" is hereby supplemented by the addition of the following subparagraph:

"13.5.7 When work has been installed contrary to any Contract requirements and the Construction Manager requests the privilege of testing in lieu of removal, such testing shall be at the Construction Manager's expense."

- HH. INTENTIONALLY OMITTED

- II. Add the following new Article:

#### ARTICLE 15: REQUESTS FOR INFORMATION

15.1.1 In the event that the Construction Manager or its subcontractor, at any tier, determines that some portion of the Drawings, Specifications, or other Contract Documents requires clarification or interpretation by the Architect, the Construction Manager shall submit a Request for Information in writing to the Architect. Requests for information may only be submitted by the Construction Manager and shall be only submitted on the Request for Information Forms provided by the Architect. The Construction Manager shall clearly and concisely set forth the issue for which clarification and interpretation is sought and why a response is needed from the Architect. If the Request for Information is being used to request confirmation of an interpretation or understanding of a requirement, the Construction Manager shall set forth that interpretation or understanding of the requirement along with reasons why such an understanding was reached.

15.1.2 The Architect will review all Requests for Information to determine whether they are Requests for Information within the meaning of this term. If the Architect determines

that the document is not a Request for Information, it will be returned to the Construction Manager, unreviewed as to content, for resubmittal on the proper form and in the proper manner. In either case, the Architect must reply to RFI in writing within the time requested by the Construction Manager, or three (3) working days, whichever is earlier.

15.1.3 Responses from the Architect are not intended to change any requirement of the Contract Documents. In the event the Construction Manager believes that a response to a Request for Information will cause a change to the requirements of the Contract Document, the Construction Manager shall immediately give written notice to the Architect in accordance with Section 4 of the General Conditions stating that the Construction Manager considers the response to be a change in the scope of work or a change to the project schedule.

**END OF SUPPLEMENTARY CONDITIONS**



**RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit "C"**

**Weather Delays**

1. A "Work Day" is defined as Monday thru Friday, 7:30 am-- 4:00 pm.
2. The occurrence of one or more of the following will constitute a weather delay as indicated:
  - a. 0.25" of rain during the workday constitutes one lost workday
  - b. 2.0" of snow during the workday constitutes one lost workday
  - c. 12" of snow in a 24-hour period constitutes two lost workdays.
  - d. Temperature of 5 degrees below zero (Fahrenheit) constitutes one lost workday.
  - e. Any drying time required for soil stabilization (as directed by the geotechnical engineer) due to rain or snow will constitute lost work day(s).
3. Weather days will be included in the final schedule approved as part of the GMP proposal to be incorporated into the contract by amendment. The number of weather days included will be in accordance with Section 3.P of Exhibit B. Adjustments to the contract completion dates due to adverse weather will be made in accordance with Section 3.P of Exhibit B.

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**RainbowVision Santa Fe/Wala Contract Agreement  
Exhibit "D"  
Personnel Billing Rates**

| Position                               | Reimbursable<br>as a Cost of<br>the Work<br>(w/in GMP) | Included<br>in Fee | Notes | Expected<br>to be<br>Full or Part<br>Time | Billing<br>Rate<br>(\$/hr) |
|----------------------------------------|--------------------------------------------------------|--------------------|-------|-------------------------------------------|----------------------------|
| <b>Field Staff Stationed on Site</b>   |                                                        |                    |       |                                           |                            |
| Superintendent                         | X                                                      |                    | 1     | Full                                      | \$70                       |
| Project Engineer, QA/QC                | X                                                      |                    | 1     | Full                                      | \$80                       |
| Carpenter                              | X                                                      |                    | 2     | Full                                      | Varies - local rate        |
| Laborer                                | X                                                      |                    | 2     | Full                                      | Varies - local rate        |
| <b>Personnel Not Stationed on Site</b> |                                                        |                    |       |                                           |                            |
| Vice President                         |                                                        | X                  |       |                                           |                            |
| CFO                                    |                                                        | X                  |       |                                           |                            |
| Project Manager                        | X                                                      |                    | 3     | Part                                      | \$75                       |
| General Superintendent                 | X                                                      |                    | 3     | Part                                      | \$75                       |
| Project Coordinator                    |                                                        | X                  |       |                                           |                            |
| Safety Director                        | X                                                      |                    | 3     | Part                                      | \$60                       |
| Project Accountant                     |                                                        | X                  |       |                                           |                            |
| <b>Pre-Construction Personnel</b>      |                                                        |                    |       |                                           |                            |
| Senior Estimator/Pre-Con Services M    | X                                                      |                    | 4     | Part                                      | \$90                       |
| Assistant Estimator                    | X                                                      |                    | 4     | Part                                      | \$60                       |

**Notes:**

- 1 Field staff on project site.
- 2 It is expected that all trade work will be subcontracted. Trade labor rates shown only if need for Gen Conditions.
- 3 Billed only for time spent on site and traveling to project
- 4 Billed only for time during pre-construction phase, subject to Pre-construction services billing cap (see Exhibit F).

**RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit E  
Project Scope & Budget Summary**

- The Scope of the project includes:
  - 40 Single-story Condominium living units
  - 80 Single-level Independent Living units built in a series of two-story buildings
  - 28 Assisted Living apartments (and related support spaces) constructed on the 2<sup>nd</sup> level of the central services building
  - Central services building (El Centro) containing commercial kitchen, dining spaces, activity spaces, administrative and marketing offices, retail spaces, and a spa/wellness center.
  - 13 acres of site development, with some off-site, public improvements
  - Total building area is approximately 183,000 sf.
- Based on a preliminary site plan and building design commissioned by the Owner, the Construction Manager prepared a detailed, preliminary cost report and presented that report to the Owner on February 1, 2004. Based on that scope and cost report, the Owner has established a construction budget of \$20,540,000, based on the Preliminary Divisional Cost Breakdown shown in Exhibit F.
- The Owner has contracted with the Architect to complete the design of the project in accordance with the budget stated above. The completion of the design, and related activities is proceeding in accordance with the Preconstruction Phase Schedule prepared and updated regularly by the Construction Manager. See Exhibit G.
- The Construction Manager has also prepared a Preliminary Construction Schedule. See Exhibit H. A final Construction Schedule will be included in the GMP report and made part of the contract by amendment.
- The Owner, Architect and Construction Manager are working together to monitor the completion of the design to ensure meeting the Construction Budget.
- Upon receipt of the Design Development documents, the Construction Manager will, in accordance with contract Section 2.2 prepare a GMP report that will include all of the elements outlined in Section 2.2.4. Prior to submitting the final GMP report, the Construction Manager will review the preliminary cost estimates with the Owner and Architect to determine if any adjustments to scope are required in order to achieve the construction budget stated above. Upon approval by the Owner, the GMP will be incorporated into the contract by amendment, in accordance with Section 2.2.
- During the completion of the design The Construction Manager will continue to meet regularly with the Owner and Architect, and will regularly review the Architect's work in progress to monitor the design as a means to ensure conformance to the construction budget.

**RainbowVision Santa Fe/Wals Contract Agreement  
EXHIBIT F**

**Preliminary Divisional Cost Breakdown**

| <b>C.S.I. SYSTEMS BREAKDOWN</b>            | <b>Total<br/>Costs</b> | <b>%</b>            |
|--------------------------------------------|------------------------|---------------------|
| Division 1 - General Conditions            | \$1,047,401            | 5.9%                |
| Division 1 - Building Permit Allowance     | \$184,620              | 1.0%                |
| Division 2 - Site Construction             | \$1,534,319            | 8.7%                |
| Division 3 - Concrete                      | \$885,149              | 5.5%                |
| Division 4 - Masonry                       | \$488,508              | 2.8%                |
| Division 5 - Metals                        | \$439,822              | 2.5%                |
| Division 6 - Woods & Plastics              | \$2,609,478            | 14.8%               |
| Division 7 - Thermal & Moisture Protection | \$969,353              | 5.5%                |
| Division 8 - Doors & Windows               | \$771,105              | 4.4%                |
| Division 9 - Finishes                      | \$3,286,198            | 18.6%               |
| Division 10 - Specialties                  | \$592,989              | 3.4%                |
| Division 11 - Equipment (See Note 1)       | \$445,320              | 2.5%                |
| Division 12 - Furnishings (See Note 2)     | \$49,198               | 0.3%                |
| Division 14 - Conveying                    | \$230,919              | 1.3%                |
| Division 15 - Mechanical                   | \$2,410,820            | 13.7%               |
| Division 16 - Electrical                   | \$1,638,100            | 9.3%                |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    | <b>100%</b>         |
| Escalation - For 2004                      | 0.0%                   | -                   |
| <b>Sub-Total</b>                           | <b>\$17,661,276</b>    |                     |
| Est./Const Contingency - El Centro         | 5.0%                   | \$243,521           |
| Est./Const Contingency - Balance           | 3.0%                   | \$383,728           |
| <b>Sub-Total</b>                           | <b>\$18,288,523</b>    |                     |
| Builders Risk Insurance                    | 0.8%                   | \$148,308           |
| Liability Insurance                        | 0.85%                  | \$156,698           |
|                                            |                        | <b>\$18,591,527</b> |
| Construction Manager Fee                   | 3.00%                  | \$557,746           |
| <b>Sub-Total</b>                           | <b>\$19,149,273</b>    |                     |
| Performance and Payment Bond               |                        | \$108,393           |
| NM Gross Receipts Tax                      |                        | \$1,284,082         |
| <b>Project Totals</b>                      |                        | <b>\$20,539,728</b> |

**Notes:**

1. "Equipment" includes residential appliances, commercial kitchen and laundry equipment.
2. "Furnishings" does not include FF&E - which is being designed and purchased by the Owner under a separate contract.

**: RainbowVision Santa Fe/Vels Contract Agreement  
Exhibit G  
Preconstruction Phase Schedule**

Refer to the "Preconstruction Schedule" dated \_\_\_\_\_ (filename: RVSF007), attached separately but made a part of this Exhibit by reference.

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**Rainbow Vision Santa Fe Wells Contract Agreement**  
**Exhibit H**  
**Preliminary Construction Phase Schedule**

Refer to the "Preliminary Construction Schedule" dated  
attached separately but made a part of this Exhibit by reference.

(Filename: )

SFC CLERK RECORDED 02/02/2007

SFC CLERK RECORDED 02/02/2007

Amendment No. 1  
(Revised December 15, 2004)  
To Contract Agreement Between  
RainbowVision Santa Fe, LLC and Wels Builders, Inc

In accordance with article 2.2.9 of the Contract Agreement, the Guaranteed Maximum Price (GMP) and Project Schedule are hereby modified to reflect the following:

- The Guaranteed Maximum Price will be Twenty-One Million Five Hundred Thirty Nine Thousand, Seven Hundred Twenty-Eight Dollars (\$21,539,728).
- The Construction Start date will be January 3, 2005. Based on that start date:
- The Substantial Completion date for Buildings 16, 17, 18, 19, and 20 will be October 28, 2005.
- The Substantial Completion date for the balance of the project will be April 28, 2006.

Accordingly, the GMP Divisional Cost Breakdown (Exhibit F) shall be modified as per the attached revision, dated September 30, 2004. The revised GMP is based on the following:

- Wels September 15, 2004 "Confirmation of GMP" letter (with attachments)
- Wels September 30, 2004 "Summary of Approved Enhancements"

The Construction Schedule (Exhibit H) shall be as shown in the attached update, dated December 15, 2004.

For:  
RainbowVision Santa Fe, LLC

(Signature)

(Printed Name and Title)

(Date)

For:  
Wels Builders Inc.

*Peter Worthington*  
(Signature)

PETER WORTHINGTON, VICE PRESIDENT  
(Printed Name and Title)

Dec-15, 2004  
(Date)

# EXHIBIT F



## LRaport

---

**From:** Maureen Thomas [mthomas@bmhc.com]  
**Sent:** Friday, September 12, 2008 9:13 PM  
**To:** Tonya MacBeth  
**Cc:** Len Baumann  
**Subject:** FW: Rainbow Vision - BBD Construction

**Attachments:** Rainbow Vision Summons.pdf; Weiss Certificates of Occupancy.pdf

Hi: We have been served with the 3rd party complaint in this matter and are trying to confirm which carrier to tender to. I have attached the matrix you sent me before. We only framed the balconies on the 2 story buildings. Can you tell me which of the building on the attached matrix are the 2 story ones?  
Thanks.

**Maureen E. Thomas, Esq.**  
**[mthomas@bmhc.com](mailto:mthomas@bmhc.com)**  
**248 698-0965 direct**  
**248 505-2962 cell**  
**832 550-4383 efax**

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# EXHIBIT G

## LRaport

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**From:** Maureen Thomas [mthomas@bmhc.com]  
**Sent:** Friday, June 20, 2008 5:43 PM  
**To:** Tonya MacBeth; Katie Dalessio; Gardner, Lee [Lee.Gardner@ace-ina.com]  
**Subject:** RE: Rainbow v. Weis v. BMHC

I believe that ACE is sending someone from the local Gallagher Bassett office to listen to the experts presentations. I will gather the info on the counter claim and get it to you but it will be late next week as I will be traveling.

Please provide the location information to Lee Gardner. Thanks.

**Maureen E. Thomas, Esq.**  
[mthomas@bmhc.com](mailto:mthomas@bmhc.com)  
248 698-0965 direct  
248 505-2962 cell  
832 550-4383 efax

---

**From:** Tonya MacBeth  
**Sent:** Fri 6/20/2008 5:22 PM  
**To:** Katie Dalessio; mthomas@bmhc.com  
**Subject:** FW: Rainbow v. Weis v. BMHC

Maureen:

I recommend that someone attend the meeting. It should assist all parties in focusing future action. I am interested in your potential counter-claim. Supporting documentation may change our litigation path. Please forward it when you have an opportunity.

My assistant will send the location information.

---

**From:** Maureen Thomas [mailto:mthomas@bmhc.com]  
**Sent:** Thursday, June 19, 2008 12:05 PM  
**To:** Tonya MacBeth  
**Cc:** Katie Dalessio  
**Subject:** RE: Rainbow v. Weis v. BMHC

Thanks. I am fairly certain that we don't have anyone in NM at this time. I will get with the carriers and see if they want to engage an expert and have him or her attend.

**Maureen E. Thomas, Esq.**  
[mthomas@bmhc.com](mailto:mthomas@bmhc.com)  
248 698-0965 direct  
248 505-2962 cell  
832 550-4383 efax

---

**From:** Tonya MacBeth  
**Sent:** Thu 6/19/2008 2:56 PM  
**To:** Maureen Thomas  
**Cc:** Katie Dalessio  
**Subject:** RE: Rainbow v. Weis v. BMHC

10/30/2009

Maureen:

The mediation is being held on June 26, 2008 in Albuquerque NM. Weis is paying for the mediator for a one day meeting to narrow the issues in dispute and come to agreements wherever possible. The framing on the two story balconies is currently being replaced. It is our understanding that the slope—created by the framer—was improper/negative.

Service of the complaint is being handled by our NM counsel. I can forward a copy for your information. I recommend having someone familiar with the work being present for the presentation by the different experts would be advantageous to understanding the issues as the case moves forward. We of course would understand if that person could not come to any agreements regarding actual settlement on the 26<sup>th</sup>.

Please feel free to call to discuss this further.

**Tonya K. MacBeth, Esq.**  
Burch & Cracchiolo, P.A.  
702 East Osborn Rd., Suite 110  
Phoenix, AZ 85014  
Phone: (602) 234-9926  
Fax: (602) 343-7926

E-mail: [tmacbeth@bcattorneys.com](mailto:tmacbeth@bcattorneys.com)  
Website: <http://www.bcattorneys.com/>

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---

**From:** Maureen Thomas [mailto:[mthomas@bmhc.com](mailto:mthomas@bmhc.com)]  
**Sent:** Thursday, June 19, 2008 8:25 AM  
**To:** Tonya MacBeth  
**Cc:** Katie Dalessio  
**Subject:** RE: Rainbow v. Weis v. BMHC

Hi Tonya:

SelectBuild was not involved in this project. It was BMC West Corporation using a dba BMC Construction. Where is the mediation?

We have never been served with a 3rd party complaint. Our carriers only recently received an AI tender. We are still owed \$200,000 on this project and if sued will of course assert a counterclaim for that amount.

We had no involvement in the insulation of the exterior walls, drainage or grading. We did no work on the El Centro building. We framed balconies on the two story units only, but understand that the balcony issue is related to the concrete (and may not involve the two story units). What claims are being asserted as to our framing of the balconies on the two story units?

Thanks.

**Maureen E. Thomas, Esq.**  
[mthomas@bmhc.com](mailto:mthomas@bmhc.com)  
248 698-0965 direct

10/30/2009

248 505-2962 cell  
832 550-4383 efax

---

**From:** Tonya MacBeth  
**Sent:** Wed 6/18/2008 10:38 PM  
**To:** mthomas@bmhc.com  
**Cc:** Katie Dalessio  
**Subject:** Rainbow v. Weis v. BMHC

Ms. Thomas:

Lee Garner informed me that you are corporate counsel for BMHC. I am counsel for Weis. I have been trying to reach the subcontractor—one of your entities—that performed work at the Rainbow Vision project in Albuquerque. This may have been Select Build, as it is listed on the insurance certificate.

Per Court order, we are holding a mediation on June 26, 2008 with all subcontractors (and whomever they choose to invite), our client, our expert and a mediator. We are extending an invitation to you to attend.

The goal of the mediation is always resolution. However, it is likely that the mediation will center on a frank discussion of the issues and as-built conditions to appropriately focus all parties on areas of genuine dispute, streamlining the process. To further the productivity of the process, we have been authorized to retain the mediator at our expense for this one day issue exploration/resolution session.

Please forward this message to whomever may best participate in this meeting. Further information regarding exact times and the location will follow. Thank you for your assistance in this matter. I sincerely hope you and yours are managing well in the weather crisis.

Regards,  
*Tonya K. MacBeth, Esq.*  
Burch & Cracchiolo, P.A.  
702 East Osborn Rd., Suite 110  
Phoenix, AZ 85014  
Phone: (602) 234-9926  
Fax: (602) 343-7926

E-mail: [lmacbeth@bcattorneys.com](mailto:lmacbeth@bcattorneys.com)  
Website: <http://www.bcattorneys.com/>

**CONFIDENTIALITY NOTICE:** This e-mail may contain confidential information that is legally privileged. Do not read this e-mail if you are not the intended recipient. This e-mail transmission, and any documents, files or previous e-mail messages attached to it, may contain confidential information that is legally privileged. If you are not the intended recipient, or a person responsible for delivering it to the intended recipient, you are hereby notified that any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is **STRICTLY PROHIBITED**. If you have received this transmission in error, please immediately notify us by reply e-mail or by telephone at (602) 234-9926 and destroy the original transmission and its attachments without reading or saving in any manner. Thank you.

10/30/2009

# EXHIBIT H

## LRaport

---

**From:** Gardner, Lee [Lee.Gardner@ace-ina.com]  
**Sent:** Friday, June 20, 2008 6:09 PM  
**To:** Maureen Thomas; Tonya MacBeth; Katie Dalessio  
**Subject:** RE: Rainbow v. Weis v. BMHC

Still working on this...should have a name for you Monday.

*Lee Gardner*

Liability Specialist  
ACE USA Claims  
P.O. Box 25160  
Lehigh Valley, PA 18002-5160  
Direct: 818-428-3765  
Fax: 866-635-5687

*We are migrating to a paperless environment. Please send all correspondence and reports to our scanning center at: Construction Defect Claims, P.O. Box 25160, Lehigh Valley, PA 18002-5160. Please be sure to include the addressee and our claim number on all documents.*

 Please consider the environment before printing this e-mail

---

**From:** Maureen Thomas [mailto:mthomas@bmhc.com]  
**Sent:** Friday, June 20, 2008 2:43 PM  
**To:** Tonya MacBeth; Katie Dalessio; Gardner, Lee  
**Subject:** RE: Rainbow v. Weis v. BMHC

I believe that ACE is sending someone from the local Gallagher Bassett office to listen to the experts presentations. I will gather the info on the counter claim and get it to you but it will be late next week as I will be traveling.

Please provide the location information to Lee Gardner. Thanks.

**Maureen E. Thomas, Esq.**  
[mthomas@bmhc.com](mailto:mthomas@bmhc.com)  
248 698-0965 direct  
248 505-2962 cell  
832 550-4383 efax

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**From:** Tonya MacBeth  
**Sent:** Fri 6/20/2008 5:22 PM  
**To:** Katie Dalessio; mthomas@bmhc.com  
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Maureen:

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10/30/2009

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**Sent:** Thursday, June 19, 2008 12:05 PM  
**To:** Tonya MacBeth  
**Cc:** Katie Dalessio  
**Subject:** RE: Rainbow v. Weis v. BMHC

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**Maureen E. Thomas, Esq.**  
[mthomas@bmhc.com](mailto:mthomas@bmhc.com)  
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**Sent:** Thu 6/19/2008 2:56 PM  
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**Cc:** Katie Dalessio  
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Service of the complaint is being handled by our NM counsel. I can forward a copy for your information. I recommend having someone familiar with the work being present for the presentation by the different experts would be advantageous to understanding the issues as the case moves forward. We of course would understand if that person could not come to any agreements regarding actual settlement on the 26<sup>th</sup>.

Please feel free to call to discuss this further.

**Tonya K. MacBeth, Esq.**  
Burch & Cracchiolo, P.A.  
702 East Osborn Rd., Suite 110  
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10/30/2009



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**From:** Maureen Thomas [mailto:mthomas@bmhc.com]  
**Sent:** Thursday, June 19, 2008 8:25 AM  
**To:** Tonya MacBeth  
**Cc:** Katie Dalessio  
**Subject:** RE: Rainbow v. Weis v. BMHC

Hi Tonya:

SelectBuild was not involved in this project. It was BMC West Corporation using a dba BMC Construction. Where is the mediation?

We have never been served with a 3rd party complaint. Our carriers only recently received an AI tender. We are still owed \$200,000 on this project and if sued will of course assert a counterclaim for that amount.

We had no involvement in the insulation of the exterior walls, drainage or grading. We did no work on the El Centro building. We framed balconies on the two story units only, but understand that the balcony issue is related to the concrete (and may not involve the two story units). What claims are being asserted as to our framing of the balconies on the two story units?

Thanks.

**Maureen E. Thomas, Esq.**  
[mthomas@bmhc.com](mailto:mthomas@bmhc.com)  
248 698-0965 direct  
248 505-2962 cell  
832 550-4383 efax

---

**From:** Tonya MacBeth  
**Sent:** Wed 6/18/2008 10:38 PM  
**To:** mthomas@bmhc.com  
**Cc:** Katie Dalessio  
**Subject:** Rainbow v. Weis v. BMHC

Ms. Thomas:

Lee Garner informed me that you are corporate counsel for BMHC. I am counsel for Weis. I have been trying to reach the subcontractor—one of your entities—that performed work at the Rainbow Vision project in Albuquerque. This may have been Select Build, as it is listed on the insurance certificate.

Per Court order, we are holding a mediation on June 26, 2008 with all subcontractors (and whomever they choose to invite), our client, our expert and a mediator. We are extending an invitation to you to attend.

The goal of the mediation is always resolution. However, it is likely that the mediation will center on a frank discussion of the issues and as-built conditions to appropriately focus all parties on areas of genuine dispute, streamlining the process. To further the productivity of the process, we have been authorized to retain the mediator at our expense for this one day issue exploration/resolution session.

Please forward this message to whomever may best participate in this meeting. Further information regarding exact times and the location will follow. Thank you for your assistance in this matter. I sincerely hope you and yours are managing well in the weather crisis.

Regards,

10/30/2009

**Tonya K. MacBeth, Esq.**  
**Burch & Cracchiolo, P.A.**  
702 East Osborn Rd., Suite 110  
Phoenix, AZ 85014  
Phone: (602) 234-9926  
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# EXHIBIT I

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

RAINBOW VISION SANTA FE, LLC,

Plaintiff,

vs.  
00010

No. D-0101-CV-2007-

WEIS BUILDERS, INC.,  
PCI CONTRACTORS, INC., and RLA, INC.,

Defendants.

and

WEIS BUILDERS, INC.,

Third-Party Plaintiff,

vs.

HSH NORDBANK AG, et al.,

Third-Party Defendants.

#### CERTIFICATE OF SERVICE

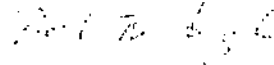
The undersigned hereby certifies that she served an original and one copy of Weis Builders, Inc.'s First Set of Non-uniform Interrogatories and Request for Admission to BMC West Corporation D/B/A BMC Construction and Weis Builders, Inc.'s First Request for Production of Documents to BMC West Corporation D/B/A BMC Construction, by first-class mail on November \_\_\_, 2008, to the following address:

BMC West Corporation D/B/A BMC Construction  
808 Hensley Lane  
Wylie, TX 75098

and emailed to Maureen E. Thomas, Esq. at [mthomas@bmhc.com](mailto:mthomas@bmhc.com)

Respectfully Submitted,

**BURCH & CRACCHIOLO, P.A.**



Mitchell J. Resnick  
Richard J. Brumbaugh  
702 East Osborn Rd., Suite 200  
Phoenix, AZ 85014  
Attorneys for Defendants/Third-Party Plaintiffs  
Weis Builders, Inc.

We hereby certify that a copy of the foregoing was  
served via first-class mail on the \_\_\_ day of November, 2008  
to counsel of record:

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RHODES & SALMON, P.C.  
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Ronald VanAmberg  
Vanamberg, Rogers, Yepa & Abeita, LLP  
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Santa Fe, NM 87504-1447

# EXHIBIT J

12/24/06

THE STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT OF

EMCO, INC.  
First Judicial District Court

Dec 22 2006

RAINBOW VISION SANTA FE, LLC,

Plaintiff,

0/01  
Nos D-0141-CV--2007-00010

V.

WEIS BUILDERS, INC.  
PCI CONTRACTORS, INC., and  
RLA, INC.,

Defendants.

and

WEIS BUILDERS, INC.,

Third-Party Plaintiff,

V.

RODGERS PLUMBING AND HEATING, INC.,  
EKER BROTHERS, INC.,  
TLC COMPANY,  
EMCO, INC.,  
SUPERIOR CONTRACTING CORPORATION, D/B/A AMERICAN  
NATIONAL INSULATION AND SEALANTS,  
BMCW SOUTHCENTRAL, L.P. D/B/A BMC CONSTRUCTION,  
BBD CONSTRUCTION, L.P., as successor in interest to or assignee of  
BMC CONSTRUCTION,  
MAVERICK FRAMING, INC., as successor in interest to or assignee of  
BMC CONSTRUCTION,  
PCI CONTRACTORS, INC.;  
WESTERN TECHNOLOGIES, INC.,  
VALLEY FIRE PROTECTION, INC.,  
STORM WATER CONTROL, INC.,  
PINON WINDOW & DOOR, INC.,  
MICHAEL HUNTER PAINTING, INC.,  
MESA ERECTORS, INC.,  
LOPEZ ROOFING SERVICE, INC.,  
KOCH MECHANICAL,  
KLEIN ENTERPRISES, LLC;  
HUGHES AND ASSOCIATES, INC.,

GEO-TEST, INC.,  
F&J HOMEBUILDERS, INC.,  
DAWSON SURVEYS, INC., AND  
BOHANNAN-HUSTON, INC.,

Third-Party Defendants.

**THIRD AMENDED THIRD-PARTY COMPLAINT**

Weis Builders Inc. ("WBI") as Third Party Plaintiff, makes this Third Amended Third Party Complaint.

1. WBI is a Minnesota corporation duly and validly licensed in the State of New Mexico.
2. Rodgers Plumbing and Heating Co., Inc. is a New Mexico corporation with its principal place of business in Albuquerque, New Mexico.
3. Eker Brothers, Inc. is a New Mexico Corporation with its principal address in Santa Fe, New Mexico, and its registered agent in Albuquerque, New Mexico.
4. T L C Company, Inc. is a New Mexico Corporation with its principal place of business in Albuquerque, New Mexico.
5. PCI Contractors, INC. is a New Mexico Corporation with its principal place of business in Albuquerque, New Mexico.
6. Upon information and belief EMCO, Inc. is a New Mexico Corporation with a place of business in Santa Fe, New Mexico and licensed to do business in the State of New Mexico.
7. Upon information and belief, Superior Contracting Corporation, D/B/A American



National Insulation And Sealants is a Delaware Corporation with a place of business in Albuquerque, New Mexico and licensed to do business in the State of New Mexico.

8. Upon information and belief, BMCW Southcentral, L.P. D/B/A BMC Construction is a Texas Company doing business in the State of New Mexico.
9. Upon information and belief, BBD Construction, L.P., is Texas Limited Partnership doing business in the state of New Mexico and is a successor in interest to or assignee of BMC Construction.
10. Upon information and belief, Maverick Framing, Inc., is a Texas corporation registered to do business in the state of New Mexico that is the assignee of the subcontract or a successor in interest to BMC Construction regarding BMC's work on the Project.
11. Upon information and belief, Defendant Bohannon-Huston, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as an engineering/land surveying subcontractor, which caused acts and events to occur in this County from which WBI' claims arise.
12. Upon information and belief, Defendant Dawson Surveys, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as a land surveying subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.
13. Upon information and belief, Defendant F&J Homebuilders, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as construction subcontractor, which caused acts and events to

occur in this County from which WBI's' claims arise.

14. Upon information and belief, Defendant Geo-Test, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as an engineering and consulting subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.
15. Upon information and belief, Defendant Hughes and Associates, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as construction subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.
16. Upon information and belief, Defendant Klein Enterprises, LLC was, at all time material hereto, a New Mexico limited liability company authorized to do or doing business in Santa Fe County as subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.
17. Upon information and belief, Defendant Koch Mechanical was, at all time material hereto, an unknown entity doing business in Santa Fe County as subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.
18. Upon information and belief, Defendant Lopez Roofing Service, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as a roofing subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.
19. Upon information and belief, Defendant Mesa Erectors, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe

County as a subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.

20. Upon information and belief, Defendant Michael Hunter Painting, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as a painting subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.
21. Upon information and belief, Defendant Pinon Window & Door, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as a window vendor, which caused acts and events to occur in this County from which WBI's' claims arise.
22. Upon information and belief, Defendant Storm Water Control, Inc. was, at all time material hereto, a Colorado corporation doing business in Santa Fe County as a roofing subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.
23. Upon information and belief, Defendant Valley Fire Protection, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as a subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise.
24. Upon information and belief, Western Technologies, Inc. was, at all time material hereto, a New Mexico corporation authorized to do or doing business in Santa Fe County as a engineering subcontractor, which caused acts and events to occur in this County from which WBI's' claims arise
25. This Court has subject matter jurisdiction over this action and personal jurisdiction

of WBI. Venue is proper in Santa Fe County pursuant to NMSA 1978 § 38-3-1.

26. On or about April 28, 2004, WBI and RainbowVision Santa Fe, LLC ("RVSF") entered into a contract under which WBI agreed to provide certain construction services, labor, and materials for work specified in the contract (the "Contract") for the RainbowVision Santa Fe Retirement Community (the "Project"), in Santa Fe, New Mexico, in return for compensation for its services. A true and correct copy of the Contract is being served with this pleading as Exhibit 1 pursuant to Rule 1-009(1) NMRA.
27. The Project is located on real property located at 500 Rodeo Road, Santa Fe New Mexico (the "Property") and more particularly described as:

That certain tract of land within Section 11, Township 16 North, Range 9 East, NMPM per plat 605/24 bearing uniform property code number 1-053-095-353-509
28. RVSF brought a Complaint against WBI, alleging, among other things, that the work on the Project was not completed in a workmanlike manner which resulted in property damage, including separate damage from the subcontractor's scope of work; defective work has not been remedied, Contract warranty obligations have not been honored, and that substantial completion was not achieved within the times specified in the Contract.
29. RVSF and WBI entered into a Stipulated Order of Dismissal of Certain Claims and Parties following entering into a Settlement Agreement ("RVSF-WBI Agreement") resolving the claims of RVSF against WBI set forth in Counts III, IV, V, VI, VII and VIII of the First Amended Complaint filed herein on February 6, 2007

30. Pursuant to the RVSF-WBI Agreement, WBI agreed to perform certain work at the Project and incurred damages, liquidated damages costs, and fees associated with the construction, remediation and general allegations brought by RVSF, as well as agreed that conditions identified in the future that were major or pervasive would be excluded from the agreement.
31. Pursuant to the RVSF-WBI Settlement Agreement and its limitations, WBI has or anticipates performing substantial work to remediate the balconies, foundation insulation, sill-plates and grading/drainage at the project. WBI's has been put on Notice of additional claims relating to the following: fire-stop installation, draft barriers, framing, joist construction/installation, concrete flatwork, penetration sealants, waterproofing, and various structural components.
32. Evidence of deficiencies within the work of individual subcontractors has been alleged by RVSF or identified by WBI investigation; and individual deficiencies have caused or contributed to the conditions necessitating WBI to incur expenses for its remediation.
33. WBI has incurred approximately \$700,000.00 in expenses to date and anticipates continued expenditures for completion of the items identified or excluded from the Settlement Agreement.

**COUNT I**  
**EXPRESS INDEMNIFICATION**  
**(AGAINST ALL THIRD-PARTY DEFENDANT SUBCONTRACTORS)**

34. WBI realleges and incorporates by reference Paragraphs 1 through 33 of its Third Amended Third-Party Complaint.
35. WBI asserts a claim for indemnity against all Third-Party Defendant Subcontractors

(Rodgers Plumbing & Heating CO. INC.; Eker Brothers, INC.; TLC Company, INC.; EMCO, INC.; Superior Contracting Corporation, D/B/A American National Insulation and Sealants; BMCW Southcentral, L.P., D/B/A BMC Construction; BBD Construction, L.P.; as successor in interest to or assignee of BMC Construction; Maverick Framing, INC., as successor in interest to or assignee of BMC Construction; PCI Contractors, INC.; Western Technologies, Inc., Valley Fire Protection, Inc., Storm Water Control, Inc., Pinon Window & Door, Inc., Michael Hunter Painting, Inc., Mesa Erectors, Inc., Lopez Roofing Service, Inc., Koch Mechanical, Klein Enterprises, LLC; Hughes and Associates, Inc., Geo-Test, Inc., F&J Homebuilders, Inc., Dawson Surveys, Inc., Bohannon-Huston, Inc.) (collectively, the "Third-Party Subcontractors" or "Subcontractors").

36. WBI entered into separate subcontracts (collectively, the "Subcontracts") with the Third Party Subcontractors under which the Subcontractors agreed to furnish all labor, material, skill and equipment necessary or required and to perform all work WBI contracted with the Owner, Rainbow Vision Santa Fe, LLC ("RVSF") for completion of the Project.
37. Pursuant to the Subcontracts, the Third-Party Subcontractors agreed, among other things: To save harmless the Contractor, the Owner and all other subcontractors from any and all losses or damage (including without limiting the generality of the foregoing, legal fees and disbursements paid or incurred by the Contractor to enforce the provisions of this paragraph) occasioned by the failure of the Subcontractor to carry out the provisions of this Subcontract. (Subcontracts, 1. G.)
38. Pursuant to the Subcontracts, The Third-Party Subcontractors also agreed, among other things,

"To the fullest extent permitted by law, Subcontractor shall defend and indemnify Contractor and Owner, and all others whom Contractor or Owner or both, are legally obligated to defend and indemnify by the contract documents, including amendments thereto, from any and all suits and claims alleging damages or injuries to persons or property, or liabilities resulting therefrom, arising out of , or in any manner connected with Subcontractor's Work, including all suits and claims for which any or all of the indemnified parties, may be or may be claimed to be liable, and including all suits and claims that arise either during construction or after completion of the project. Subcontractor understands and agrees that this paragraph obligates Subcontractor to defend and indemnify the indemnified parties from all suits and claims that allege negligence or other wrongful conduct on the part of the indemnified parties. Subcontractor's obligation under this paragraph shall exclude, however, liability for such damages or injury when such damages or injury are caused by the sole fault of the indemnified party seeking indemnity pursuant to this paragraph. Subcontractor understands and agrees to undertake this obligation regardless whether the injured party asserting a suit or claim is an employee of Subcontractor. Subcontractor's obligation hereunder shall not be limited by the operation of a workers' or workman's compensation act, and disability act, or any other employee benefit act. Subcontractor understands and agrees that this paragraph obligates Subcontractor to pay any and all legal fees and expenses incurred by the indemnified parties in defending any suit or claim brought against them that arises out of or is in any manner connected with Subcontractor's Work, as well as any legal fees and expenses incurred in connection with enforcing this paragraph. Subcontractor further agrees to obtain maintain and pay for commercial general liability insurance, to the fullest extent available, including completed operations coverages, to secure the provisions of this paragraph. Notwithstanding anything to the contrary stated herein, no indemnified party hereunder shall be indemnified for liability, claims, damages, losses or expenses, including attorney fees, arising out of:

A. The preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the indemnitee, or agents or employees of the indemnitee; or the giving of or the failure to give directions or instructions by the indemnitee, or the agents or employees of the indemnitee, where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damage to the property. The parties hereto agree that this paragraph conforms to the requirements of N.M. STAT.ANN. §56-7-1.

39. RVSF brought suit against WBI alleging damages and injuries to property resulting from, arising out and connected with Subcontractor's Work alleging negligence, breach of the subcontractor contracts or constructions documents, or wrongful

conduct by the Subcontractors.

40. WBI actively defended against the claims of RVSF and incurred attorney costs and fees, expert and consultant costs and fees, and general expenses related to its defense as well as the defense of its subcontractors; and WBI tendered its defense and indemnification to the subcontractors, including by this Third-Party Complaint.
41. RVSF and WBI entered into a Settlement Agreement to resolve RVSF's claims related to its allegations of construction deficiencies.
42. As required by the Settlement Agreement, WBI performed and continues to perform work at the Project, thereby incurring repair costs of labor and materials, consultant and expert fees and expenses, and legal costs and fees; currently at approximately \$700,000.00 and expected to increase.
43. The Settlement Agreement specifically identifies that if other conditions not identified by the Settlement Agreement are identified and found to be major, or pervasive, further action may be taken by RVSF against WBI.
44. The conditions which WBI agreed to remediate, and new claims which have been identified, were caused by the conduct of the Third-Party Subcontractors insofar as the Third-Party Subcontractors performed defective work that did not meet industry standards, failed to remedy defective work, failed to honor their warranty obligations, negligently performed work, and failed to perform their work within the times specified in the Contract.
45. WBI is entitled to entry of judgment in its favor and against the Third-Party Complaint Indemnity Subcontractors, based upon principles of indemnity, for an amount equal to any liability on RVSF's claims against WBI and damages incurred



by WBI in performing additional corrective work at the Project.

46. WBI is further entitled to entry of judgment in its favor and against the Third-Party Complaint Indemnity Subcontractors for an amount equal to the attorneys' fees and costs incurred to defend against RVSF's claims.

**Count II**

**BREACH OF CONTRACT**

(AGAINST ALL THIRD-PARTY DEFENDANT SUBCONTRACTORS)

47. WBI realleges and incorporates by reference Paragraphs 1 through 46 of its Amended Third-Party Complaint.
48. WBI entered into valid and binding Subcontracts with all Third-Party Defendant Subcontractors in which Subcontractors agreed to furnish materials and labor at the Project.
49. WBI performed its obligations under the Subcontracts and demanded similar performance of the Third-Party Subcontractor.
50. Pursuant to their respective Subcontracts, the Third-Party Complaint Subcontractors expressly and/or impliedly agreed to the following:
- a. To furnish all labor, material, skill and equipment necessary or required and to perform all the work required under the Subcontract;
  - b. To perform all work in a good and workmanlike manner;
  - c. To timely perform all work in accordance with the Project schedule;
  - d. To guarantee the Subcontract to the same extent that the Contractor is obligated to guarantee its work under the General Contract;
  - e. To save harmless the Contractor and all other subcontractors from any and all losses or damage (including without limiting the generality of the

foregoing, legal fees and disbursements paid or incurred by the Contractor to enforce the provisions of this paragraph) occasioned by the failure of the Subcontractor to carry out any provision of the Subcontract;

- f. To accept responsibility for all damage caused by the Subcontractor;
- g. To comply with all Federal and State laws, codes, and regulations and all municipal ordinances and regulations;
- h. To timely perform all punch list work, and
- i. To save WBI's harmless from any loss.

- 51. According to the Subcontract, section H and addendum H, Subcontractors also individually agreed to defend WBI against claims against its work.
- 52. Subcontractors have breached their respective contracts by failing to perform their work in compliance with said contractual obligations.
- 53. Pursuant to their contracts, the Subcontractors breached the terms of their contracts by failing to defend WBI.
- 54. Pursuant to their contracts, the Subcontractors breached the terms of their contracts by failing to indemnify WBI.
- 55. Pursuant to equitable and common-law principles, the Subcontractors each have a duty to defend WBI.
- 56. As a direct and proximate result of the Subcontractors' individual breaches of contract, WBI has incurred damages, including but not limited to, attorneys' fees, litigation costs, expert/consultant fees and costs, labor and material costs, and expenses.
- 57. The claims and obligations against WBI for damages to the Project are the result

of the acts or omissions of the Subcontractors.

58. WBI is therefore entitled to recover from the Subcontractors their specific share of all losses and damages—directly assigned to the individual subcontractors—incurred by WBI as a result of any settlement, compromise, judgment, or award which has or may occur in this matter; including for its costs to defend against the claims and settlement obligations.
59. The Third-Party Complaint Subcontractors have breached their respective Subcontracts including without limitation, each of the obligations described above and in paragraphs 38 and 50.
60. As a result of the Third-Party Complaint Subcontractors breaches, WBI has incurred damages in an amount to be determined at trial plus interest, costs, expert/consultant costs, disbursements, and attorneys' fees/costs.
61. WBI is entitled to judgment in its favor and against each of the Third-Party Complaint Subcontractors for an amount to be determined as determined to be each subcontractors proportional share of damages, plus interest, costs, disbursements, and attorneys' fees.

**Count III**  
**IMPLIED/ COMMON LAW/ EQUITABLE**  
**INDEMNIFICATION**

(AGAINST ALL THIRD-PARTY DEFENDANT SUBCONTRACTORS)

62. WBI realleges and incorporates by reference Paragraphs 1 through 61 of its Amended Third-Party Complaint.
63. Subcontractors have an implied, common law, equitable duty to indemnify WBI for the work each Subcontractor individually performed which is alleged to be deficient.

64. By reason of the foregoing any sum or cost incurred or paid by WBI, or will be ordered to be paid by WBI, because of a requirement for additional or remedial work, then WBI is entitled to indemnity from the Subcontractors according to each proportional share of its liability for injuries and damages sustained by WBI by virtue of settlement or judgment against WBI regarding the Project, and any cause of action alleged here.
65. This Complaint arises out of a contract, and WBI will be entitled to recover, in addition to its damages, reasonable attorneys' fees and costs.

**Count IV**  
**BREACH OF EXPRESS/IMPLIED WARRANTY**  
**(AGAINST ALL THIRD-PARTY DEFENDANT SUBCONTRACTORS)**

66. WBI re-alleges paragraphs 1 through 65 of this Complaint as if fully set forth herein.
67. Subcontractors expressly and/or impliedly warranted their materials would be of merchantable quality and reasonably fit for their intended purpose, and that the work and labor performed under the construction subcontracts, would be done in a professional and workmanlike manner and in conformance with New Mexico Construction standards.
68. As evidenced by the remedial work performed at the project, expert analysis and Project conditions, the warranties expressly or impliedly provided by Third-Party Subcontractors have been breached as the workmanship and labor were not performed in a workmanlike manner in accordance with the New Mexico construction standards, and/or the materials were not reasonably fit for their intended purpose and of merchantable quality and free from defects.
69. As a result of the allegation of breach of warranties, WBI has and will continue to

suffer direct and consequential damages in an amount not yet known but in excess of this Court's minimum jurisdictional amount and is entitled to recover the same from Third-Party Subcontractors.

70. This Complaint arises out of a contract, and WBI will be entitled to recover, in addition to its damages, reasonable attorneys' fees and costs.

**Count V**  
**NEGLIGENCE**

(AGAINST ALL THIRD-PARTY DEFENDANT SUBCONTRACTORS)

71. WBI re-alleges paragraphs 1 through 70 of this Complaint as if fully set forth herein.
72. Each Third-Party Subcontractor owes a duty to WBI to ensure their work would be performed in a workmanlike manner and in accordance with New Mexico construction standards, and materials so provided would be free from material defects and/or fit for their intended purposes. Subcontractors knew or should have known that the breach of these duties—if proven—would cause damages to WBI.
73. The prior and current allegations raised by RVSF allege deficiencies in the balconies, sill-plates, insulation, grading and drainage, joists, flat-work, penetrations, waterproofing, stucco, EFIS, and all other aspects of the construction are evidenced by subsequent evaluations; and identify that the Third-Party Subcontractors breached their individual duties to WBI by negligently failing to ensure the work was performed in a workmanlike manner and in accordance with New Mexico construction standards and materials provided on the project were free from defects and the Project was reasonably fit for their

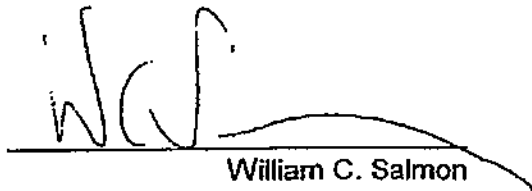
intended purpose.

74. As a proximate result of the alleged breaches, WBI has suffered, and will continue to suffer, direct and consequential damages in an amount not yet known but in excess of \$700,000.00 and in excess of this Court's minimal jurisdictional amount and is therefore entitled to recover the same from Subcontractors for each specific deficiency.

**WHEREFORE**, Weis Builders, Inc. respectfully requests the Court to enter judgment as follows:

- a. for WBI for its attorneys' fees and costs, expert/consultant fees and costs, and expense of litigation;
- c. Compensatory and consequential damages in an amount to be proven at trial;
- d. Pre-judgment and post-Judgment interest thereon at the statutory rate; and
- e. Any such other and further relief the Court deems just and proper.

Respectfully submitted,  
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The undersigned certifies that he forwarded a copy of the above Order to counsel of record listed below on this 24 day of December, 2008.

  
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# **AIA** Document A121™CMc – 2003 and AGC Document 565

**Standard Form of Agreement Between Owner and Construction Manager**  
where the Construction Manager is Also the Constructor

## AGREEMENT

made as of the Twenty Eighth day of April in the year of Two Thousand and Four

*(In words, indicate day, month and year)*

**BETWEEN the Owner:**  
*(Name and address)*

RainbowVision Santa Fe LLC  
4001 Office Court Road,  
Suite 403  
Santa Fe, NM 87505

**and the Construction Manager:**  
*(Name and address)*

Weiss Builders, Inc.  
7645 Lyndale Avenue South  
Minneapolis, MN 55423

**The Project is:**  
*(Name, address and brief description)*

RainbowVision Santa Fe Retirement Community  
500 Rodeo Road at Antigua  
Santa Fe, NM 87505

**The Architect is:**  
*(Name and address)*

Lloyd & Associates Architects  
301 N. Guadalupe Suite 104  
Santa Fe, NM 87501

The Owner and Construction Manager agree as set forth below:

## ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The 1997 Edition of AIA® Document A201™, General Conditions of the Contract for Construction, is referred to herein. This Agreement requires modification if other general conditions are utilized.

**EXHIBIT**

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(part 552001)

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 RELATIONSHIP OF PARTIES

The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services and use the Construction Manager's best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Construction Manager and other persons or entities employed by the Owner for the Project.

### § 1.2 GENERAL CONDITIONS

For the Construction Phase, the General Conditions of the contract shall be the AIA® Document A201™-1997, *General Conditions of the Contract for Construction*, which is incorporated herein by reference. For the Preconstruction Phase, or in the event that the Preconstruction and Construction Phases proceed concurrently, A201™-1997 shall apply to the Preconstruction Phase only as specifically provided in this Agreement. The term "Contractor" as used in A201™-1997 shall mean the Construction Manager.

## ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager shall perform the services described in this Article. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction Phase services. If the Owner and Construction Manager agree, after consultation with the Architect, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

### § 2.1 PRECONSTRUCTION PHASE

#### § 2.1.1 PRELIMINARY EVALUATION

The Construction Manager shall provide a preliminary evaluation of the Owner's program and Project budget requirements, each in terms of the other.

#### § 2.1.2 CONSULTATION

The Construction Manager with the Architect shall jointly schedule and attend regular meetings with the Owner. The Construction Manager shall consult with the Owner and Architect regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.

#### § 2.1.3 PRELIMINARY PROJECT SCHEDULE

When Project requirements described in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare, and periodically update, a preliminary Project schedule for the Architect's review and the Owner's approval. The Construction Manager shall obtain the Architect's approval of the portion of the preliminary Project schedule relating to the performance of the Architect's services. The Construction Manager shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect and Construction Manager. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed date of Substantial Completion. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

#### § 2.1.4 PHASED CONSTRUCTION

The Construction Manager shall make recommendations to the Owner and Architect regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economics, time of performance, availability of labor and materials, and provisions for temporary facilities.

#### **§ 2.1.5 PRELIMINARY COST ESTIMATES**

§ 2.1.5.1 When the Owner has sufficiently identified the Project requirements and the Architect has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a preliminary cost estimate utilizing area, volume or similar conceptual estimating techniques.

§ 2.1.5.2 When Schematic Design Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare, for the review of the Architect and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the Design Development Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

§ 2.1.5.3 When Design Development Documents have been prepared by the Architect and approved by the Owner, the Construction Manager shall prepare a detailed estimate with supporting data for review by the Architect and approval by the Owner. During the preparation of the Construction Documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect and Construction Manager.

§ 2.1.5.4 If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

#### **§ 2.1.6 SUBCONTRACTORS AND SUPPLIERS**

The Construction Manager shall seek to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors, including suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner know of any objection to such subcontractor or supplier. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the Owner or Architect later to object to or reject any proposed subcontractor or supplier.

#### **§ 2.1.7 LONG-LEAD-TIME ITEMS**

The Construction Manager shall recommend to the Owner and Architect a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager. The Construction Manager shall expedite the delivery of long-lead-time items.

#### **§ 2.1.8 EXTENT OF RESPONSIBILITY**

The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Owner and the Owner's professional consultants. It is not the Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Drawings and Specifications are at variance therewith, the Construction Manager shall promptly notify the Architect and Owner in writing.

#### **§ 2.1.9 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION**

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

#### **§ 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL AND CONTRACT TIME**

§ 2.2.1 When the Drawings and Specifications are sufficiently complete, the Construction Manager shall propose a Guaranteed Maximum Price, which shall be the sum of the estimated Cost of the Work and the Construction Manager's Fee.

§ 2.2.2 As the Drawings and Specifications may not be finished at the time the Guaranteed Maximum Price proposal is prepared, the Construction Manager shall provide in the Guaranteed Maximum Price for further development of

the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The estimated Cost of the Work shall include the Construction Manager's contingency, a sum established by the Construction Manager for the Construction Manager's exclusive use to cover costs arising under Section 2.2.2 and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order.

#### § 2.2.4 BASIS OF GUARANTEED MAXIMUM PRICE

The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include:

1. A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Guaranteed Maximum Price proposal.
2. A list of allowances and a statement of their basis.
3. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
4. The proposed Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the Fee that comprise the Guaranteed Maximum Price.
5. The Date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, and a schedule of the Construction Documents issuance dates upon which the date of Substantial Completion is based.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by the Construction Manager.

§ 2.2.7 Prior to the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing.

§ 2.2.8 Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis shall be set forth in Amendment No. 1. The Guaranteed Maximum Price shall be subject to additions and deductions by a change in the Work as provided in the Contract Documents, and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 2.2.9 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in Amendment No. 1. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

§ 2.2.10 The Guaranteed Maximum Price shall include in the Cost of the Work only those taxes which are enacted at the time the Guaranteed Maximum Price is established.

#### § 2.3 CONSTRUCTION PHASE

##### § 2.3.1 GENERAL

§ 2.3.1.1 The Construction Phase shall commence on the earlier of:

- (1) the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, or
- (2) the Owner's first authorization to the Construction Manager to:
  - (a) award a subcontract, or
  - (b) undertake construction Work with the Construction Manager's own forces, or
  - (c) issue a purchase order for materials or equipment required for the Work.

#### § 2.3.2 ADMINISTRATION

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated to a special design for the Work from the list previously reviewed and, after analyzing such bids, shall deliver such bids to the Owner and Architect. The Owner will then determine, with the advice of the Construction Manager and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the Construction Manager shall obtain bids; however, if the Guaranteed Maximum Price has been established, the Owner may not prohibit the Construction Manager from obtaining bids from other qualified bidders. ~~The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.~~

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Construction Manager to the Owner and Architect (1) is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work, and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of Sections 7.1.8 and 7.1.9 and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.3.2.4 The Construction Manager shall schedule and conduct meetings at which the Owner, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

§ 2.3.2.5 Promptly after the Owner's acceptance of the Guaranteed Maximum Price proposal, the Construction Manager shall prepare a schedule in accordance with Section 3.10 of A201™-1997, including the Owner's occupancy requirements.

§ 2.3.2.6 The Construction Manager shall provide monthly written reports to the Owner and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.3.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals.

#### § 2.4 PROFESSIONAL SERVICES

Section 3.12.10 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

#### § 2.5 HAZARDOUS MATERIALS

Section 10.3 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

### ARTICLE 3 OWNER'S RESPONSIBILITIES

#### § 3.1 INFORMATION AND SERVICES

§ 3.1.1 The Owner shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Owner's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

§ 3.1.2 The Owner shall, at the written request of the Construction Manager prior to commencement of the Construction Phase and thereafter, furnish to the Construction Manager reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.3 The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies for changes in the Work and other costs which are the responsibility of the Owner.

#### § 3.1.4 STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS

In the Preconstruction Phase, the Owner shall furnish the following with reasonable promptness and at the Owner's expense. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely upon the accuracy of any such information, reports, surveys, drawings and tests described in Sections 3.1.4.1 through 3.1.4.4 but shall exercise customary precautions relating to the performance of the Work.

§ 3.1.4.1 Reports, surveys, drawings and tests concerning the conditions of the site which are required by law.

§ 3.1.4.2 Surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a project benchmark.

§ 3.1.4.3 The services of a geotechnical engineer when such services are requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, including necessary operations for anticipating subsurface conditions, with reports and appropriate professional recommendations.

§ 3.1.4.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.

§ 3.1.4.5 The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.

#### § 3.2 OWNER'S DESIGNATED REPRESENTATIVE

The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. This representative shall have the authority to make decisions on behalf of the Owner concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201™-1997, the Architect does not have such authority.

#### § 3.3 ARCHITECT

The Owner shall retain an Architect to provide Basic Services, including normal structural, mechanical and electrical engineering services, other than cost estimating services. The Owner shall authorize and cause the Architect to provide Additional Services, requested by the Construction Manager which must necessarily be provided by the Architect for the Preconstruction and Construction Phases of the Work. Such services shall be



provided in accordance with time schedules agreed to by the Owner, Architect and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect, from which compensation provisions may be deleted.

#### § 3.4 LEGAL REQUIREMENTS

The Owner shall determine and advise the Architect and Construction Manager of any special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project. The Owner shall furnish such legal services as are necessary to provide the information and services required under Section 3.1.

#### ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

The Owner shall compensate and make payments to the Construction Manager for Preconstruction Phase services as follows:

##### § 4.1 COMPENSATION

§ 4.1.1 For the services described in Sections 2.1 and 2.2, the Construction Manager's compensation shall be calculated as follows:

The Construction Manager's fee for Preconstruction Phase Services shall be Seven Thousand Dollars (\$7,000), in accordance with Weir's 1/22/03 letter of intent.

*(State basis of compensation, whether a stipulated sum, multiple of Direct Personnel Expense, actual cost, etc. Include a statement of reimbursable cost items as applicable.)*

§ 4.1.2 Compensation for Preconstruction Phase Services shall be equitably adjusted if such services extend beyond April 1, 2004 in accordance with Weir's 12/22/03 letter of intent.

§ 4.1.3 If compensation is based on a multiple of Direct Personnel Expense, Direct Personnel Expense is defined as the direct salaries of the Construction Manager's personnel engaged in the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

##### § 4.2 PAYMENTS

§ 4.2.1 Payments shall be made monthly following presentation of the Construction Manager's invoice and, where applicable, shall be in proportion to services performed.

§ 4.2.2 Payments are due and payable Thirty ( 30 ) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear interest at the rate entered below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon.)*

Interest rate shall be 4% above US Bancorp Prime Rate.

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

#### ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

The Owner shall compensate the Construction Manager for Construction Phase services as follows:

### § 5.1 COMPENSATION

§ 5.1.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager in current funds the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Construction Manager's Fee determined as follows:

Base Fee will be Three percent (3.0%) of the Cost of the Work as defined in Article 6. For changes in the Work not associated with any "Resident Upgrade Packages" that are to be offered on a unit-by-unit basis, the fee for additive changes will be 3.0% and for deductive changes the fee will be 0.0%.

#### 5.1.2

In addition to the basic fees in 4.1.1 and 5.1.1 above, the Owner shall pay the Construction Manager a Resident Upgrade Fee equal to 15% of the cost of the work, together with such reasonable administrative costs that the Construction Manager will incur directly related to the performance of such work, associated with the Resident Upgrade Packages that the Owner is planning to offer. It is the intent that a limited number of such Upgrade packages will be offered by the Owner, and that once the scope and cost for the upgrades being considered is established, the Owner and Construction Manager will incorporate by Amendment to this Contract the terms and conditions pursuant to which the Construction Manager shall perform such work. It is intended that the Construction Manager will establish a lump sum price per unit type for each Upgrade Package to be offered, and that said lump sum price shall include the fee and administrative costs described above, as well as define the date for each unit by which the Owner must direct the Construction Manager to proceed with the Upgrade. Unit upgrades for which direction to proceed is given after the agreed upon date, or which reflect a deviation in scope from the defined Upgrade Packages will be evaluated separately, and a cost and time adjustment proposed, by the Construction Manager.

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

### § 5.2 GUARANTEED MAXIMUM PRICE

§ 5.2.1 The sum of the Cost of the Work and the Construction Manager's Fee are guaranteed by the Construction Manager not to exceed the amount provided in Amendment No. 1, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum as adjusted by approved changes in the Work is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner. At time of Final Completion, any costs savings shall be returned 100% to the Owner and 0% to the Construction Manager.

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

### § 5.3 CHANGES IN THE WORK

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of Amendment No. 1 may be determined by any of the methods listed in Section 7.3.3 of A201™-1997.

§ 5.3.2 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of A201™-1997 and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Section 7.3.6 of A201™-1997 shall have the meanings assigned to them in that Agreement and shall not be modified by this Article 5. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.3 In calculating adjustments to the Contract, the terms "cost" and "costs" as used in the above-referenced provisions of A201™-1997 shall mean the Cost of the Work as defined in Article 6 of this Agreement, and the term "and a reasonable allowance for overhead and profit" shall mean the Construction Manager's Fee as defined in Section 5.1.1 of this Agreement.

§ 5.3.4 If no specific provision is made in Section 5.1.1 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.1 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

"Article 5.4: Commencement and Completion has been added. See Exhibit A."

#### ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

##### § 6.1 COSTS TO BE REIMBURSED

§ 6.1.1 The term "Cost of the Work" shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 6.

##### § 6.1.2 LABOR COSTS

- 1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's agreement, at off-site workshops.
- 2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's agreement. To the extent that some of the Construction Manager's supervisory and administrative personnel located at the Construction Manager's main office provide service to the project, a portion of their wages and salaries will be included in the cost of work and will be reimbursed in accordance with Exhibit C.

Classification

Name

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal office or offices other than the site office shall be included in the Cost of the Work, such personnel shall be identified below.)*

- 3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.
- 4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Cost of the Work under Sections 6.1.2.1 through 6.1.2.3.

##### § 6.1.3 SUBCONTRACT COSTS

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

##### § 6.1.4 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

- 1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.
- 2 Costs of materials described in the preceding Section 6.1.4.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be turned over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

##### § 6.1.5 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

- 1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed,

- whether sold to others or retained by the Construction Manager. Cost for items previously used by the Construction Manager shall mean fair market value.
- 2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval.
  - 3 Costs of removal of debris from the site.
  - 4 Reproduction costs, costs of telegrams, facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephone at the site and reasonable petty cash expenses of the site office.
  - 5 That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while traveling in discharge of duties connected with the Work.

#### § 6.1.6 MISCELLANEOUS COSTS

- 1 That portion directly attributable to this Contract of premiums for insurance and bonds.  
*(If charges for self-insurance are to be included, specify the basis of reimbursement.)*
- 2 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.
- 3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.
- 4 Fees of testing laboratories for tests required by the Contract Documents, except those related to nonconforming Work other than that for which payment is permitted by Section 6.1.8.2.
- 5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the Guaranteed Maximum Price and provided that such royalties, fees and costs are not excluded by the last sentence of Section 3.17.1 of A201™-1997 or other provisions of the Contract Documents.
- 6 Data processing costs related to the Work.
- 7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.
- 8 Legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld.
- 9 Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
- 10 All premiums (without markup) and deductibles associated with Builder's Risk Insurance provided by the Construction Manager at the Owner's request.
- 11 All premiums (without markup) and deductibles associated with providing professional liability insurance for the mechanical and electrical design services for the condominiums and II units.

#### § 6.1.7 OTHER COSTS

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

#### § 6.1.8 EMERGENCIES AND REPAIRS TO DAMAGED OR NONCONFORMING WORK

The Cost of the Work shall also include costs described in Section 6.1.1 which are incurred by the Construction Manager except, however, where conditions requiring such action were caused by or are the result of the Construction Manager's negligence.

- 1 In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.6 of A201™-1997.
- 2 In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this agreement of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, Subcontractors or suppliers.

§ 6.1.9 The costs described in Sections 6.1.1 through 6.1.8 shall be included in the Cost of the Work notwithstanding any provision of AIA or A201™-1997 other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.2.

#### § 6.2 COSTS NOT TO BE REIMBURSED

§ 6.2.1 The Cost of the Work shall not include:

- 1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Sections 6.1.2.2 and 6.1.2.3.
- 2 Expenses of the Construction Manager's principal office and offices other than the site office, except as specifically provided in Section 6.1.
- 3 Overhead and general expenses, except as may be expressly included in Section 6.1.
- 4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
- 5 Rental costs of machinery and equipment, except as specifically provided in Section 6.1.5.2.
- 6 Except as provided in Section 6.1.8.2, cost due to the negligence of the Construction Manager or to the failure of the Construction Manager to fulfill a specific responsibility to the Owner set forth in this Agreement.
- 7 Costs incurred in the performance of Preconstruction Phase Services.
- 8 Except as provided in Section 6.1.7.1, any cost not specifically and expressly described in Section 6.1.
- 9 Costs which would cause the Guaranteed Maximum Price to be exceeded.

#### § 6.3 DISCOUNTS, REBATES AND REFUNDS

§ 6.3.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be secured.

§ 6.3.2 Amounts which accrue to the Owner in accordance with the provisions of Section 6.3.1 shall be credited to the Owner as a deduction from the Cost of the Work.

#### § 6.4 ACCOUNTING RECORDS

§ 6.4.1 See Exhibit A for revised Accounting Records requirements.

### ARTICLE 7 CONSTRUCTION PHASE

#### § 7.1 PROGRESS PAYMENTS

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

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

§ 7.1.3 Provided an Application for Payment is received by the Architect not later than the 30<sup>th</sup> day of a month, the Owner shall make payment to the Construction Manager not later than the 30<sup>th</sup> day of the following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than Thirty ( 30 ) days after the Architect receives the Application for Payment.

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager; less (2) that portion of those payments attributable to the Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

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

1. Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.8 of A201™-1997, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
2. Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing.
3. Add the Construction Manager's Fee, less retainage of Five percent ( 5.00% ). The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the two preceding Sections bears to a reasonable estimate of the probable Cost of the Work upon its completion.
4. Subtract the aggregate of previous payments made by the Owner.
5. Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation.
6. Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of A201™-1997.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than Five percent ( 5.00% ). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts.

7.1.8.1 As an alternative means of achieving the 5% retainage described in 7.1.7 and 7.1.8 above, the Construction Manager and the Subcontractors may allocate a portion of their respective contract amounts to a "Final Completion" line item within each firm's schedule of values. The portions of each contract so allocated shall be equal to the 5% retainage stipulated. Billing against any such "final completion" line item in a schedule of values will be allowed only under the same circumstances as otherwise defined in the contract documents for the retention or release of retainage.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data, that the Architect has made exhaustive or continuous on-site inspections or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

#### § 7.2 FINAL PAYMENT

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager when (1) the Contract has been fully performed by the Construction Manager except for the Construction Manager's responsibility to correct nonconforming Work, as provided in Section 12.2.2 of A201™-1997, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Owner's accountants; and (3) a final Certificate for Payment has then been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The amount of the final payment shall be calculated as follows:

- 1 Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price.
- 2 Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of A201™-1997 or other provisions of the Contract Documents.
- 3 Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.

§ 7.2.3 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of A201™-1997. The time periods stated in this Section 7.2 supersede those stated in Section 9.4.1 of A201™-1997.

§ 7.2.4 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without a further decision of the Architect. Unless agreed to otherwise, a demand for mediation or arbitration of the disputed amount shall be made by the Construction Manager within 60 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Owner's

accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.5 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1 and not excluded by Section 6.2 (1) to correct nonconforming Work or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's fee, if any, related thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

#### ARTICLE 8 INSURANCE AND BONDS

##### § 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in Section 11.1 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance shall be as follows:

(Paragraph deleted)

None

§ 8.1.2 Insurance provided will be per the construction Manager's standard policy. The Construction Manager will provide the Owner with a statement of the additional premium cost (if any) associated with other insurance coverage as the Owner may want to consider. If the Owner elects to require the Construction Manager to provide other coverage or limits, then the contract will be adjusted accordingly.

§ 8.1.3

(Paragraph deleted)

§ 8.1.4 Other coverage:

*(If Umbrella Excess Liability coverage is required over the primary insurance or retention, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be attained by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)*

##### § 8.2 INSURANCE REQUIRED OF THE OWNER

During both phases of the Project, the Owner shall purchase and maintain liability and property insurance, including waivers of subrogation, as set forth in Sections 11.2 and 11.4 of A201™-1997. Such insurance shall be written for not less than the following limits, or greater if required by law:

###### § 8.2.1 Property Insurance:

\$10,000 Deductible Per Occurrence



(Paragraph deleted)

#### **§ 8.3 PERFORMANCE BOND AND PAYMENT BOND**

§ 8.3.1 The Construction Manager shall (insert "shall" or "shall not") furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work. The amount of each bond shall be equal to One hundred percent ( 100.00% ) of the Contract Sum.

§ 8.3.2 The Construction Manager shall deliver the required bonds to the Owner after the contract is executed and three days before the commencement of any Work at the Project site. Further, Construction Manager shall deliver a binding commitment for the issuance of such bonds at least two weeks prior to the estimated date for the closing on Project financing. In the event of any early start as identified in paragraph 4.2.1.1 Owner may require Construction Manager to provide such bonds. Owner shall provide Construction Manager with 10 days notice of such requirement and stipulate in such notice the time for providing same, and the amount of coverage required by owner.

#### **ARTICLE 9 MISCELLANEOUS PROVISIONS**

##### **§ 9.1 DISPUTE RESOLUTION**

§ 9.1.1 During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201™-1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

##### **§ 9.2 OTHER PROVISIONS**

§ 9.2.1 Unless otherwise noted, the terms used in this Agreement shall have the same meaning as those in A201™-1997, *General Conditions of the Contract for Construction*.

##### **§ 9.2.2 EXTENT OF CONTRACT**

This Contract, which includes this Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and Construction Manager. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

##### **§ 9.2.3 OWNERSHIP AND USE OF DOCUMENTS**

Article 1.6 of A201™-1997 shall apply to both the Preconstruction and Construction Phases.

##### **§ 9.2.4 GOVERNING LAW**

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

##### **§ 9.2.5 ASSIGNMENT**

The Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of each other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 13.2.2 of A201™-1997, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

#### **ARTICLE 10 TERMINATION OR SUSPENSION**

##### **§ 10.1 TERMINATION PRIOR TO ESTABLISHING GUARANTEED MAXIMUM PRICE**

§ 10.1.1 Prior to execution by both parties of Amendment No. 1 establishing the Guaranteed Maximum Price, the Owner may terminate this Contract at any time without cause, and the Construction Manager may terminate this Contract for any of the reasons described in Section 14.1.1 of A201™-1997.

§ 10.1.2 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 prior to commencement of the Construction Phase, the Construction Manager shall be equitably compensated for

Preconstruction Phase Services performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Section 4.1.1.

§ 10.1.3 If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 after commencement of the Construction Phase, the Construction Manager shall, in addition to the compensation provided in Section 10.1.2, be paid an amount calculated as follows:

1. Take the Cost of the Work incurred by the Construction Manager.
2. Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.
3. Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders.

Subcontracts, purchase orders and rental agreements entered into by the Construction Manager with the Owner's written approval prior to the execution of Amendment No. 1 shall contain provisions permitting assignment to the Owner as described above. If the Owner accepts such assignment, the Owner shall reimburse or indemnify the Construction Manager with respect to all costs arising under the subcontract, purchase order or rental agreement except those which would not have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner elects not to accept the assignment of any subcontract, purchase order or rental agreement which would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager shall terminate such subcontract, purchase order or rental agreement and the Owner shall pay the Construction Manager the costs necessarily incurred by the Construction Manager by reason of such termination.

#### § 10.2 TERMINATION SUBSEQUENT TO ESTABLISHING GUARANTEED MAXIMUM PRICE

Subsequent to execution by both parties of Amendment No. 1, the Contract may be terminated as provided in Article 14 of A201™-1997.

§ 10.2.1 In the event of such termination by the Owner, the amount payable to the Construction Manager pursuant to Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 In the event of such termination by the Construction Manager, the amount to be paid to the Construction Manager under Section 14.1.3 of A201™-1997 shall not exceed the amount the Construction Manager would have been entitled to receive under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, including a reasonable estimate of the Cost of the Work for Work not actually completed.

#### § 10.3 SUSPENSION

The Work may be suspended by the Owner as provided in Article 14 of A201™-1997; in such case, the Guaranteed Maximum Price, if established, shall be increased as provided in Section 14.3.2 of A201™-1997 except that the term "cost of performance of the Contract" in that Section shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1.1 and 5.3.4 of this Agreement.

### ARTICLE 11 OTHER CONDITIONS AND SERVICES

11.1 thru 11.4

See Exhibit A

11.5

It is understood and agreed that the GMP is for the total cost of the work and that cost over-runs from one line item can be offset by cost savings from another line item.

11.6

All personnel listed in Exhibit C as a "Reimbursable as a cost of the work" shall be included in the cost of the work per Article 7.2, subject to the GMP per Article 6.1.2.2.

11.7

The following procedure is agreed to by Owner and or Owner's lender and Title Company in the event of a lien being filed by one of the Construction Manager's Vendors and/or Vendor's Vendor(s): At the Construction Manager's sole discretion either 1. Construction Manager shall make a cash deposit equal to 150% of each lien amount in separate escrow account held by Owner's Title Company on behalf of the Construction Manager or 2. The Construction Manager may provide a lien transfer bond for the amount of the lien. Upon said deposit being made or lien bond being provided by Construction Manager, Owner and or Owner's Lender, and Title Company shall immediately disburse to Construction Manager any monies owed to Construction Manager under the terms of this contract.

11.8

Owner and Construction Manager agree to the following punch list procedure for each phase of the project:

1. Prior to issuance of temporary of Full Certificate of Occupancy by City, Owner and/or Owner's designated representative(s) shall prepare one original interior and exterior punch list.
2. Within 7 calendar days after completion punch list work by Construction Manager, Owner and/or Owner's representative(s) will re-inspect to confirm original punch list items are complete.
3. New items will not be added to the original punch list at any time except for items which are substantiated (i.e. no hot water) and thus were obviously missed during original punch list items.
4. Any item(s) not included in original punch list shall be considered warranty item(s).
5. Warranty items shall not be considered outstanding punch list items and thus shall not be subject to withholding of final payments.

11.9

If a discrepancy occurs within this Agreement and/or between this Agreement and other contract documents, it is understood and agreed that Article 11 of this Agreement, the balance of this Agreement, and Exhibits "A", "B", "C" and "D" (in that order) shall govern.

11.10

If interest costs occur per Paragraph 4.2, the cost shall be reimbursed by issuance of an Owner Change Order.

11.11

Architect shall return all submittals (i.e. shop drawings) to Contractor within 10 working days of date received from Contractor.

11.12

Modification and/or extension of project completion date due to "weather days" shall be as outlined in Exhibit "D" attached hereto.

11.13

The following Exhibits, attached hereto, form part of the Contract Documents:

Exhibit A: Modifications to the AIA/CES

Exhibit B: Supplementary Conditions

Exhibit C: Personnel Billing Rates and Matrix

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User Notes:

(2878450001)

- Exhibit D: Definition of Weather Days
- Exhibit E: Project Scope and Budget Summary
- Exhibit F: Preliminary Divisional Cost Breakdown
- Exhibit G: Pre-Construction Phase Schedule
- Exhibit H: Preliminary Construction Phase Schedule

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

OWNER

*[Signature]*  
 (Signature)  
DAVID SILVER, PRES  
 (Printed name and title)  
April 30, 2004  
 Date

ATTEST

CONSTRUCTION MANAGER

*[Signature]*  
 (Signature)  
PETER WATKINSON, VICE PRESIDENT  
 (Printed name and title)  
April 28, 2004  
 Date

ATTEST

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit A**  
**Additional Provisions/Modifications based on the AIA A121CMC (2003 Edition)**

**5.4 COMMENCEMENT AND COMPLETION**

Add the following paragraphs:

**5.4.1** The date of commencement is the date from which the Contract Time of subparagraph 5.4.2 is measured; it shall be the date of the giving of the Notice to Proceed (the "Commencement Date"). The Owner shall issue the Notice to Proceed within ten calendar days of the last to occur of all of the following (the "Conditions to Commencement"): (i) closing of financing acceptable to Owner, sufficient in an amount to satisfy the Owner's financial obligations hereunder, and (ii) receipt of all permits and approvals necessary to allow commencement and continuation of construction. In no event shall the Construction Manager commence any work on site by placing materials at the site or by conducting other work at the site until a Notice to proceed has been given.

The immediately aforementioned notwithstanding, Construction Manager and Owner acknowledge that prior to receiving a Notice to Proceed the Construction Manager may be required to enter into certain other subcontracts, issue purchase orders, or make similar commitments which, if the Project were not to proceed would result in the incurrence, by Construction Manager of certain costs, financial penalties, or other like or similar expenses. Owner agrees to reimburse Construction Manager all such costs, penalties, or similar expenses, so long as, and only to the extent that Construction Manager has received Owner's written approval prior to the incurrence of such costs, and/or the entering into such subcontracts, authorization of such purchase orders or making such similar commitments. Any activity conducted hereunder shall in no way effect the dates established for substantial completion for each phase as shall be provided for in Amendment No. 1 hereto.

**5.4.2** It is anticipated that the Work is to be completed in phases so as to permit residents of the Project to move in on a phased basis (each of which shall be referred to as a "Phase").

**1** Substantial Completion of each Phase is to occur on or before an agreed date. The agreed dates for each Phase shall be established by Amendment No. 1 to this Agreement at the time the GMP is established, which shall be an agreed upon number of calendar days from the Commencement Date. Once established each of these days shall be measured from the Commencement Date and may only be extended in accordance with the Contract Documents.

**2** Each date by which Substantial Completion of a Phase must occur pursuant to the Contract Documents shall be referred to as a "Phase Completion Deadline". The period of time from the Commencement Date to the applicable Phase Completion Deadline shall be referred to as the "Phase Contract Time".

**3** The Owner and the Construction Manager acknowledge that if the Construction Manager fails to achieve substantial completion of a Phase before the applicable Phase Completion Deadline, the Owner will suffer damages which are difficult to ascertain. However, the Owner and the Construction Manager agree that the degree to which the Owner will be damaged by the Construction Manager's failure to substantially complete a particular Phase of the Project within the Phase Contract Time generally will decrease as the overall Project nears Substantial Completion. Accordingly, the Construction Manager agrees to pay the Owner as liquidated damages with respect to each particular Phase, and not as a penalty, for each calendar day that passes after the Phase Completion Deadline has expired for the particular Phase of the Project, until the date that the Construction Manager achieves Substantial Completion of that particular Phase, an amount equal to the portion of the GMP allocable to that particular Phase times the construction financing daily interest for Project (the "Stipulated Damage

Amount"). Any liquidated damages payable by the Construction Manager as to a particular Phase shall then be determined by multiplying the Stipulated Damage amount by each day of delay. The Stipulated Damage Amounts for each phase shall be established by an amendment hereto at the closing for financing on the Project.

4 For purposes of determining that portion of the GMP allocable to a particular Phase, the following method of calculating same will be utilized:

(i) Reasonably determine that amount of the total GMP which generally applies to construction of the Project (as a whole) by adding the sum of the following amounts contained within the GMP: (Specific amounts to be determined when GMP is established by Amendment to the Contract.)

|                            |          |
|----------------------------|----------|
| Site Development           | \$ _____ |
| General Conditions         | \$ _____ |
| Construction Manager's Fee | \$ _____ |
| Other                      | \$ _____ |

|       |          |
|-------|----------|
| Total | \$ _____ |
|-------|----------|

(ii) Subtract total in (i) above from the total GMP to determine the "remaining GMP".

(iii) Utilize the approved Schedule of Values and construction costing information to calculate the percentage of the cost of a particular Phase to the "remaining GMP" amount as determined in (ii) above.

(iv) Apply the percentage from (iii) above for the particular Phase(s) to the GMP.

5 The Stipulated Damage amount for each Phase is intended to be cumulative of the other Phases. Accordingly, if the Phase Completion Deadline for more than one (1) Phase shall have elapsed without the applicable Phases having been substantially completed, then the Stipulated Damage Amount for each Phase not so substantially complete shall be due and owing by the Construction Manager to the Owner. The Owner may collect the Stipulated Damage Amounts by withholding them from payments due the Construction Manager or by separate demand. The Stipulated Damage Amounts provided herein shall be in lieu of all other claims, costs, losses, damages and/or expenses that the Owner might otherwise have against the Construction Manager by reason of its failure to achieve Substantial Completion before the relevant Phase completion Deadline, whether arising from contract or tort, or actual, direct, indirect or consequential damages, and the Owner hereby releases the Construction Manager therefrom.

.6

1 The Construction Manager agrees that final completion of each Phase of the Work shall occur as soon as possible after Substantial Completion of the Phase, but no later than thirty (30) calendar days after the date on which Substantial Completion of that Phase has occurred, as evidenced by the Architect's Certificate of Substantial Completion. Final payment as to a Phase shall be due upon final completion of such Phase.

2 Owner acknowledges that there may be certain items which may be on order that, through no fault of the Construction Manager, may not arrive and/or otherwise be available for incorporation into the Work within said thirty (30) day period. To the extent that Owner, in Owner's sole discretion, accepts a Phase as having achieved final completion, even though such items remain outstanding, Owner may, (a) acknowledge such acceptance, and (b) withhold up to one and one half (1.5) times the total cost (as determined by the Construction Manager) for each Phase, or \$5000 for each Phase (whichever is greater), of such Work which remains incomplete or unincorporated.

3 Further, it is the intent that outstanding items described in 5.4.2.6.2 are to be secured and installed as quickly as possible -- preferably within five (5) days after the Construction Manager receives those items. It is acknowledged that some items may be more significant than others in terms of the operation or marketability of the project. It is also acknowledged that unless determined otherwise, the costs incurred by the Construction Manager for procuring, expediting and installing the items covered by 5.4.2.6.2 are reimbursable costs as defined under Article 6 of the Contract. Accordingly, it may be less costly for the Owner, and less disruptive to the operation of the facility, to have several items accumulated and installed at one time rather than have each item installed as it is delivered. Therefore, for each item outstanding as of Substantial Completion, within five (5) days the Construction Manager shall provide the Owner, in writing, with a proposed plan indicating the expected delivery date and proposed installation date for each item. The Owner and Construction Manager will jointly review (and revise as needed) said plan and reach an agreement on the plan. The Construction Manager will report to the Owner on a weekly basis of the status of the items remaining to be installed, and immediately notify the Owner of any change in delivery date or installation date due to unforeseen procurement or delivery problems. ~~If, after receiving an outstanding item the Construction Manager fails to commence the Work within five (5) days after agreed upon commencement date, or subsequently fails to complete the Work in accordance with the agreed upon schedule, the Owner may exercise its right to carry out the work as provided in section 2.4 of the A201 General Conditions~~

4 The provision stated above for withholding 1.5 times the cost of items outstanding at the time of Substantial Completion does not apply to any Upgrade Options initiated by the Owner subsequent to the decision date established by the Construction Manager for each upgrade option proposed for a given residential unit.

7 Except for the portions of the project which the Owner has requested completion and occupancy prior to the completion of the Commons Areas in the El Centro building, it is the intent that when developing the Phase Completion Deadlines described in 5.4.2.1 and 5.4.2.2 above, for the purposes of determining what, if any, stipulated damage amount may be owed by Construction Manager, no phase shall be deemed to have achieved Substantial Completion until such time as (1) the common areas (as defined in Amendment No. 1) portion of the Project shall have achieved Substantial Completion or (2) the Owner agrees to deem the phase Substantially Complete or (3) the Owner takes beneficial occupancy of all or part of the phase. Further and accordingly, when establishing the completion dates for each phase as provided for herein by amendment hereto, such amendment shall also provide that no phase shall be deemed complete for the purposes hereof unless (1) and/or until the common area portion of the Project shall have attained substantial completion, (2) the Owner has agreed to deem the phase Substantially Complete, or (3) the Owner takes beneficial occupancy of all or part of the phase.

#### 8.4 ACCOUNTING RECORDS

6.4.1 The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to the Owner and Owner's lender. The Owner and the Owner's accountants and the lender and lender's accountant or consultants shall be afforded reasonable access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement and the Project, (collectively "the records") and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law. All Records shall be maintained in accordance with generally accepted accounting principles, consistently applied. There shall be an "open book" policy, in effect at all times with regard to all Records relative to the project

maintained by either the Construction Manager or the Owner, or anyone on their behalf, and each party shall have full and complete access to said Records maintained by the other at all reasonable times. The Construction Manager shall require all Subcontractors and Sub-Subcontractors retained on a cost-plus basis to retain Records and permit the same access by Owner as is required of the Construction Manager under this Article 6.4.

6.4.1.1 If the Owner, Owner's accountants, Lender or Lender's accountants elect to perform an audit of "the records" maintained by Construction Manager, said audit shall be performed within six (6) months of the Final Completion of the project. This stipulation does not affect the Construction Manager's obligation to maintain "the records" for the time period noted in 6.4.1.

6.4.2 If, at any time during construction, any inspection by the Owner or the Lender of the Construction Manager's Records or any other data relating to the contract documents reveals an overcharge or undercharge by the Construction Manager as confirmed by an independent auditor, the next Application for Payment shall be appropriately adjusted by the amount of such overcharge or undercharge and related fee.

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## **ARTICLE 7 CONSTRUCTION PHASE**

### **7.1 PROGRESS PAYMENTS**

Add the following:

7.1.11 To the extent of payments received by the Construction Manager from the Owner, the Construction Manager warrants the real property on which the Project is located will remain free of any legitimate and proper claims of lien arising from the Work performed by or through the Construction Manager. If any such liens are properly recorded, the Construction Manager shall have fifteen (15) business days from its receipt of written notice by the Owner or Owner's agent (including Title company) of such recording within which to discharge or secure by cash deposit or by construction lien transfer bond any such claims of lien. If the Construction Manager fails to discharge or otherwise secure such claim of lien within said time period, the Owner shall be entitled to satisfy the lien or take whatever action it deems appropriate to remove the lien from its property. All reasonable expenses and costs, including reasonable attorney's fees, incurred by the Owner after the abovementioned fifteen (15) day period to effect the discharge, securing and/or removal of any such claims of lien shall be promptly reimbursed to the Owner by the Construction Manager.

7.1.12 Concurrently with each Application for Payment, Construction Manager will deliver to Owner lien waivers (which may be conditioned upon payment) waiving all lien rights in respect of the Project, executed by Construction Manager, and executed by Subcontractors and suppliers covering amounts paid on their account or to be paid with funds received from such Application for Payment. All lien waivers shall be in form and substance satisfactory to Owner and the Owners Lender(s). Additionally, the Construction Manager shall provide further evidence regarding application of each progress payment to payment of all Subcontractors and suppliers providing services or material in respect of the Project, and shall comply with such other reasonable requirements as the Owners Lender(s) may impose with respect to obtaining advances of funds be applied to each Application for Payment."



**ARTICLE 9**  
**MISCELLANEOUS PROVISIONS**

**9.1 DISPUTE RESOLUTION**

Add the following the following subparagraphs to 9.1.1:

- .1 Claims between the parties to this Agreement shall be resolved as set forth below. At all times, the parties shall approach the dispute resolution process in good faith.
- .2 In the event of a Claim between the parties, the parties shall promptly meet in good faith to resolve the Claim informally before invoking the dispute resolution procedures outlined elsewhere in the Contract Documents, including the A201 General Conditions and Supplementary Conditions, and below. If the parties are not able to quickly resolve the claim, either party may request participation by the Architect. Both parties shall promptly submit a written summary of its position to the Architect. Upon receipt of both summaries, the Architect shall immediately convene a formal meeting with the parties to further discuss the Claim. If the Claim is not resolved within three business days after the commencement of such meeting, either party may then commence the dispute resolution process defined in the Contract Documents.
- .3 If the informal dispute resolution efforts outlined in 9.1.1.2 are not successful, then the dispute resolution procedures outlined in the balance of the Contract Documents. Any mediation conducted pursuant to this Paragraph 9.1 shall be held in Santa Fe, unless the parties mutually agree otherwise.
- .4 Intentionally omitted
- .5 Intentionally omitted
- .6 Consent to arbitration involving an additional person or entity shall not constitute agreement to arbitration of a dispute not described in such consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.
- .7 Intentionally omitted
- .8 The arbitration shall be held in Santa Fe.
- .9 Notwithstanding anything herein to the contrary, if (1) the Claims involve a proposed, net aggregate payment or reimbursement in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose, an "interested person or entity" means any person or entity if (a) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (b) the interested person or entity is so situated that the disposition of the claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law.

**ARTICLE 11**  
**OTHER CONDITIONS AND SERVICES**

11.1 The Construction Manager recognizes that any Lender involved in financing the Project will have requirements pertaining to this Agreement. The Construction Manager agrees to cooperate with and assist the Owner and the Architect in amending and supplementing the Contract Documents to conform to reasonable and customary requirements of any Lender (to the extent such requirements are acceptable to the Owner). However, the Construction Manager shall not be responsible for actually preparing amendments or supplements to the Contract Documents for any reason at any time. Such amendments or supplements may include, without limitation, provisions:

- A. Naming any Lender as an additional insured on the Construction Manager's bonds and insurance policies and providing notice to any Lender of termination, cancellation or material modification of such policies.
- B. ~~Requiring approval of Applications for Payment by a consultant designated by a Lender prior to payment.~~
- C. Agreeing not to amend Contract Documents without the reasonable and timely consent of the Lender.
- D. Requiring approval of Change Orders by the Lender, provide that Lender approval will be provided on a timely basis and the Owner will use its best efforts to secure such timely approval.
- E. Requiring notice of the Owner's default to the Lender, with a Lender having the right to cure, and requiring continued performance by the Construction Manager, provided that the Lender assumes all contract obligations of the Owner.
- F. Subordinating any lien rights of the Construction Manager to rights of the Lender.
- G. Requiring copies of all written notices to be sent to the Lender.
- H. Granting the Lender the right to inspect the work and to examine records pertaining thereto.
- I. Recognizing the pledge of the Owner's rights under Contract Documents to the Lender.
- J. Requiring the Construction Manager to acknowledge, on the Lender's request, whether or not the Owner is in default of its obligations under the Contract.
- K. Requiring the Construction Manager to assist the Owner in preparing and submitting reports and information concerning the Work as may be reasonably required by the Lender.

11.2 Nothing contained in Paragraph 11.2 or Paragraph 11.3 is intended to derogate from any other rights to terminate this Contract that may be granted the Construction Manager elsewhere in this Contract, including, but not limited to, the provisions of Article 2 and Article 14 of the General Conditions and Article 10 of this Agreement.

11.3 The Construction Manager may perform all or any part of the Work with its own forces, or through an Affiliate, provided that (1) the Construction Manager secures at least two competitive bids with respect to the work Construction Manager intends to perform (2) the Owner consents thereto in writing, which consent shall not be unreasonably withheld, after full disclosure by the Construction Manager to the Owner of the affiliation or relationship of the Affiliate to the Construction Manager and (3) any Work performed by an Affiliate shall be covered in a separate agreement between the Construction Manager

and the Affiliate, which shall satisfy all of the requirements for subcontracts as set forth in Paragraph 5.3 of the General Conditions and which shall be approved by the Owner in writing.

11.4 Any amounts payable hereunder which are not paid when due shall thereafter accrue interest at Wall Street Journal "prime" plus one percent (1%) per annum or at the highest rate allowed under the law of the state where the Project is located, whichever is less.

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11.4

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit B**  
**Supplementary Conditions to the AIA A201 General Conditions (1997 Edition)**

1. The following Supplementary Conditions shall apply to that certain Standard Form of Agreement Between Owner and Construction Manager (the "Agreement") dated
2. For purposes of these Supplementary Conditions, capitalized terms shall have the meaning given to them in the Contract Documents (as such term is defined in Article 1 of the Agreement), unless otherwise defined in these Supplementary Conditions.

~~3. The following paragraphs supplement, modify, or amend that certain Contract Document entitled "General Conditions of the Contract for Construction," AIA Document A201, Fifteenth Edition, 1997, Articles 1 through 14 inclusive (the "General Conditions"). Where only a portion of any provision of the General Conditions is supplemented, modified, or amended, the remaining portions of that provision shall remain unaltered and in effect. In the event of any inconsistency between the General Conditions and these Supplementary Conditions, the terms of these Supplementary Conditions shall apply. Hereinafter, all references to the General Conditions shall mean the General Conditions as amended by these Supplementary Conditions.~~

**A. INTENTIONALLY OMITTED**

- B. PARAGRAPH 1.2.4 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.4 Where no explicit quality or standards for materials or workmanship are established for Work, such Work is to be of good quality for the intended use and consistent with quality of the surrounding Work and of the construction of the Project generally.

- C. PARAGRAPH 1.2.5 "Correlation and Intent of the Contract Documents" is hereby added as follows:**

1.2.5 All indications or notations which apply to one of a number of similar situations, materials or processes shall be deemed to apply to all such situations, materials or processes wherever they appear in the Work, except where a contrary result is clearly indicated by the Contract Documents.

**D. INTENTIONALLY OMITTED**

- E. SUBPARAGRAPH 1.5.1, add at the end of the first sentence: ", unless otherwise identified and incorporated by reference in Agreement."**

- F. SUBPARAGRAPH 2.2.8 Modify Subparagraph 2.2.5 as follows:**

"In addition to the sets the Construction Manager used for bidding, the Owner will furnish a to be agreed upon number of sets of black and white prints of the Drawings and copies of the Project Manual free of charge for execution of the Work. Additional sets may be purchased from the Office of the Architect."

- G. SUBPARAGRAPH 3.2.3, delete the second sentence, and add at the end: "If the Construction Manager performs Work knowing it involves such error, inconsistency, omission or difference without such notice to the Architect, the Construction Manager shall assume appropriate responsibility for such Work and shall bear the costs attributed to correction."
- H. PARAGRAPH 3.3 "SUPERVISION AND CONSTRUCTION PROCEDURES" is hereby supplemented by the addition of the following sub-paragraphs:
- 3.3.4. The Construction Manager shall carefully check its own work and that of Subcontractors as the Work is being performed. The Construction Manager shall ensure that incorrect or faulty Work is corrected as soon as possible but in any event in a timely manner so as not to impact the project schedule.
- 3.3.5. During the finishing stages of the project, the Construction Manager shall make frequent inspections of the Work in the presence of the Architect or the Owners Representative and the applicable Subcontractor(s) involved, if any, and the Architect shall identify incorrect and faulty Work. The Construction Manager shall ensure that incorrect or faulty Work is corrected in accordance with 3.3.4.
- I. PARAGRAPH 3.4 "LABOR AND MATERIALS" is hereby supplemented by addition of the following Subparagraphs 3.4.3 and 3.4.4:
- 3.4.4. Should the Owner make reasonable objection, based upon qualifications, fitness, behavior or temperament, to the presence of any personnel of Construction Manager or any subcontractor, such person shall not perform services on the Project site, or otherwise in connection with the Project, without written consent of the Owner.
- 3.4.5. The Construction Manager shall not change or replace the assigned Project Manager or Superintendent without prior written consent by the Owner.
- J. SUBPARAGRAPH 3.5.1, Add to the end: "Construction Manager's warranties shall commence upon Substantial Completion of the Work for each Phase and continue for a period of one year thereafter."
- K. PARAGRAPH 3.5 "WARRANTY" is hereby supplemented by the addition of the following sub-paragraphs:
- 3.5.2. In the event of a claim by the Owner against the Construction Manager under Paragraph 3.5.1. of these General Conditions (or under any other express written warranty made by the Construction Manager) for any item of Work performed under the Contract Documents, the Owner shall give notice (a "Warranty Notice") of the claim to the Architect and the Construction Manager and thereafter, the Architect or Architects authorized representative and the Construction Manager shall inspect the item(s) of Work in question. If following its inspection the Architect determines that any such item is included within the Construction Manager's warranty under the Contract Documents, then:
- (a) Upon formal notification from the Architect, the Construction Manager shall have thirty (30) days, notwithstanding any other time period specified in the Contract Documents, to either (1) complete the cure for the item or, for a Longer Cure Item, commence the cure and thereafter diligently proceed to complete the cure, or (2) if the Construction Manager disputes the warranty coverage of the item, commence the

dispute resolution procedures described in Section 4.3 of the General Conditions.

- (b) If upon the expiration of the thirty (30) day period the Construction Manager has failed to satisfy the provisions of either clause (a) (1) or clause (a) (2) immediately above, then the Owner shall have the right to engage a third party Construction Manager of the Owner's sole selection to cure or complete the cure of the warranty item at the Construction Manager's expense.
- (c) If the Construction Manager fails to cure an item within the required time and if the item is finally determined by arbitration or, when permitted, judicial proceedings to be covered by any Construction Manager's warranty under the Contract Documents, then the Construction Manager shall be liable for all expenses incurred by the Owner in enforcing its warranty claim including legal and Architectural fees and expenses, an administrative charge of a percentage equal to Construction Manager's fee times the cost to cure the warranty item to cover the Owner's administrative costs to enforce the warranty claim, and, when a third party Construction Manager has been engaged by the Owner under this Paragraph 3.5.2, the costs and expenses of the third party Construction Manager.

**L. INTENTIONALLY OMITTED**

**M. ARTICLE 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES is supplemented by the following replacement language for Subparagraph 3.12.4**

3.12.4 Shop Drawings, Product Data, Samples and similar submittals which are required by the Contract Documents to be submitted for Architect's review shall become Contract Documents upon Architect's review and approval. Submittals which are not required by the Contract Documents to be submitted for Architect's review are not Contract Documents.

**N. ARTICLE 3.16 "ACCESS TO WORK" is hereby supplemented by addition of the following Subparagraph:**

"3.16.2 Representatives of the State Agencies shall have access at all reasonable times to the Work wherever it is in preparation or progress, and the Construction Manager shall provide proper facilities for such access and inspection."

**O. PARAGRAPH 4.2.4 "COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION" is hereby supplemented by the additions of the following subparagraphs: Nothing contained herein shall prohibit the Owner's Representative from communicating directly with the Construction Manager for the purpose of receiving information and/or providing the Construction Manager with clarification as to Owner's position with regard to any matters affecting or concerning the Work.**

**4.2.4.1 The following definitions shall apply to construction communications:**

**4.2.4.1.1 Contract Document Clarifications:** An answer from the Architect, in response to an inquiry from the Construction Manager, intended to make some

requirement(s) of the Drawings or plans clearly understood. Drawing/plan clarifications may be sketches, drawings, or in a narrative form and are not intended to change any requirements of the Contract Documents. Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.2 Non-Conformance Notice:** A Notice issued by the Architect documenting that the Work or some portion thereof has not been performed in accordance with the requirements of the Contract Documents. Payment shall not be made on any portion of the Work for which a Non-Conformance Notice has been issued and the Work not corrected to the satisfaction of the Architect.

Upon receipt of a Non-Conformance Notice the Construction Manager shall provide a written Response to the Non-Conformance Notice within five (5) working days after receipt of the Notice. The Construction Manager's response shall state either (a) the basis of Construction Manager's determination that the Work was performed in accordance with the Contract Documents or (b) the corrective action Construction Manager intends to take, at its sole expense, to correct the non-conforming work.

If the Construction Manager disputes issuance of the Notice the Architect has five (5) working days in which to respond by either (a) withdrawing the Notice of Non-Conformance or (b) directing the Construction Manager to correct the Work.

If directed to correct the Work, the Construction Manager shall do so within five (5) working days after receipt of such direction from the Architect, or such other time as may be agreed to with the Architect, without loss of rights for claim recovery or dispute resolution as may be available by the Contract.

**4.2.4.1.3 Requests for Information:** A written request from the Construction Manager or one of its subcontractors, to the Architect, seeking an interpretation or a clarification of some requirement of the Contract Documents. The Construction Manager shall clearly and concisely set forth the issue for which it seeks clarification or interpretation and why a response is needed from the Architect.

Responses to Construction Manager inquiries shall be as outlined in the Article "Requests For Information" of these General Conditions.

**4.2.4.1.4 Substitution/Or-Equal Submittals:** A written request from the Construction Manager to substitute a material, article, device, product, fixture, form, type of construction, or process called for in the Contract Documents with another item that shall substantially equal in all respects to that so indicated or supplied. Each such request shall specifically set forth any manner in which the proposed change does not conform to the Contract Documents and Construction Manager (and any subcontractor initiating the request) warrants that the proposed substitute conforms in all respects with the contract documents except as specifically identified as non-conforming in the request.

**4.2.4.1.5 Submittals/Shop Drawings:** When required by any technical specification included in these Contract Documents, the Construction Manager shall transmit to the Architect technical submittals, shop drawings, or samples, including supporting catalog cuts, manufacturer's literature, sketches or drawings, calculations, and other pertinent, in sufficient detail to enable the Architect to review the information and determine that the Construction Manager clearly understands the requirements of the Contract Documents. Construction Manager (and any subcontractor initiating a submittal) warrants that all Work and materials depicted in technical submittals, shop drawings and samples shall conform in all respects to the requirements of the Contract Documents, except as otherwise specifically identified as non-conforming.

4.2.4.1.6 Schedule Submittals: When required by the Construction Schedule Specification of these Contract Documents, the Construction Manager shall submit required schedules, schedule updates, schedule revisions, time impact analysis, etc. for review.

P. INTENTIONALLY OMITTED

Q. SUBPARAGRAPH 4.3.7.2 is hereby revised (and paragraphs 4.3.7.3 and 4.3.7.4 are added) to read as follows:

4.3.7.2 Weather days: Construction Manager confirms that the Contract Time, Phased Contract Time and the agreed upon dates for same as set forth in Amendment No. 1 to this Agreement are reasonable periods to perform The Work. ~~Construction Manager has included in the work schedule ordinary and normally anticipated lost days due to adverse weather ("weather days") and therefore Construction Manager shall not be entitled to an extension of the Contract Time or Phased Contract Time as a result of weather conditions normally experienced in the greater Santa Fe area unless (1) the Construction Manager is unable to make up for the weather delay by scheduling work for a Saturday in accordance with 4.3.7.2 below, and (2) the number of weather days lost (and not made up by Saturday work) in that calendar month exceeds the number of weather days provided for in the Contract Time.~~

4.3.7.3 The Construction Manager's work schedule is based upon a regular five-day work week per calendar week. It is mutually agreed that in the event of a weather day the Construction Manager, before requesting a time extension the Construction Manager will first try to make up that weather day on the next Saturday available during the following 30 calendar days. A Saturday will be considered to be "available" only if all of the following conditions are met: (1) no work has already been scheduled for that day that would interfere with the work being rescheduled, (2) it is not a national holiday, (3) working on that Saturday is allowed by local ordinance, and (4) materials and workforce equivalent to what was scheduled for the lost weekday are available on that Saturday. The Construction Manager will only be required to utilize a Saturday if either (a) the Construction Manager incurs no additional cost in rescheduling work for that Saturday, or (b) the Owner agrees to compensate the Construction Manager (by Change Order) for any additional costs (such as for labor rate differential) the Construction Manager may incur.

4.3.7.4 The requirement stated above for the Construction Manager to utilize a Saturday to make up for a weather delay only applies the number of weather days included in each calendar month as indicated in the following list of Anticipated Lost Days. For every weather day beyond the number included below, the Construction Manager shall be entitled to an equivalent number of days extension to the Contract Time. The Construction Manager may (at the CM's sole discretion) attempt to mitigate the delay utilizing additional Saturdays as outlined in 4.3.7.3, but has no obligation to do so.

For the purposes of this Paragraph the table provided below setting forth the norms/anticipated lost weather days shall be utilized by the parties in determining lost weather days:



| <u>Month</u> | <u>Anticipated Lost Days<br/>Due to Adverse Weather</u> |
|--------------|---------------------------------------------------------|
| January      | 1                                                       |
| February     | 1                                                       |
| March        | 0                                                       |
| April        | 1                                                       |
| May          | 0                                                       |
| June         | 0                                                       |
| July         | 1                                                       |
| August       | 1                                                       |
| September    | 2                                                       |
| October      | 2                                                       |
| November     | 1                                                       |
| December     | 0                                                       |

See the Exhibit D "Weather Delays" - attached to the Contract.

R. INTENTIONALLY OMITTED

S. SUBPARAGRAPH 4.6.8, add as new subparagraph:

"4.6.8 Limitations of Arbitration. Notwithstanding anything in the Contract Documents to the contrary, if (1) the Claims involve a proposed, net aggregate payment to owner or Construction Manager in an amount greater than \$100,000 or (2) the Claims involve an interested person or entity (including the Architect) who has not consented to be joined in the arbitration, then arbitration shall apply only if both parties consent to arbitration. For this purpose an "interested person or entity" means any person or entity if (3) in such interested person or entity's absence, complete relief cannot be accorded among those already parties, or (4) the interested person or entity is so situated that the disposition of the Claim without the joinder of such interested person or entity may leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. If both parties do not consent to arbitration for such Claims as described herein, then all requirements, conditions, and conditions precedent pertaining to arbitration shall be deemed appropriately adjusted to permit either party to pursue such Claims as otherwise permitted by the Contract Documents or by law."

T. SUBPARAGRAPH 5.2.1, change "promptly" to "within 10 days" in lines 5 and 7.

U. PARAGRAPH 7.3 "CONSTRUCTION CHANGE DIRECTIVES"

Supparagraph 7.3.3.3 is hereby changed to read as follows:

7.3.3.3 The following fees apply to Changes to the Work:

7.3.3.3.1 INTENTIONALLY OMITTED

7.3.3.3.2 The same markup applied by the subcontractor in the subcontractors base subcontract, which shall be defined in said subcontract and subject to Owner's approval, to the cost of work performed by any subcontractor.

V. INTENTIONALLY OMITTED

W. INTENTIONALLY OMITTED

X. PARAGRAPH 9.8.1. of the General Conditions is hereby deleted in its entirety and the following is substituted in lieu thereof:

9.8.1 "Substantial Completion" of the Project shall be deemed to occur when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use and, in addition, all requirements of the Contract Documents for Substantial Completion, including the following conditions, have been fulfilled as follows:

a. A Temporary of Final Certificate of Occupancy has been issued and all construction related approvals, licenses and requirements have been obtained or satisfied for the Project such that the Project may be operated for its intended use.

b. INTENTIONALLY OMITTED

Y. PARAGRAPH 9.8.2. of the General Conditions is hereby deleted in its entirety and the following Paragraphs 9.8.2.1. through 9.8.2.6. are substituted in lieu thereof:

9.8.2.1. When the Construction Manager considers that the Work, or portion thereof which the Owner agrees to accept separately, is substantially complete, the Construction Manager shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Construction Manager shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents. Following receipt of the Construction Manager's list, the Architect will make an inspection (the "Initial Punch List Inspection") to determine whether the Work or designated portion thereof is Substantially Complete. Upon completion of its Initial Punch List Inspection, the Architect shall prepare and submit to the Construction Manager and the Owner the Architect's list (the "Punch List") of items to be completed or corrected. For the items on the Punch List, the Architect shall specify:

- a. a date (a "Punch Item Date") by which such items shall be completed, which Punch Item Date shall be no more than forty-five (45) days from the date of the Punch List unless the Architect determines that reasonable cause exists for a later completion date; and
- b. the cost to complete or correct the items as reasonably determined by the Architect.

The Architect shall expressly state on the Punch List what the Construction Manager must do to achieve Substantial Completion under Paragraph 9.8.1 of the General. If as a result of the Initial Punch List Inspection the Architect determines that Substantial Completion has occurred, the Architect shall prepare a Certificate of Substantial Completion pursuant to Paragraph 9.8.2.6 below.

9.8.2.2 If the Construction Manager has not given notice that the Work is substantially complete and requested inspection thereof on or before the date for Substantial Completion set by the parties in the Contract Documents, then the Owner may request the Architect to make an Initial Punch List Inspection of the Work to (x) prepare the Punch List pursuant to the provisions of Paragraph 9.8.2.1. above and (y) determine if Substantial Completion has occurred.

9.8.2.3. Upon the request of the Construction Manager prior to the expiration of the relevant Punch Item Date(s) and for good cause shown, the Architect may extend any Punch Item Date(s) for a reasonable period. Following receipt of the Punch List and the Construction Manager's compliance with the requirements of Paragraph 9.8.1. above, the Construction Manager may submit a request for another inspection by the Architect, if necessary, to determine whether Substantial Completion of the Work has been achieved.

9.8.2.4. If the Construction Manager fails to satisfactorily complete any item(s) on the Punch List by the applicable Punch Item Date(s), then the Owner has the right to take over the work in accordance with Section 2.4 of the General Conditions.

9.8.2.5. When the requirements of Paragraph 9.8.1. above have been met and upon the request of either the Owner or the Construction Manager, the Architect shall prepare a Certificate of Substantial Completion, in the form set out in Paragraph 9.8.3 below, which shall establish the date of Substantial Completion and shall establish responsibilities of the Owner and the Construction Manager for security, maintenance, heat, utilities, damage to the Work, and insurance. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise specifically stated in the Contract Documents or in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Construction Manager for their written acceptance of responsibilities assigned to them in such certificate.

**Z. INTENTIONALLY OMITTED**

**AA.** In addition to the provisions of Paragraph 9.10 Final Completion shall not have been deemed to have occurred until the date upon which all of the following have occurred:

**a. INTENTIONALLY OMITTED**

**b.** Delivery of conditional or unconditional lien waivers from each person who performed work at or provide or fabricated materials in connection with the Work (including all subcontracts executed in connection therewith), other than from those persons whose claims are being contested by Construction Manager in good faith and for which Construction Manager has provided to Owner a bond or security in an amount reasonably acceptable to Owner, and

**c.** Issuance and obtaining of a final, unconditional certificate of occupancy and all construction-related approvals, licenses, and requirements for the Project enabling it to be occupied and operated for its intended use.

**BB.** SUBPARAGRAPH 9.10.4.1, after "Claims" add: "previously made in writing and identified by Owner as unsettled at the time of final payment."

**CC.** Paragraph 10.1.1 add the following: "Construction Manager shall prepare and submit to Owner for Owner's approval a comprehensive safety program. Further, Construction Manager shall provide written verification and certification in a form satisfactory to the

Owner, that all subcontractors have familiarized themselves with the safety program and agreed to abide by said program and training regimen thereunder.

- DD. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." In the first line of Subparagraph 11.1.1, following the work "companies," insert the following:

" , acceptable to the Owner,."

- EE. PARAGRAPH 11.1 "CONSTRUCTION MANAGER'S LIABILITY INSURANCE." Add the following to subparagraph 11.1.3:

"Certificates called for herein shall be furnished in duplicate and shall specifically set forth evidence of all coverage required by 11.1.2 and the Construction Manager shall furnish to the Architect copies of all endorsements that are subsequently issued amending coverage or limits."

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- FF. SUBPARAGRAPH 13.4.3, add as a new subparagraph:

"In the event of any litigation between the parties, the prevailing party shall be entitled to reimbursements for all reasonable attorneys' fees, expert fees, court costs, and all other third-party costs of the litigation incurred by the prevailing party to the extent allowed by law."

- GG. PARAGRAPH 13.5 "TESTS AND INSPECTIONS" is hereby supplemented by the addition of the following subparagraph:

"13.5.7 When work has been installed contrary to any Contract requirements and the Construction Manager requests the privilege of testing in lieu of removal, such testing shall be at the Construction Manager's expense."

- HH. INTENTIONALLY OMITTED

- II. Add the following new Article:

#### ARTICLE 15: REQUESTS FOR INFORMATION

15.1.1 In the event that the Construction Manager or its subcontractor, at any tier, determines that some portion of the Drawings, Specifications, or other Contract Documents requires clarification or interpretation by the Architect, the Construction Manager shall submit a Request for Information in writing to the Architect. Requests for Information may only be submitted by the Construction Manager and shall be only submitted on the Request for Information Forms provided by the Architect. The Construction Manager shall clearly and concisely set forth the issue for which clarification and interpretation is sought and why a response is needed from the Architect. If the Request for Information is being used to request confirmation of an interpretation or understanding of a requirement, the Construction Manager shall set forth that interpretation or understanding of the requirement along with reasons why such an understanding was reached.

15.1.2 The Architect will review all Requests for Information to determine whether they are Requests for Information within the meaning of this term. If the Architect determines

that the document is not a Request for Information, it will be returned to the Construction Manager, unreviewed as to content, for resubmittal on the proper form and in the proper manner. In either case, the Architect must reply to RFI in writing within the time requested by the Construction Manager, or three (3) working days, whichever is earlier.

15.1.3 Responses from the Architect are not intended to change any requirement of the Contract Documents. In the event the Construction Manager believes that a response to a Request for Information will cause a change to the requirements of the Contract Document, the Construction Manager shall immediately give written notice to the Architect in accordance with Section 4 of the General Conditions stating that the Construction Manager considers the response to be a change in the scope of work or a change to the project schedule..

**END OF SUPPLEMENTARY CONDITIONS**

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**RainbowVision Santa Fe/Wels Contract Agreement  
Exhibit "C"**

**Weather Delays**

1. A "Work Day" is defined as Monday thru Friday, 7:30 am- 4:00 pm.
2. The occurrence of one or more of the following will constitute a weather delay as indicated:
  - a. 0.25" of rain during the workday constitutes one lost workday
  - b. 2.0" of snow during the workday constitutes one lost workday
  - c. 12" of snow in a 24-hour period constitutes two lost workdays.
  - d. Temperature of 5 degrees below zero (Fahrenheit) constitutes one lost workday.
  - e. Any drying time required for soil stabilization (as directed by the geotechnical engineer) due to rain or snow will constitute lost work day(s).
3. Weather days will be included in the final schedule approved as part of the GMP proposal to be incorporated into the contract by amendment. The number of weather days included will be in accordance with Section 3.P of Exhibit B. Adjustments to the contract completion dates due to adverse weather will be made in accordance with Section 3.P of Exhibit B.

**RainbowVision Santa Fe/West Contract Agreement  
Exhibit "D"  
Personnel Billing Rates**

| <u>Position</u>                               | <u>Reimbursable<br/>as a Cost of<br/>the Work<br/>(w/in GMP)</u> | <u>Included<br/>in Fee</u> | <u>Notes</u> | <u>Expected<br/>to be<br/>Full or Part<br/>Time</u> | <u>Billing<br/>Rate<br/>(\$/hr)</u> |
|-----------------------------------------------|------------------------------------------------------------------|----------------------------|--------------|-----------------------------------------------------|-------------------------------------|
| <b><u>Field Staff Stationed on Site</u></b>   |                                                                  |                            |              |                                                     |                                     |
| Superintendent                                | X                                                                |                            | 1            | Full                                                | \$70                                |
| Project Engineer, QA/QC                       | X                                                                |                            | 1            | Full                                                | \$80                                |
| Carpenter                                     | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| Laborer                                       | X                                                                |                            | 2            | Full                                                | Varies - local rate                 |
| <b><u>Personnel Not Stationed on Site</u></b> |                                                                  |                            |              |                                                     |                                     |
| Vice President                                |                                                                  | X                          |              |                                                     |                                     |
| CFO                                           |                                                                  | X                          |              |                                                     |                                     |
| Project Manager                               | X                                                                |                            | 3            | Part                                                | \$75                                |
| General Superintendent                        | X                                                                |                            | 3            | Part                                                | \$75                                |
| Project Coordinator                           |                                                                  | X                          |              |                                                     |                                     |
| Safety Director                               | X                                                                |                            | 3            | Part                                                | \$50                                |
| Project Accountant                            |                                                                  | X                          |              |                                                     |                                     |
| <b><u>Pre-Construction Personnel</u></b>      |                                                                  |                            |              |                                                     |                                     |
| Senior Estimator/Pre-Con Services M           | X                                                                |                            | 4            | Part                                                | \$90                                |
| Assistant Estimator                           | X                                                                |                            | 4            | Part                                                | \$80                                |

**Notes:**

- 1 Field staff on project site.
- 2 It is expected that all trade work will be subcontracted. Trade labor rates shown only if need for Gan Conditions.
- 3 Billed only for time spent on site and traveling to project
- 4 Billed only for time during pre-construction phase, subject to Pre-construction services billing cap (see Exhibit F).

**RainbowVision Santa Fe/Weis Contract Agreement  
Exhibit E  
Project Scope & Budget Summary**

- The Scope of the project includes:
  - 40 Single-story Condominium living units
  - 80 Single-level Independent Living units built in a series of two-story buildings
  - 26 Assisted Living apartments (and related support spaces) constructed on the 2<sup>nd</sup> level of the central services building
  - Central services building (El Centro) containing commercial kitchen, dining spaces, activity spaces, administrative and marketing offices, retail spaces, and a spa/wellness center.
  - ~~○ 12 acres of site development, with some off-site, public improvements~~
  - Total building area is approximately 183,000 sf.
- Based on a preliminary site plan and building design commissioned by the Owner, the Construction Manager prepared a detailed, preliminary cost report and presented that report to the Owner on February 1, 2004. Based on that scope and cost report, the Owner has established a construction budget of \$20,540,000, based on the Preliminary Divisional Cost Breakdown shown in Exhibit F.
- The Owner has contracted with the Architect to complete the design of the project in accordance with the budget stated above. The completion of the design, and related activities is proceeding in accordance with the Preconstruction Phase Schedule prepared and updated regularly by the Construction Manager. See Exhibit G.
- The Construction Manager has also prepared a Preliminary Construction Schedule. See Exhibit H. A final Construction Schedule will be included in the GMP report and made part of the contract by amendment.
- The Owner, Architect and Construction Manager are working together to monitor the completion of the design to ensure meeting the Construction Budget.
- Upon receipt of the Design Development documents, the Construction Manager will, in accordance with contract Section 2.2 prepare a GMP report that will include all of the elements outlined in Section 2.2.4. Prior to submitting the final GMP report, the Construction Manager will review the preliminary cost estimates with the Owner and Architect to determine if any adjustments to scope are required in order to achieve the construction budget stated above. Upon approval by the Owner, the GMP will be incorporated into the contract by amendment, in accordance with Section 2.2.
- During the completion of the design The Construction Manager will continue to meet regularly with the Owner and Architect, and will regularly review the Architect's work in progress to monitor the design as a means to ensure conformance to the construction budget.



**RainbowVision Santa Fe/Weis Contract Agreement  
EXHIBIT F**

**Preliminary Divisional Cost Breakdown**

| <b>C.S.I. SYSTEMS BREAKDOWN</b>            |       | <u>Total<br/>Costs</u> | <u>%</u>    |
|--------------------------------------------|-------|------------------------|-------------|
| Division 1 - General Conditions            |       | \$1,047,401            | 5.9%        |
| Division 1 - Building Permit Allowance     |       | \$184,620              | 1.0%        |
| Division 2 - Site Construction             |       | \$1,534,319            | 8.7%        |
| Division 3 - Concrete                      |       | \$965,149              | 5.5%        |
| Division 4 - Masonry                       |       | \$488,508              | 2.8%        |
| Division 5 - Metals                        |       | \$439,822              | 2.5%        |
| Division 6 - Woods & Plastics              |       | \$2,609,476            | 14.8%       |
| Division 7 - Thermal & Moisture Protection |       | \$969,353              | 5.5%        |
| Division 8 - Doors & Windows               |       | \$771,105              | 4.4%        |
| Division 9 - Finishes                      |       | \$3,286,188            | 18.6%       |
| Division 10 - Specialties                  |       | \$592,969              | 3.4%        |
| Division 11 - Equipment (See Note 1)       |       | \$445,320              | 2.5%        |
| Division 12 - Furnishings (See Note 2)     |       | \$49,186               | 0.3%        |
| Division 14 - Conveying                    |       | \$230,919              | 1.3%        |
| Division 15 - Mechanical                   |       | \$2,410,820            | 13.7%       |
| Division 16 - Electrical                   |       | \$1,636,100            | 9.3%        |
| <b>Sub-Total</b>                           |       | <b>\$17,661,276</b>    | <b>100%</b> |
| Escalation - For 2004                      | 0.0%  | -                      |             |
| <b>Sub-Total</b>                           |       | <b>\$17,661,276</b>    |             |
| Est./Const Contingency - El Centro         | 5.0%  | \$243,521              |             |
| Est./Const Contingency - Balance           | 3.0%  | \$383,726              |             |
| <b>Sub-Total</b>                           |       | <b>\$18,288,523</b>    |             |
| Builders Risk Insurance                    | 0.8%  | \$146,308              |             |
| Liability Insurance                        | 0.65% | \$156,696              |             |
|                                            |       | <b>\$18,591,527</b>    |             |
| Construction Manager Fee                   | 3.00% | \$557,748              |             |
| <b>Sub-Total</b>                           |       | <b>\$19,149,273</b>    |             |
| Performance and Payment Bond               |       | \$108,393              |             |
| NM Gross Receipts Tax                      |       | \$1,284,062            |             |
| <b>Project Totals</b>                      |       | <b>\$20,539,728</b>    |             |

**Notes:**

1. "Equipment" includes residential appliances, commercial kitchen and laundry equipment.
2. "Furnishings" does not include FF&E - which is being designed and purchased by the Owner under a separate contract.

**RainbowVision Santa Fe/Wels Contract Agreement**  
**Exhibit G**  
**Preconstruction Phase Schedule**

Refer to the "Preconstruction Schedule" dated \_\_\_\_\_ (filename: RVSF007), attached separately but made a part of this Exhibit by reference.

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**RainbowVision Santa Fe/Weis Contract Agreement**  
**Exhibit H**  
**Preliminary Construction Phase Schedule**

Refer to the "Preliminary Construction Schedule" dated \_\_\_\_\_ (filename: \_\_\_\_\_),  
attached separately but made a part of this Exhibit by reference.

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Amendment No. 1  
(Revised December 15, 2004)  
To Contract Agreement Between  
RainbowVision Santa Fe, LLC and Weis Builders, Inc

In accordance with article 2.2.9 of the Contract Agreement, the Guaranteed Maximum Price (GMP) and Project Schedule are hereby modified to reflect the following:

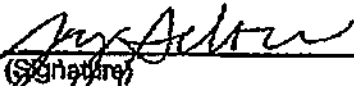
- The Guaranteed Maximum Price will be Twenty-One Million Five Hundred Thirty Nine Thousand, Seven Hundred Twenty-Eight Dollars (\$21,539,728).
- The Construction Start date will be January 3, 2005. Based on that start date:
- The Substantial Completion date for Buildings 16, 17, 18, 19, and 20 will be October 28, 2005.
- The Substantial Completion date for the balance of the project will be April 28, 2006.

Accordingly, the GMP Divisional Cost Breakdown (Exhibit F) shall be modified as per the attached revision, dated September 30, 2004. The revised GMP is based on the following:

- Weis September 15, 2004 "Confirmation of GMP" letter (with attachments)
- Weis September 30, 2004 "Summary of Approved Enhancements"

The Construction Schedule (Exhibit H) shall be as shown in the attached update, dated December 15, 2004.

For:  
RainbowVision Santa Fe, LLC

  
(Signature)

JAY SILVER, PRESIDENT  
(Printed Name and Title)  
RAINBOWVISION PROPERTIES, INC  
MANAGING MEMBER  
(Date)

For:  
Weis Builders Inc.

  
(Signature)

PETER WORTHINGTON, VICE PRESIDENT  
(Printed Name and Title)  
Dec. 15, 2004  
(Date)

| Act<br>ID                                | Description                            | Dur | Early<br>Start | Early<br>Finish |  | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|------------------------------------------|----------------------------------------|-----|----------------|-----------------|--|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| 1000                                     | Receive Utility Permit                 | 0   | 05AUG04        | A               |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| 1100                                     | Receive General Permit                 | 0   | 05AUG04        | A               |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| 1080                                     | Receive Bid Package #2 Building Permit | 0   | 05AUG04        | A               |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| 1000                                     | Loan Closing                           | 0   | 22DEC04        |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| 1005                                     | Notice to Proceed                      | 0   | 22DEC04        |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| 1100                                     | Receive Bid Package #3 Building Permit | 0   | 22DEC04        |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| 1010                                     | Site Construction Start                | 0   | 01JAN05        |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| 1020                                     | Building Construction Start            | 0   | 01JAN05        |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 285 | 01JAN05        | 03FEB05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Condominium Building 20                 |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 117 | 01JAN05        | 25JAN05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Condominium Building 18                 |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 130 | 01JAN05        | 20JUL05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Condominium Building 19                 |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 144 | 06FEB05        | 30AUG05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Condominium Building 17                 |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 150 | 21FEB05        | 28SEP05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Condominium Building 16                 |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 171 | 03MAY05        | 29OCT05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Developer/Builder Group 1 Condominiums  |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 0   | 28OCT05        | 28OCT05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Independent Living Building 3 - 3 Units |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 180 | 03FEB05        | 19OCT05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Independent Living Building 2 - 4 Units |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 189 | 06FEB05        | 14NOV05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Condominium Building 3                  |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 147 | 21FEB05        | 14SEP05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Condominium Building 4                  |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 158 | 03MAY05        | 12OCT05         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
| +Independent Living Building 5 - 4 Units |                                        |     |                |                 |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |
|                                          |                                        | 201 | 06JAN06        | 14DEC06         |  |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |     |

Rainbow Vision Retirement Community  
Santa Fe, New Mexico  
Weiss Builders, Inc.



# EXHIBIT K

| MARSH                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                            | CERTIFICATE OF INSURANCE                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | CERTIFICATE NUMBER<br>SEA-000922486-14   |                                                                                                                                                                                                                                                                                                                                                     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>PRODUCER</b><br>MARSH RISK & INSURANCE SERVICES<br>P. O. BOX 193880<br>SAN FRANCISCO, CA 94119-3880<br>CALIFORNIA LICENSE NO. 0437163<br><br>Attn: Priscilla Tom 415-743-7658                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                            | <b>THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER OTHER THAN THOSE PROVIDED IN THE POLICY. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES DESCRIBED HEREIN.</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |                                                                                                                                                                                                                                                                                                                                                     |
| <b>INSURED</b><br><i>BMC</i><br>Building Materials Holding Corporation<br>BMC West Corporation<br>SelectBuild Construction, Inc.<br>A-1 Building Components, LLC<br>3500 Fairlane Farms Road, Suite 4<br>Wellington, FL 33414<br><br><i>74404 045602</i>                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                            | <b>COMPANIES AFFORDING COVERAGE</b>                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |                                                                                                                                                                                                                                                                                                                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                            | COMPANY<br>A ACE AMERICAN INSURANCE COMPANY                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |                                                                                                                                                                                                                                                                                                                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                            | COMPANY<br>B                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |                                                                                                                                                                                                                                                                                                                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                            | COMPANY<br>C                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |                                                                                                                                                                                                                                                                                                                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                            | COMPANY<br>D                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |                                                                                                                                                                                                                                                                                                                                                     |
| <b>COVERAGE</b><br>THIS IS TO CERTIFY THAT POLICIES OF INSURANCE DESCRIBED HEREIN HAVE BEEN ISSUED TO THE INSURED NAMED HEREIN FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THE CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, CONDITIONS AND EXCLUSIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS. |                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |                                                                                                                                                                                                                                                                                                                                                     |
| <b>CO LTR</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <b>TYPE OF INSURANCE</b>                                                                                                                                                                                                                                                                                                                                                                   | <b>POLICY NUMBER</b>                                                                                                                                                                                                                                                  | <b>POLICY EFFECTIVE DATE (MM/DD/YY)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <b>POLICY EXPIRATION DATE (MM/DD/YY)</b> | <b>LIMITS</b>                                                                                                                                                                                                                                                                                                                                       |
| A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>GENERAL LIABILITY</b><br><input checked="" type="checkbox"/> <b>COMMERCIAL GENERAL LIABILITY</b><br><input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR<br><input type="checkbox"/> OWNERS & CONTRACTORS PROT                                                                                                                                                | XSL62170250A<br>DED: \$1.9MM PER OCC XS OF \$100,000 SIR<br>AGG LIMIT PER PROJECT<br>GEN AGG SUBJECT TO POLICY<br>MAXIMUM OF \$25,000,000                                                                                                                             | 11/11/06                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 11/11/07                                 | GENERAL AGGREGATE \$ 2,000,000<br>PRODUCTS - COMPROP AGG \$ 2,000,000<br>PERSONAL & ADV INJURY \$ 1,900,000<br>EACH OCCURRENCE \$ 1,900,000<br>FIRE DAMAGE (Any one fire) \$ N/A<br>MED EXP (Any one person) \$ N/A<br>COMBINED SINGLE LIMIT \$ 3,000,000<br>BODILY INJURY (Per person) \$<br>BODILY INJURY (Per accident) \$<br>PROPERTY DAMAGE \$ |
| A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>AUTOMOBILE LIABILITY</b><br><input checked="" type="checkbox"/> ANY AUTO<br><input type="checkbox"/> ALL OWNED AUTOS<br><input type="checkbox"/> SCHEDULED AUTOS<br><input checked="" type="checkbox"/> HIRED AUTOS<br><input checked="" type="checkbox"/> NON-OWNED AUTOS<br><input checked="" type="checkbox"/> DEDUCTIBLE:<br><input checked="" type="checkbox"/> \$1MM PER ACCIDENT | ISAH08012970<br>AUTO PHYSICAL DAMAGE-<br>OWNED & HIRED VEHICLES:<br>SELF-INSURED                                                                                                                                                                                      | 11/11/06                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 11/11/07                                 | AUTO ONLY - EA ACCIDENT \$<br>OTHER THAN AUTO ONLY: \$<br>EACH ACCIDENT \$<br>AGGREGATE \$<br>EACH OCCURRENCE \$ 10,000,000<br>AGGREGATE \$ 10,000,000<br>SELF-INSURED RET. \$ 2,000,000                                                                                                                                                            |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <b>GARAGE LIABILITY</b><br><input type="checkbox"/> ANY AUTO                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |                                                                                                                                                                                                                                                                                                                                                     |
| A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>EXCESS LIABILITY</b><br><input checked="" type="checkbox"/> UMBRELLA FORM<br><input type="checkbox"/> OTHER THAN UMBRELLA FORM                                                                                                                                                                                                                                                          | XOOG2378970A                                                                                                                                                                                                                                                          | 11/11/06                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 11/11/07                                 |                                                                                                                                                                                                                                                                                                                                                     |
| A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b><br>THE PROPRIETOR/<br>PARTNERS/EXECUTIVE<br>OFFICERS ARE: <input checked="" type="checkbox"/> INCL <input type="checkbox"/> EXCL                                                                                                                                                                                                      | WLRC44466016 (AOS incl. FL)<br>DEDUCTIBLE:<br>\$2,000,000 PER ACCIDENT                                                                                                                                                                                                | 11/11/06                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 11/11/07                                 | <input checked="" type="checkbox"/> WC STATUTORY LIMITS <input type="checkbox"/> OTHER<br>EL EACH ACCIDENT \$ 1,000,000<br>EL DISEASE-POLICY LIMIT \$ 1,000,000<br>EL DISEASE-EACH EMPLOYEE \$ 1,000,000                                                                                                                                            |
| A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>GENERAL LIABILITY: SELF-INSURED RETENTION:</b>                                                                                                                                                                                                                                                                                                                                          | XSL62170250A                                                                                                                                                                                                                                                          | 11/11/06                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 11/11/07                                 | SELF-INSURED RETENTION: \$100,000                                                                                                                                                                                                                                                                                                                   |
| <b>DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS</b><br>Project Rainbow Vision Santa Fe-500 Rodeo Road, Santa Fe, NM 55707; Contract No. D45602<br>Weis Builders Inc. (Contractor) and Rainbow Vision Santa Fe, LLC (Owner) are Included as Additional Insureds on the General Liability Policy but only with respect to liability arising out of Named Insured's operations (labor, materials and trusses). Forms CC1E15 and CC1E15 attached.                                                            |                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |                                                                                                                                                                                                                                                                                                                                                     |
| <b>CERTIFICATE HOLDER</b><br><br>Weis Builders, Inc.<br>7645 Lyndale Avenue South<br>Minneapolis, MN 55423<br><br>NOV 13 2006                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                       | <b>CANCELLATION</b><br>SHOULD ANY OF THE POLICIES DESCRIBED HEREIN BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE INSURER AFFORDING COVERAGE WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED HEREIN, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO DEDUCTION OR LIABILITY OF ANY KIND UPON THE INSURER AFFORDING COVERAGE, ITS AGENTS OR REPRESENTATIVES, OR THE ISSUER OF THIS CERTIFICATE.<br>MARSH USA INC.<br>By: Gloria N. Brumfield <i>Gloria N. Brumfield</i><br>MM113021<br>VALID AS OF: 11/06/06 |                                          |                                                                                                                                                                                                                                                                                                                                                     |



POLICY NUMBER: XLS62170250A

Named Insured: Building Materials Holding Corporation, BMC West Corporation,  
SelectBuild Construction, Inc., et al.

212  
EXCESS COMMERCIAL  
GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR  
CONTRACTORS – SCHEDULED PERSON OR  
ORGANIZATION**

This endorsement modifies insurance provided under the following:

**EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART  
SCHEDULE**

| Name Of Additional Insured Person(s)<br>Or Organization(s):                                               | Location(s) Of Covered Operations                                                                                                                                            |
|-----------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Weis Builders, Inc.<br>Rainbow Vision Santa Fe, LLC<br>7645 Lyndale Avenue South<br>Minneapolis, MN 55423 | Re: Rainbow Vision Santa Fe-500 Rodeo Road, Santa<br>Fe, NM 55707; Contract #D45602<br>Liability arising out of Named Insured's operations<br>(labor, materials and trusses) |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations.    |                                                                                                                                                                              |

- A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

- B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CC1E15

# EXHIBIT L

NOV. 30. 2005 2:32PM MARSH USA

NO. 0496 P. 2/5

MARSH

## CERTIFICATE OF INSURANCE

CERTIFICATE NUMBER  
SEA-00022486-02

## PRODUCER

MARSH RISK & INSURANCE SERVICES  
P.O. BOX 193880  
SAN FRANCISCO, CA 94119-3880  
CALIFORNIA LICENSE NO. 0437153

Attn: Priscilla Tom 415.743.7658

## INSURED

Building Materials Holding Corp.;  
BMC West Corporation;  
A1 Building Components, LLC  
3500 Fairlane Farms Road, Suite 4  
Wellington, FL 3341474404  
045602

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER OTHER THAN THOSE PROVIDED IN THE POLICY. THIS CERTIFICATE DOES NOT AFFECT, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES DESCRIBED HEREIN.

## COMPANIES AFFORDING COVERAGE

## COMPANY

A ACE AMERICAN INSURANCE COMPANY

## COMPANY

B

## COMPANY

C

## COMPANY

D

THIS IS TO CERTIFY THAT POLICIES OF INSURANCE DESCRIBED HEREIN HAVE BEEN ISSUED TO THE INSURED NAMED HEREIN FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, CONDITIONS AND EXCLUSIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

| CO LTR | TYPE OF INSURANCE                                                              | POLICY NUMBER | POLICY EFFECTIVE DATE (MM/DD/YYYY) | POLICY EXPIRATION DATE (MM/DD/YYYY) | LIMITS                                                                                  |
|--------|--------------------------------------------------------------------------------|---------------|------------------------------------|-------------------------------------|-----------------------------------------------------------------------------------------|
| A      | GENERAL LIABILITY                                                              | HDOGI8072889  | 11/11/05                           | 11/11/06                            |                                                                                         |
|        | <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY               |               |                                    |                                     | GENERAL AGGREGATE \$ 2,000,000                                                          |
|        | <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR |               |                                    |                                     | PRODUCTS - COMPROP AGG \$ 2,000,000                                                     |
|        | <input checked="" type="checkbox"/> OWNERS & CONTRACTORS PROT                  |               |                                    |                                     | PERSONAL & ADV INJURY \$ 2,000,000                                                      |
|        | <input checked="" type="checkbox"/> Agg Limit Per Location/Project             |               |                                    |                                     | EACH OCCURRENCE \$ 2,000,000                                                            |
|        | <input checked="" type="checkbox"/> Deductible: \$2 mfl per occur.             |               |                                    |                                     | FIRE DAMAGE (Any one fire) \$ N/A                                                       |
|        |                                                                                |               |                                    |                                     | MED EXP (Any one person) \$ N/A                                                         |
| A      | AUTOMOBILE LIABILITY                                                           | ISAH08012799  | 11/11/05                           | 11/11/06                            |                                                                                         |
|        | <input checked="" type="checkbox"/> ANY AUTO                                   |               |                                    |                                     | COMBINED SINGLE LIMIT \$ 2,000,000                                                      |
|        | <input checked="" type="checkbox"/> ALL OWNED AUTOS                            |               |                                    |                                     | BODILY INJURY (Per person) \$                                                           |
|        | <input checked="" type="checkbox"/> SCHEDULED AUTOS                            |               |                                    |                                     | BODILY INJURY (Per accident) \$                                                         |
|        | <input checked="" type="checkbox"/> HIRED AUTOS                                |               |                                    |                                     | PROPERTY DAMAGE \$                                                                      |
|        | <input checked="" type="checkbox"/> NON-OWNED AUTOS                            |               |                                    |                                     |                                                                                         |
|        | <input checked="" type="checkbox"/> Deductible:                                |               |                                    |                                     |                                                                                         |
|        | <input checked="" type="checkbox"/> \$1 mfl per occur.                         |               |                                    |                                     |                                                                                         |
|        | GARAGE LIABILITY                                                               |               |                                    |                                     |                                                                                         |
|        | <input type="checkbox"/> ANY AUTO                                              |               |                                    |                                     | AUTO ONLY - EA ACCIDENT \$                                                              |
|        |                                                                                |               |                                    |                                     | OTHER THAN AUTO ONLY \$                                                                 |
|        |                                                                                |               |                                    |                                     | EACH ACCIDENT \$                                                                        |
|        |                                                                                |               |                                    |                                     | AGGREGATE \$                                                                            |
| A      | EXCESS LIABILITY                                                               | XOOG22912422  | 11/11/05                           | 11/11/06                            |                                                                                         |
|        | <input checked="" type="checkbox"/> UMBRELLA FORM                              |               |                                    |                                     | EACH OCCURRENCE \$ 10,000,000                                                           |
|        | <input type="checkbox"/> OTHER THAN UMBRELLA FORM                              |               |                                    |                                     | AGGREGATE \$ 10,000,000                                                                 |
|        |                                                                                |               |                                    |                                     | SELF INSURED RET. \$ 2,000,000                                                          |
| A      | WORKERS COMPENSATION AND EMPLOYERS LIABILITY                                   | WLRC43964379  | 11/11/05                           | 11/11/06                            |                                                                                         |
|        | THE PROPRIETARY PARTIAL EXECUTIVE OFFICERS ARE:                                |               |                                    |                                     | <input checked="" type="checkbox"/> WORKERS COMPENSATION <input type="checkbox"/> OTHER |
|        | <input checked="" type="checkbox"/> INCL                                       |               |                                    |                                     | EACH ACCIDENT \$ 1,000,000                                                              |
|        | <input type="checkbox"/> EXCL                                                  |               |                                    |                                     | EL DISEASE-POLICY LIMIT \$ 1,000,000                                                    |
|        | OTHER                                                                          |               |                                    |                                     | EL DISEASE-EACH EMPLOYEE \$ 1,000,000                                                   |
|        | Auto Physical Damage--Owned and Hired Vehicles                                 | SELF INSURED  | 11/11/05                           | 11/11/06                            |                                                                                         |

## DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS

Project Rainbow Vision Santa Fe 500 Rodeo Road, Santa Fe, NM 55707; Contract No. D45602  
Wels Builders Inc. (Contractor) and Rainbow Vision Santa Fe, LLC (Owner) are included as Additional Insureds on the General Liability Policy but only with respect to liability arising out of Named Insured's operations (labor, materials and insures). Forms CG 2010 0704 and CG 2037 0704 attached. Insurance hereunder is primary and non-contributory with respect to any insurance maintained by or available to Wels Builders Inc. (Contractor) and Rainbow Vision.Wels Builders, Inc.  
7845 Lyndale Avenue South  
Minneapolis, MN 55423

SHOULD ANY OF THE POLICIES DESCRIBED HEREIN BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUER AFFORDING COVERAGE WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED HEREIN, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE ISSUER AFFORDING COVERAGE, ITS AGENTS OR REPRESENTATIVES, OR THE ISSUER OF THIS CERTIFICATE.

MARSH USA INC.

By: Gloria N. Brumfield

Gloria N. Brumfield

VALID AS OF: 11/30/05

NOV. 30. 2005 2:33PM MARSH USA

NO. 0496 P. 3/5

# ADDITIONAL INFORMATION

## PRODUCER

MARSH RISK & INSURANCE SERVICES  
P.O. BOX 183880  
SAN FRANCISCO, CA 94119-5880  
CALIFORNIA LICENSE NO. 0437163  
Attn: Priscilla Tom 415,743,7653

## COMPANIES AFFORDING COVERAGE

COMPANY

E

COMPANY

F

## INSURED

Building Materials Holding Corp.;  
BMC West Corporation;  
A11 Building Components, LLC  
300 Fairlane Farms Road, Suite 4  
Wellington, FL 33414

COMPANY

G

COMPANY

H

## TEXT

CONTINUED FROM DESCRIPTION SECTION:

Santa Fe LLC (Owner).

## CARRIER

Wyle Builders, Inc.  
7445 Lyndale Avenue South  
Minneapolis, MN 55423

MARSH USA INC. BY

Gloria N. Brumfield

*Gloria N. Brumfield*

Commercial General Liability Forms 07/01/04

POLICY NUMBER: HDOGI8072889

Named Insured: Building Materials Holding Corp., BMC West Corp., et al

COMMERCIAL GENERAL  
LIABILITY

CG 20 10 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR  
CONTRACTORS – SCHEDULED PERSON OR  
ORGANIZATION**

This endorsement modifies Insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART****SCHEDULE**

| Name Of Additional Insured Person(s)<br>Or Organization(s)                                                                     | Location(s) Of Covered Operations                                                                                                                                                     |
|--------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Wais Builders Inc. (Contractor) and Rainbow Vision Santa Fe, LLC (Owner)<br>7645 Lyndale Avenue South<br>Minneapolis, MN 55423 | Project: Rainbow Vision Santa Fe-500<br>Rodeo Road, Santa Fe, NM 55707;<br>Contract No. D45602<br>Liability arising out of Named Insured's operations (labor, materials and trusses). |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations.                         |                                                                                                                                                                                       |

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 20 10 07 04

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Commercial General Liability Forms 07/01/04

POLICY NUMBER: HDOG18072889

Named Insured: Building Materials Holding Corp., BMC West Corp., et al

COMMERCIAL GENERAL  
LIABILITY

CG 20 37 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR  
CONTRACTORS – COMPLETED OPERATIONS**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART****SCHEDULE**

| Name Of Additional Insured Person(s)<br>Or Organization(s):                                                                     | Location And Description Of Completed Operations                                                                                                                                       |
|---------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Vic's Builders Inc. (Contractor) and Rainbow Vision Santa Fe, LLC (Owner)<br>7145 Lyndale Avenue South<br>Minneapolis, MN 55423 | Project: Rainbow Vision Santa Fe-500<br>Rodeo Road, Santa Fe, NM 55707;<br>Contract No. D45602<br>Liability arising out of Named Insured's operations (labor, materials and trussing). |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations.                          |                                                                                                                                                                                        |

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

CG 20 37 07 04

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# EXHIBIT M

13

| PRODUCER                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                      | INSURED                                                                                                                                                                                     |                                    | CERTIFICATE NUMBER                           |                                                                                                                                                                                                                          |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------|----------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>PRODUCER</b><br>MARSH RISK & INSURANCE SERVICES<br>P. O. BOX 193660<br>SAN FRANCISCO, CA 94119-3660<br>CALIFORNIA LICENSE NO. 0437153<br>Attn: Priscilla Tom 415.743.7668                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                      | <b>INSURED</b><br>Building Materials Holding Corp.<br>BMC Construction, Inc.<br>BBD Construction, L.P.<br>dba: BMC Construction<br>ATTN: Terry Johnson<br>808 Hanley Lane<br>Wyke, TX 75088 |                                    | <b>CERTIFICATE NUMBER</b><br>SEA-00082249-01 |                                                                                                                                                                                                                          |
| THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFIRMS NO RIGHTS UPON THE CERTIFICATE HOLDER OTHER THAN THOSE PROVIDED IN THE POLICY. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES DESCRIBED HEREIN.                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| <b>COMPANIES AFFORDING COVERAGE</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| <b>COMPANY</b><br>A NATIONAL UNION FIRE INS CO OF PA                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| <b>COMPANY</b><br>B INSURANCE CO OF THE STATE OF PA                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| <b>COMPANY</b><br>C                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| <b>COMPANY</b><br>D                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| THIS IS TO CERTIFY THAT POLICIES OF INSURANCE DESCRIBED HEREIN HAVE BEEN ISSUED TO THE INSURED NAMED HEREIN FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THE CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, CONDITIONS AND EXCLUSIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.                             |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| CO LTR                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | TYPE OF INSURANCE                                                                                                                                                                                                                                                                                                                                                    | POLICY NUMBER                                                                                                                                                                               | POLICY EFFECTIVE DATE (MM/DD/YYYY) | POLICY EXPIRATION DATE (MM/DD/YYYY)          | LIMITS                                                                                                                                                                                                                   |
| A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <b>GENERAL LIABILITY</b><br><input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY<br><input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR<br><input checked="" type="checkbox"/> OWNER'S & CONTRACTORS PROT<br>Agg Limit Per Project _____<br><input checked="" type="checkbox"/> Deductible: \$1 mil. per occurr.              | GL8845010                                                                                                                                                                                   | 11/11/04                           | 11/11/05                                     | GENERAL AGGREGATE \$ 2,000,000<br>PRODUCTS - COM/OP AGG \$ 2,000,000<br>PERSONAL & ADY INJURY \$ 1,000,000<br>EACH OCCURRENCE \$ 1,000,000<br>FIRE DAMAGE (Any one fire) \$ 100,000<br>MED EXP (Any one person) \$ 5,000 |
| A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <b>AUTOMOBILE LIABILITY</b><br><input checked="" type="checkbox"/> ANY AUTO<br><input type="checkbox"/> ALL OWNED AUTOS<br><input type="checkbox"/> SCHEDULED AUTOS<br><input type="checkbox"/> HIRED AUTOS<br><input type="checkbox"/> NON-OWNED AUTOS<br><input checked="" type="checkbox"/> Deductible:<br><input checked="" type="checkbox"/> \$1 mil. each acc. | CA8281878 (AOS)<br>CA8281878 (TX)                                                                                                                                                           | 11/11/04<br>11/11/04               | 11/11/05<br>11/11/05                         | COMMER SINGLE LIMIT \$ 2,000,000<br>BODILY INJURY (Per person) \$<br>BODILY INJURY (Per accident) \$<br>PROPERTY DAMAGE \$                                                                                               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <b>GARAGE LIABILITY</b><br><input type="checkbox"/> ANY AUTO                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                             |                                    |                                              | AUTO ONLY - EA ACCIDENT \$<br>OTHER THAN AUTO ONLY \$<br>EACH ACCIDENT \$<br>AGGREGATE \$                                                                                                                                |
| A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <b>EXCESS LIABILITY</b><br><input checked="" type="checkbox"/> UMBRELLA FORM<br><input type="checkbox"/> OTHER THAN UMBRELLA FORM                                                                                                                                                                                                                                    | BE2850037                                                                                                                                                                                   | 11/11/04                           | 11/11/05                                     | EACH OCCURRENCE \$ 25,000,000<br>AGGREGATE \$ 25,000,000<br>SELF INSURED RET. \$ 1,000,000                                                                                                                               |
| A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <b>WORKERS COMPENSATION AND EMPLOYERS LIABILITY</b><br><input checked="" type="checkbox"/> THE PROPRIETOR/PARTNER/EXECUTIVE OFFICER/ANE<br><input type="checkbox"/> EXCL                                                                                                                                                                                             | WC7165000 (CA)<br>WC7165001 (NV, TX, VA)<br>WC7165002 (AZ, FL)                                                                                                                              | 11/11/04<br>11/11/04<br>11/11/04   | 11/11/05<br>11/11/05<br>11/11/05             | EL EACH ACCIDENT \$ 1,000,000<br>EL DISEASE-POLICY LIMIT \$ 1,000,000<br>EL DISEASE-EACH EMPLOYEE \$ 1,000,000                                                                                                           |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <b>OTHER</b><br>Auto Physical<br>Damage-Owned &<br>Hired Vehicles                                                                                                                                                                                                                                                                                                    | SELF INSURED                                                                                                                                                                                | 11/11/04                           | 11/11/05                                     |                                                                                                                                                                                                                          |
| <b>DESCRIPTION OF OPERATION/LOCATION/OTHER SPECIAL ITEMS</b><br>Project: Rainbow Vision Santa Fe - 800 Rodeo Road, Santa Fe, NM 87507; Contract/Job No.: D45002<br>Wells Builders, Inc. (Contractor) and Rainbow Vision Santa Fe, LLC (Owner) are named as Additional Insureds (except Workers' Compensation) but only with respect to liability arising out of Named Insured's operations (labor, materials, and business). Forms CG 2010 0704 and CG 2037 0704 attached. Insurance hereunder is primary and non-contributory. |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| <b>SHOULD ANY OF THE POLICIES DESCRIBED HEREIN BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE INSURER AFFORDING COVERAGE WILL endeavor TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED HEREIN, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER AFFORDING COVERAGE, ITS AGENTS OR REPRESENTATIVES, OR THE ISSUER OF THIS CERTIFICATE.</b>                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| <b>WELLS BUILDERS, INC.</b><br>7845 Lyndale Avenue South<br>Minneapolis, MN 55423                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| <b>MARKED USA INC.</b><br>BY: Gloria N. Brumfield <i>Gloria N. Brumfield</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |
| <b>VALID AS OF 11/22/04</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                             |                                    |                                              |                                                                                                                                                                                                                          |



2/3

Commercial General Liability Form: 07/01/04

POLICY NUMBER: GL6845010

Named Insured: Building Materials Holding Corp., BMC Construction, et al

**COMMERCIAL GENERAL  
LIABILITY**

CG 20 10 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR  
CONTRACTORS – SCHEDULED PERSON OR  
ORGANIZATION**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART****SCHEDULE**

| Name Of Additional Insured Person(s)<br>Or Organization(s):                                                                        | Location(s) Of Covered Operations         |
|------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------|
| Wels Builders, Inc. (Contractor)<br>7645 Lyndale Avenue South<br>Minneapolis, MN 55423<br><br>Rainbow Vision Santa Fe, LLC (Owner) | RE: RainbowVision Santa Fe – Santa Fe, NM |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations.                             |                                           |

- A. Section II – Who is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

- B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 20 10 07 04

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Commercial General Liability Forms 07/01/04

POLICY NUMBER: GL5948010

Named Insured: Building Materials Holding Corp., BMC Construction, et al

**COMMERCIAL GENERAL  
LIABILITY**

CG 20 37 07 04

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.****ADDITIONAL INSURED – OWNERS, LESSEES OR  
CONTRACTORS – COMPLETED OPERATIONS**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART****SCHEDULE**

| Name Of Additional Insured Person(s)<br>Or Organization(s):                                            | Location And Description Of Completed Operations |
|--------------------------------------------------------------------------------------------------------|--------------------------------------------------|
| Weis Builders, Inc. (Contractor)<br>7645 Lyndale Avenue South<br>Minneapolis, MN 55423                 | RR: RainbowVision Santa Fe – Santa Fe, NM        |
| Rainbow Vision Santa Fe, LLC (Owner)                                                                   |                                                  |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations. |                                                  |

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

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# EXHIBIT N

THE STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT OF

RAINBOW VISION SANTA FE, LLC,

Plaintiff,

No. D-0101-CV-2007-00010

V.

WEIS BUILDERS, INC.  
PCI CONTRACTORS, INC., and  
RLA, INC.,

Defendants.

and

WEIS BUILDERS, INC.,

Third-Party Plaintiff,

V.

RODGERS PLUMBING AND HEATING, INC.,  
EKER BROTHERS, INC.,  
TLC COMPANY,  
EMCO, INC.,  
SUPERIOR CONTRACTING CORPORATION, D/B/A AMERICAN  
NATIONAL INSULATION AND SEALANTS,  
BMCW SOUTHCENTRAL, L.P. D/B/A BMC CONSTRUCTION,  
BBD CONSTRUCTION, L.P., as successor in interest to or assignee of  
BMC CONSTRUCTION,  
MAVERICK FRAMING, INC., as successor in interest to or assignee of  
BMC CONSTRUCTION,  
PCI CONTRACTORS, INC.;  
WESTERN TECHNOLOGIES, INC.,  
VALLEY FIRE PROTECTION, INC.,  
STORM WATER CONTROL, INC.,  
PINON WINDOW & DOOR, INC.,  
MICHAEL HUNTER PAINTING, INC.,  
MESA ERECTORS, INC.,  
LOPEZ ROOFING SERVICE, INC.,  
KOCH MECHANICAL,  
KLEIN ENTERPRISES, LLC;  
HUGHES AND ASSOCIATES, INC.,

ENDORSED  
First Judicial District Court

A

APR 21 2009

Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2260  
Santa Fe, NM 87504-0260

GEO-TEST, INC.,  
F & J HOME BUILDERS, INC.,  
DAWSON SURVEYS, INC., AND  
BOHANNAH-HUSTON, INC.,

Third-Party Defendants.

**THIRD AMENDED SCHEDULING ORDER**

Pursuant to Rule 1-016 NMRA, the Court enters the following amended scheduling order:

1. Motions to amend the pleadings or to join parties shall be filed by July 30, 2009.
2. Motion addressed to the pleadings shall be filed by July 30, 2009.
3. \* Third Party Plaintiffs shall file with the Court a list of all lay witnesses who may be called to testify at trial by October 1, 2009.
4. \* Third Party Defendants shall file with the Court a list of all lay witnesses who may be called to testify at trial by October 1, 2009.
5. \* Third Party Plaintiffs shall file with the Court a list of all expert witnesses who may be called to testify at trial by November 1, 2009. A copy of any such experts' opinions or report shall be forwarded to all counsel on or before said date.
6. \* Third Party Defendants shall file with the Court a list of all expert witnesses and opinions who may be called to testify at trial by January 25, 2010. A copy of any such experts' opinions or report shall be forwarded to all counsel on or before said date.
7. \* Discovery shall be completed by June 1, 2010. Parties shall seek discovery sufficiently before this date so that persons responding to discovery reasonably

may comply with discovery requests prior to the deadline.

8. All other motions, except for motions in limine, shall be filed by May 1, 2010.
9. \*All parties shall file with the Court a preliminary exhibit list by October 1, 2009. The exhibit list shall state the reasonable place where such exhibits may be inspected and copied. The parties shall file a final exhibit list and shall exchange copies of marked exhibits by May 10, 2010.
10. All parties shall file specific objections to other parties' proposed exhibits by June 30, 2010.
11. Third party Plaintiffs should submit their portions of the pretrial order to defendants by August 1, 2010. Third party defendants shall file the proposed final pretrial order with the Court by August 15, 2010.
12. All parties shall file a final witness list by Court by March 1, 2010. The final witness list shall list "will call" and "may call" witnesses and may include any witnesses listed on any party's earlier witness list but may not include additional witnesses except by leave of Court or consent of all parties.
13. Proposed jury instructions shall be submitted to the Court by August 25, 2010. Pretrial conference shall be held at July 30, 2010 at 1:30 pm. All trial counsel shall appear for the pretrial conference.
14. Motions in limine shall be filed June 15, 2010.
15. Dates contained in paragraphs of this order marked with asterisk (\*) may be modified by written agreement of all parties, without Court approval. Only the Court, for good cause, may change other dates.

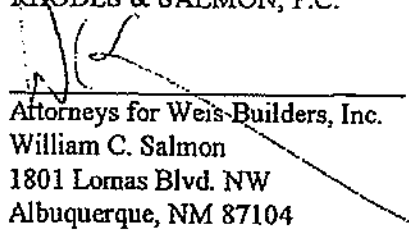
16. The matter is set for (jury) trial on August 30, 2010 (on a trailing docket).
17. The parties shall complete initial mediation with an agreed mediator by August 31, 2009.

HONORABLE JAMES HALL

JAMES A. HALL  
District Court Judge

Submitted by,

RHODES & SALMON, P.C.

  
Attorneys for Weis Builders, Inc.

William C. Salmon  
1801 Lomas Blvd. NW  
Albuquerque, NM 87104  
(505)247-0328  
(505) 766-9402 F  
[wcs@rspcnm.com](mailto:wcs@rspcnm.com)

Approved by telephone 3/11/09  
Burch & Cracchiolo, P.A.  
Co-counsel Attorneys for Weis Builders, Inc.  
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Approved as to form by:

Jack N. Hardwick  
SOMMER UDALL HARDWICK AHERN & HYATT LLP  
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Santa Fe, NM 87504-1984  
Attorney for RainbowVision Santa Fe, LLC  
(505) 982-4676

(505) 988-7029  
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*Approved by me 3/1/19*  
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Law Offices of Eva K. Rappaport  
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(505) 848-9710 - F  
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(505) 243-4323 - F  
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---

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Michael Dekleva  
Madison Harbour & Mroz, PA  
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Attorney for Valley Fire Protection, Inc.  
[mjd@madisonlaw.com](mailto:mjd@madisonlaw.com)

*Approved by email 3/15/13*  
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Attorneys for Western Technologies  
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Fax: (505) 244-3889  
[vlewis@dsblaw.com](mailto:vlewis@dsblaw.com)

# EXHIBIT O

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

|                                           |   |                                  |
|-------------------------------------------|---|----------------------------------|
| IN RE:                                    | ) |                                  |
|                                           | ) | Chapter 11                       |
| BUILDING MATERIALS HOLDING                | ) |                                  |
| CORPORATION, <i>et al.</i> , <sup>1</sup> | ) | Case No. 09-12074 (KJC)          |
|                                           | ) |                                  |
| Debtors.                                  | ) | Jointly Administered             |
|                                           | ) |                                  |
|                                           | ) | Ref. Docket No. 105, 244 and 371 |

**NOTICE OF SECOND SUPPLEMENTAL  
LIST OF ORDINARY COURSE PROFESSIONALS**

PLEASE TAKE NOTICE that, in accordance with the procedures set forth in the *Order Authorizing the Debtors' Retention and Compensation of Certain Professionals Utilized in the Ordinary Course of Business* [Docket No. 244] (the "*OCP Order*"),<sup>2</sup> Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (the "*Debtors*"), hereby provide notice (the "*Notice*") of their intent to further supplement *Exhibit A* to the *Debtors' Motion for an Order Authorizing the Employment and Payment of Professionals Used in the Ordinary Course of Business* [Docket No. 105] (the "*Motion*") for purposes of retaining the Ordinary Course Professionals listed on *Exhibit 1* to this Notice.

PLEASE TAKE FURTHER NOTICE that a copy of this Notice has been served on the United States Trustee, counsel to the official committee of unsecured creditors appointed in these chapter 11 cases, counsel to Wells Fargo Bank, as agent under both the Debtors' Prepetition Credit Agreement and the DIP Facility (as defined in the chapter 11 plan filed in these cases), and those parties requesting notice pursuant to Bankruptcy Rule 2002 (together with the Debtors, the "*Notice Parties*").

PLEASE TAKE FURTHER NOTICE that the retention and compensation of the Ordinary Course Professionals listed on *Exhibit 1* are subject to the OCP Procedures set forth in the OCP Order. As such, the retention of each Ordinary Course Professional shall not be

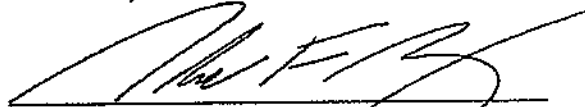
<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the OCP Order.

approved until such time as the OCP Procedures have been complied with by such Ordinary Course Professional.

Dated: Wilmington, Delaware  
September 2, 2009

YOUNG CONAWAY STARGATT &  
TAYLOR, LLP



Sean M. Beach (No. 4070)  
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--- and ---

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ATTORNEYS FOR DEBTORS AND  
DEBTORS IN POSSESSION

# **EXHIBIT 1**

**Second Supplemental OCP List**

| Professional           |                                                                                                  | Description of Services                                   |
|------------------------|--------------------------------------------------------------------------------------------------|-----------------------------------------------------------|
| \$20,000 Professionals |                                                                                                  |                                                           |
| 1.                     | Burch & Cracchiolo, PA<br>702 East Osborn Road, Suite 200<br>Phoenix, AZ 85014                   | Construction and Workers Compensation<br>Defense Attorney |
| 2.                     | Domingo Elias & Vu LLP<br>265 South Randolph Avenue, Suite 200<br>Brea, CA 92821                 | Workers Compensation Defense<br>Attorney                  |
| 3.                     | Gust Rosenfeld P.L.C.<br>201 E. Washington Street, Suite 800<br>Phoenix, AZ 85004                | Construction and Workers Compensation<br>Defense Attorney |
| 4.                     | Floyd, Skere & Kelly, LLP<br>2045 W. Orangewood Avenue, Suite A<br>Orange, CA 92868              | Workers Compensation Defense<br>Attorney                  |
| 5.                     | Hanna & Brophy<br>Attn: Jeff Lusich<br>3100 Zinfandel Dr., Suite 400<br>Rancho Cordova, CA 95670 | Workers Compensation Defense<br>Attorney                  |
| 6.                     | Knell & Poulos, P.C.<br>901 W. Jackson Boulevard, Suite 301<br>Chicago, IL 60607                 | Workers Compensation Defense<br>Attorney                  |
| 7.                     | Law Offices of Lorna A. Voboril<br>PO Box 1743<br>Fair Oaks, CA 95628                            | Workers Compensation Defense<br>Attorney                  |
| 8.                     | Lincoln, Gustafson & Cercos<br>3131 E. Camelback Road, Suite 200<br>Phoenix, AZ 85016            | Construction and Workers Compensation<br>Defense Attorney |
| 9.                     | Parker & Irwin P.C.<br>348 W. Hospitality Lane, Suite 202<br>San Bernardino, CA 92408            | Workers Compensation Defense<br>Attorney                  |
| 10.                    | Preg O'Donnell & Gillett PLLC<br>1800 Ninth Avenue, Ste 1500<br>Seattle, WA 98101-1340           | Construction Defense Attorney                             |

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

|                                           |   |                         |
|-------------------------------------------|---|-------------------------|
| IN RE:                                    | ) |                         |
|                                           | ) | Chapter 11              |
| BUILDING MATERIALS HOLDING                | ) |                         |
| CORPORATION, <i>et al.</i> , <sup>1</sup> | ) | Case No. 09-12074 (KJC) |
|                                           | ) |                         |
| Debtors.                                  | ) | Jointly Administered    |
|                                           | ) |                         |
|                                           | ) | Ref. Docket No. 105     |

**ORDER AUTHORIZING THE DEBTORS' RETENTION AND COMPENSATION OF  
CERTAIN PROFESSIONALS UTILIZED IN THE ORDINARY COURSE OF BUSINESS**

Upon consideration of the motion (the "*Motion*") of Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "*Debtors*") for entry of an order authorizing the Debtors to retain and compensate certain professionals utilized in the ordinary course of the Debtors' business, all as set forth in the Motion; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. sections 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the Court (the "*Hearing*"); and the Court having determined that the legal and factual bases set forth

<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.



in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED:**

1. The Motion is granted as set forth below.
2. Pursuant to sections 105, 327, 328, and 330 of the Bankruptcy Code, the Debtors are authorized to retain and pay the professionals identified on the OCP List attached hereto as *Exhibit A* (each an "*Ordinary Course Professional*") in the ordinary course of business pursuant to the following procedures applicable to Ordinary Course Professionals (the "*OCP Procedures*"):
  - (a) Each Ordinary Course Professional on the OCP List shall file with the Court a declaration of disinterestedness (each a "*Declaration of Disinterestedness*"), substantially in the form annexed hereto as *Exhibit B*, within 30 days after the later of (i) entry of this Order, or (ii) the docketing of any supplemental or amended OCP List (filed pursuant to subsection (g) below) which first includes such Ordinary Course Professional, and at least 20 days prior to submitting an invoice to the Debtors. Each Ordinary Course Professional shall serve the Declaration of Disinterestedness upon: (i) Building Materials Holding Corporation, 720 Park Boulevard, Suite 200, Boise, Idaho 83712, Attn.: Paul S. Street; (ii) Gibson, Dunn & Crutcher LLP, 200 Park Ave., New York, New York 10166, Attn.: Michael A. Rosenthal and Matthew K. Kelsey; (iii) Young Conaway Stargatt & Taylor, LLP, The Brandywine Building, 1000 West Street, 17th Floor, Wilmington, Delaware 19801, Attn: Sean M. Beach and Robert F. Poppiti; (iv) the Office of the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn.: Joseph J. McMahon, Jr.; (v) Arent Fox, LLP, 1050 Connecticut Avenue, NW, Washington, DC 20036-5339, Attn: Christopher J. Giaimo and Katie A. Lane and Benesch, Friedlander, Coplan & Aronoff LLP, 222 Delaware Avenue, Suite 801, Wilmington, DE 19801, Attn: Bradford J. Sandler; and (vi) Paul, Hastings, Janofsky & Walker LLP, 55 Second Street, Twenty-Fourth Floor, San Francisco, California 94105, Attn: Kevin B. Fisher (collectively, the "*Notice Parties*").
  - (b) The Notice Parties shall have 20 days after the date of filing of each Ordinary Course Professional's Declaration of Disinterestedness (the

"*Objection Deadline*") to object to the retention of such Ordinary Course Professional. The objecting party shall file any such objection and serve such objection upon the Notice Parties and the respective Ordinary Course Professional on or before the *Objection Deadline*. If any such objection cannot be resolved within 10 days of its receipt, the matter shall be scheduled for hearing before the Court at the next regularly scheduled omnibus hearing date that is no less than 10 days from that date or on a date otherwise agreeable to the parties. The Debtors shall not be authorized to retain and pay such Ordinary Course Professional until all outstanding objections have been withdrawn, resolved, or overruled by order of the Court.

- (c) If no objection is received from any of the Notice Parties by the *Objection Deadline* with respect to any particular Ordinary Course Professional, then retention of the Ordinary Course Professional shall be deemed approved by the Court without hearing or further order and the Debtors shall be authorized to retain and pay such Ordinary Course Professional as of the date such Ordinary Course Professional commenced providing services to the Debtors and pay such Ordinary Course Professional as set forth below.
- (d) The Debtors shall be authorized to pay, without formal application to the Court by any Ordinary Course Professional, 100% of fees and disbursements to each of the Ordinary Course Professionals retained by the Debtors pursuant to the OCP Procedures upon submission to the Debtors of an appropriate invoice setting forth in reasonable detail the nature of the services rendered and expenses incurred after the *Petition Date*; *provided, however*, that fees paid to Ordinary Course Professionals, excluding costs and disbursements, may not exceed (a) (i) \$20,000 per month per Ordinary Course Professional listed on the OCP List as a \$20,000 professional or (ii) \$40,000 per month per Ordinary Course Professional listed on the OCP List as a \$40,000 professional or (b) \$500,000 per month for all Ordinary Course Professionals, in the aggregate, both calculated as an average over a rolling three-month period while the chapter 11 cases are pending (the "*OCP Cap*"). The fact that payments to an Ordinary Course Professional do not exceed the *OCP Cap* does not create a presumption that the fees paid to the professional are reasonable.
- (e) If payments to an Ordinary Course Professional will exceed the *OCP Cap* all of the fees for the month(s) at issue for such Ordinary Course Professional shall be subject to prior approval of the Court in accordance with sections 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, the Fee Guidelines promulgated by the Executive Office of the United States Trustee, and any applicable orders of the Court.
- (f) Beginning on October 1, 2009, and on the first day of each quarter thereafter in which the chapter 11 cases are pending, the Debtors shall file with the Court and serve on the Notice Parties a statement with respect to

each Ordinary Course Professional paid during the immediately preceding three-month period. Each Ordinary Course Professional's statement shall include the following information: (i) the name of the Ordinary Course Professional; (ii) the aggregate amounts paid as compensation for services rendered and reimbursement of expenses incurred by that Ordinary Course Professional during the reported quarter; and (iii) a general description of the services rendered by that Ordinary Course Professional. Compensation payable/paid to Ordinary Course Professionals shall be subject to, *inter alia*, disallowance and disgorgement under applicable law after notice and a hearing.

- (g) The Debtors reserve the right to retain additional Ordinary Course Professionals from time to time during the chapter 11 cases by (i) including such Ordinary Course Professionals on an amended or supplemental OCP List that is filed with the Court and served on the Notice Parties and (ii) having such additional Ordinary Course Professionals comply with the OCP Procedures.
- (h) Both (i) Ordinary Course Professionals who are not law firms and (ii) law firm Ordinary Course Professionals who did not represent the Debtors prior to the Petition Date that are employed pursuant to this Order shall, once their employment is effective pursuant to subparagraphs (b) and (c), *supra*, be deemed to have waived any and all prepetition claims they may have against the Debtors.

3. The Debtors are authorized to supplement the OCP List as necessary to add or remove Ordinary Course Professionals, from time to time in their sole discretion, without the need for any further hearing and without the need to file individual retention applications for newly added Ordinary Course Professionals. In such event, the Debtors shall file the amended or supplemental OCP List with the Court within ten (10) days of the inception of the employment of the professionals listed thereon and serve such list on the Notice Parties. Each additional Ordinary Course Professional listed in the OCP List shall be subject to the OCP Procedures.

4. Nothing in the Motion or this Order, nor as a result of the Debtors' payment of claims pursuant to this Order, shall be deemed or construed as: (a) an admission as to the validity or priority of any claim against the Debtors; (b) a waiver of the Debtors' rights to dispute

any claim; or (e) an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code.

5. In the case of Ordinary Course Professionals listed on the original OCP List, such Professional's employment will be effective *nunc pro tunc* as of the Petition Date if such Professional files the Declaration of Disinterestedness within 30 days after entry of this Order and the Ordinary Course Professional's employment is authorized pursuant to the OCP Procedures. In the case of Ordinary Course Professional's first listed on a subsequent OCP list filed pursuant to subsection (g) of paragraph 2 of this Order, such Ordinary Course Professional's employment will be effective *nunc pro tunc* as of the date of the docketing of such subsequent OCP list if such Ordinary Course Professional files the Declaration of Disinterestedness within 30 days after the docketing of such subsequent OCP list and the Ordinary Course Professional's employment is authorized pursuant to the OCP Procedures. In either event, if the Ordinary Course Professional does not file a Declaration of Disinterestedness within the applicable 30-day time period, such Ordinary Course Professional retains its rights to seek *nunc pro tunc* relief by filing a Declaration of Disinterestedness that (i) clearly explains why *nunc pro tunc* (or retroactive) relief is warranted and (ii) expressly states in its title that the Ordinary Course Professional is seeking *nunc pro tunc* relief. The late-filed Declaration of Disinterestedness which complies with the foregoing shall otherwise be subject to the OCP Procedures.

6. This Order shall not apply to any professional retained by the Debtors pursuant to a separate order of the Court.

7. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

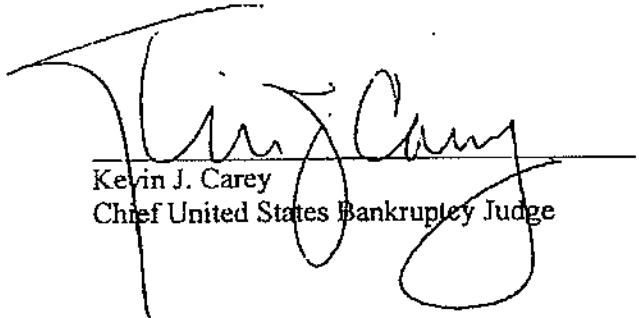
8. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

9. The requirements set forth in Rule 6003(b) of the Federal Rules of Bankruptcy Procedure are satisfied by the contents of the Motion, ~~or otherwise deemed waived.~~

10. Notwithstanding the possible applicability of Bankruptcy Rules 6004(g), 7062 or 9014, the terms and conditions of this order shall be immediately effective and enforceable upon its entry.

11. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: Wilmington, Delaware  
July 16, 2009



Kevin J. Carey  
Chief United States Bankruptcy Judge

# **EXHIBIT A**

**OCP List**

|                        | Professional                                                                             | Description of Services                           |
|------------------------|------------------------------------------------------------------------------------------|---------------------------------------------------|
| \$40,000 Professionals |                                                                                          |                                                   |
| 1.                     | Fisher Pusch & Alderman LLP<br>PO Box 1308<br>Boise, ID 83701                            | Real Estate Attorney                              |
| 2.                     | Justin Seamons<br>501 Park Avenue<br>Idaho Falls, ID 83402                               | Collection Attorney                               |
| 3.                     | Lewis & Roca LLP<br>40 North Central Avenue<br>Phoenix, AZ 85004-4429                    | Construction Defense and Collection Attorney      |
| 4.                     | Perry Winegar Attorney At Law<br>PO Box 1107<br>Tualatin, OR 97062                       | Collection Attorney                               |
| 5.                     | Seyfarth Shaw Attorneys LLP<br>131 S Dearborn Suite 2400<br>Chicago, IL 60603-5577       | Labor & Employment Attorney                       |
| 6.                     | Snell & Wilmer LLP<br>One Arizona Center<br>Phoenix, AZ 85004-2202                       | Labor & Employment Attorney                       |
| \$20,000 Professionals |                                                                                          |                                                   |
| 7.                     | Arnold & Arnold LLP<br>7596 W Jewell Avenue #305<br>Lakewood, CO 80232-6889              | Claim Prosecution and Collection Attorney         |
| 8.                     | Asbury & Asbury LLP<br>534 Pine Street, Suite 102<br>Abilene, TX 79601                   | Collection Attorney                               |
| 9.                     | Babcock Scott & Babcock<br>505 E. 200 Street, Suite 300<br>Salt Lake City, UT 84102-2055 | Collection Attorney                               |
| 10.                    | Berry & Assoc PLLC<br>2302 N 3rd Street<br>Phoenix, AZ 85004-1301                        | Collection Attorney                               |
| 11.                    | Boone Karlberg PC<br>PO Box 9199<br>Missoula, MT 59807-9199                              | Construction and Personal Injury Defense Attorney |
| 12.                    | Brian K Cuttone<br>1233 W Shaw Avenue, Suite 100<br>Fresno, CA 93711                     | Collection Attorney                               |

|     | Professional                                                                                | Description of Services                      |
|-----|---------------------------------------------------------------------------------------------|----------------------------------------------|
| 13. | Brcmer & Whyte<br>7670 West Lake Mead, Suite 225<br>Las Vegas, LV 89126                     | Construction Defense Attorney                |
| 14. | Brownstein Hyatt Farber Schreck LLP<br>410 17th Street, Suite 2200<br>Denver, CO 80202      | Labor & Employment Attorney                  |
| 15. | Christian Samson Jones & Chisholm PLLC<br>310 W Spruce<br>Missoula, MT 59802                | Collection Attorney                          |
| 16. | Crowson & Crowson LLPB<br>725 S Mesa Hills Drive, Building 2, Suite 2<br>El Paso, TX 79912  | Collection Attorney                          |
| 17. | Curtis & Arata<br>1300 K Street 2nd Floor<br>PO Box 3030<br>Modesto, CA 95353               | Collection Attorney                          |
| 18. | Damian & Valori<br>1000 Brickell Avenue, Suite 205<br>Indian Wells, CA 92210                | Labor & Employment Attorney                  |
| 19. | Dan L Claiborne<br>1025 S Broadway<br>Carrollton, TX 75006                                  | Collection Attorney                          |
| 20. | Davies Pearson PC<br>PO Box 1657<br>Tacoma, WA 98401                                        | Collection and Construction Defense Attorney |
| 21. | Davis Wright Tremaine LLP<br>1201 Third Avenue, Suite 2200<br>Seattle, WA 98101-3045        | Litigation Attorney                          |
| 22. | Duggan Schlotfeldt & Welch PLLC<br>900 Washington Street, Suite 1020<br>Vancouver, WA 98660 | Collection Attorney                          |
| 23. | Farleigh Wada Witt<br>121 SW Morrison Street, Suite 600<br>Portland, OR 97204               | Collection Attorney                          |
| 24. | Fisher & Phillips LLP<br>3993 Howard Hughes Pkwy, Suite 650<br>Las Vegas, NV 89109          | Labor & Employment Attorney                  |
| 25. | Fitzgerald & Mule LLP<br>74-770 Hwy 111, Suite 205<br>Indian Wells, CA 92210                | Labor & Employment Attorney                  |



|     | Professional                                                                                   | Description of Services                           |
|-----|------------------------------------------------------------------------------------------------|---------------------------------------------------|
| 26. | Flaherty & Flaherty<br>401 W A Street #2220<br>San Diego, CA 92101                             | Collection Attorney                               |
| 27. | Gallagher & Kennedy<br>PO Box 32159<br>Phoenix, AZ 85064-2159                                  | Department of Labor Audit Defense Attorney        |
| 28. | Garrey Woner Hoffmaster & Peshek PC<br>6611 N Scottsdale Road<br>Scottsdale, AZ 85250          | Construction Defense Attorney                     |
| 29. | Goode Casseb Jones Riklin<br>2122 N Main Avenue<br>San Antonio, TX 78212-9680                  | Construction and Personal Injury Defense Attorney |
| 30. | Gowling Lafleur Henderson LLP<br>1 First Canadian Pl., Suite 1600<br>Toronto, ON<br>M5X 1G5    | Trademark Attorney                                |
| 31. | Gregory D. D'Antonio<br>235 W. Giaconda Way<br>Yucson, AZ 85704                                | Collection Attorney                               |
| 32. | Greenfield Hardy Law Firm<br>4790 Golden Foothill Pkwy, Suite 210<br>El Dorado Hills, CA 95762 | Construction and Personal Injury Defense Attorney |
| 33. | Hawley Troxell Ennis & Hawley LLP<br>PO Box 1617<br>Boise, ID 83701-1617                       | Trademark Attorney                                |
| 34. | Helm and Associates<br>2810 W. Charleston Blvd., Suite G-67<br>Las Vegas, NV 89102             | Construction Defense Attorney                     |
| 35. | Hermes Sargent Bates LLP<br>901 Main Street, Suite 5200<br>Dallas, TX 75202                    | Collection Attorney                               |
| 36. | Hoffman, Hart & Wagner<br>1000 SW Broadway, 20th Floor<br>Portland, OR 97205                   | Construction Defense Attorney                     |
| 37. | John Somyak & Associates<br>3401 Louisiana, Suite 480<br>Houston, TX 77002                     | Collection Attorney                               |
| 38. | Judy Osborn Attorney at Law<br>2705 Bee Cave Road Suite 225<br>Austin, TX 78746                | Labor & Employment Attorney                       |

|     | Professional                                                                                              | Description of Services       |
|-----|-----------------------------------------------------------------------------------------------------------|-------------------------------|
| 39. | Kelly Olson Michod Dehaan & Richter LLC<br>30 S. Wacker Drive Suite 2300<br>Chicago, IL 60606             | Collection Attorney           |
| 40. | Kemp Smith LLP<br>221 N Kansas Suite 1700<br>El Paso, TX 79901-1441                                       | Labor & Employment Attorney   |
| 41. | Ken Jorgensen<br>2240 W. Shaw Ave., Suite 1700<br>El Paso, TX 79901-1441                                  | Collection Attorney           |
| 42. | Law Office Of Brandon W Beasley<br>2224 Walsh Tarlton Suite 210<br>Austin, TX 78746                       | Collection Attorney           |
| 43. | Law Office of Keith S. Knochel PC<br>2135 Highway 95, Suite 241<br>Bullhead City, AZ 86442                | Construction Defense Attorney |
| 44. | Leiby Stearns and Roberts PA<br>1000 Sawgrass Corp Pkwy, Suite 552<br>Fort Lauderdale, FL 33323           | Collection Attorney           |
| 45. | Letofsky & McClain<br>3655 Nobel Drive, Suite 400<br>San Diego, CA 92122                                  | Construction Defense Attorney |
| 46. | Livengood Fitzgerald & Alskog<br>PO Box 908<br>Kirkland, WA 98083                                         | Collection Attorney           |
| 47. | Mariscal Weeks McIntyre &<br>2901 North Central Avenue, Suite 200<br>Phoenix, AZ 85012                    | Collection Attorney           |
| 48. | Markowitz Davis Ringel & Trusty<br>Two Datan Center #1225<br>9130 S Dadeland Blvd<br>Miami, FL 33156-7849 | Collection Attorney           |
| 49. | Marks Golia & Finch LLP<br>8620 Spectrum Center Blvd, Suite 900<br>San Diego, CA 92123                    | Collection Attorney           |
| 50. | Maupin Cox & Legoy<br>PO Box 30000<br>Reno, NV 89599-3000                                                 | Construction Defense Attorney |
| 51. | Maziecke Frederickson & Grant<br>333 S. Sixth Street, Suite 230<br>Las Vegas, NV 89101                    | Construction Defense Attorney |

|     | Professional                                                                                | Description of Services                                  |
|-----|---------------------------------------------------------------------------------------------|----------------------------------------------------------|
| 52. | McDonough Holland & Allen<br>555 Capitol Mall 9th Floor<br>Sacramento, CA 95814             | Construction Defense Attorney                            |
| 53. | McPharlin Sprinkles & Thomas LLP<br>10 Almaden Blvd, Suite 1460<br>San Jose, CA 95113       | Labor & Employment Attorney                              |
| 54. | Meuleman & Mollerup LLP<br>755 W Front Street, Suite 200<br>Boise, ID 83702                 | Collection Attorney                                      |
| 55. | Moffatt Thomas Barrett Rock & Fields<br>PO Box 829<br>Boise, ID 83701                       | Transactional, Litigation, and Real<br>Property Attorney |
| 56. | Morris Polich & Purdy LLP<br>1055 W. 7th Street, 24th Floor<br>Los Angeles, CA 90017-2503   | Construction Defense and Collection<br>Attorney          |
| 57. | Nutting & Jorgensen LLP<br>5703 N. West Avenue Suite 103<br>Fresno, CA 93711                | Collection Attorney                                      |
| 58. | Osborn Law Firm LLC<br>217 West Olive<br>Ft. Collins, CO 80521                              | Collection Attorney                                      |
| 59. | Parker Nelson & Associates<br>2460 Professional Court, Suite 200<br>Las Vegas, NV 89101     | Construction Defense Attorney                            |
| 60. | Plant Christensen & Kanell<br>J Street<br>136 East South Temple<br>Salt Lake City, UT 84111 | Litigation Attorney                                      |
| 61. | Rainer Anding & McLindon<br>8480 Bluebonnet Blvd<br>Baton Rouge, LA 70810                   | Collections Attorney                                     |
| 62. | Reed Smith LLP<br>PO Box 39000 Dept 33489<br>San Francisco, CA 94139                        | Real Estate Attorney                                     |
| 63. | Richards Law Office<br>804 East Pennsylvania Lane<br>Boise, ID 83706                        | Employment Attorney                                      |
| 64. | Ringert Law Chartered Lawyers<br>455 South Third Street<br>Boise, ID 83701                  | Collection Attorney                                      |

|     | Professional                                                                               | Description of Services |
|-----|--------------------------------------------------------------------------------------------|-------------------------|
| 65. | Rogers & Whitley LLP<br>2210 San Gabriel<br>Austin, TX 78705                               | Real Estate Attorney    |
| 66. | Rycraft Law Office<br>2470 Street Rose Pkwy 102<br>Henderson, NV 89074                     | Collection Attorney     |
| 67. | Schwabe Williamson & Wyatt PC<br>1211 SW 5th Avenue, Suite 1900<br>Portland, OR 97204-3795 | Collection Attorney     |
| 68. | Sonnenschein Nath & Rosenthal LLP<br>2100 Rexford Road<br>Charlotte, NC 28211-3484         | Collection Attorney     |
| 69. | Spiess & Assoc Pc<br>420 W Roosevelt Street<br>Phoenix, AZ 85003                           | Collection Attorney     |

**EXHIBIT B**  
**Form of Declaration of Disinterestedness**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

|                                           |   |                         |
|-------------------------------------------|---|-------------------------|
| IN RE:                                    | ) |                         |
|                                           | ) | Chapter 11              |
| BUILDING MATERIALS HOLDING                | ) |                         |
| CORPORATION, <i>et al.</i> , <sup>1</sup> | ) | Case No. 09-12074 (KJC) |
|                                           | ) |                         |
| Debtors.                                  | ) | Jointly Administered    |
|                                           | ) |                         |

VERIFIED STATEMENTS OF CONNECTIONS

I, \_\_\_\_\_, declare under penalty of perjury:

1. I am a [position] of [insert name of sole proprietorship or company], located at [Street, City, State, Zip Code] (the "*Firm*").
2. Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "*Debtors*") have requested that the Firm provide [specific description of services] to the Debtors, and the Firm has consented to provide such services.
3. If the Firm is a law firm, I state that the Firm [did/did not] represent the Debtors prior to their bankruptcy filings.
4. The Firm may have performed services in the past, may currently perform services and may perform services in the future, in matters unrelated to these chapter 11 cases, for persons that are parties in interest in these chapter 11 cases. The Firm does not perform services for any such person in connection with these chapter 11 cases, or have any relationship

<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

with any such person, their attorneys or accountants that would be adverse to the Debtors or their estates. Furthermore, if the Firm is either (i) not a law firm or (ii) a law firm that did not represent the Debtors prior to their bankruptcy filings, the Firm is a "disinterested person" under 11 U.S.C. § 101(14), such that the Firm:

- (a) is not a creditor, an equity security holder, or an insider of any of the Debtors;
- (b) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of any of the Debtors; and
- (c) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the Debtors, or for any other reason.

5. As part of its customary practice, the Firm is retained in cases, proceedings, and transactions involving many different parties, some of whom may represent or be employed by the Debtors, claimants, and parties-in-interest in the Debtors' chapter 11 cases.

6. Neither I nor any principal, partner, director, officer, etc. of, or professional employed by, the Firm has agreed to share or will share any portion of the compensation to be received from the Debtors with any other person other than the principal and regular employees of the Firm.

7. In the ordinary course of its business, **[the Firm maintains a database for purposes of performing "conflicts checks."][the Firm confirms conflicts by reviewing its client base]** [The Firm's database contains information regarding the Firm's present and past representations.] Pursuant to Federal Rule of Bankruptcy Procedure 2014(a), I obtained a list of the entities identified in Rule 2014(a) from counsel to the Debtors for purposes of searching the aforementioned database and determining the connection(s) which the Firm has with such entities. The Firm's **[search of the database][review]** identified the following connections:

8. [ADD ANY NECESSARY DISCLOSURES]

9. Neither I nor [any principal, partner, director, officer, etc.] of or professional employed by, the Firm, insofar as I have been able to ascertain, holds or represents any interest adverse to the Debtors or their estates with respect to the matter(s) upon which this Firm is to be employed. Furthermore, if the Firm is either (i) not a law firm or (ii) a law firm that did not represent the Debtors prior to their bankruptcy filings, I state that neither I nor [any principal, partner, director, officer, etc.] of or professional employed by, the Firm, insofar as I have been able to ascertain, holds or represents any interest adverse to the Debtors.

10. The Debtors owe the Firm \$[ ] for prepetition services, the payment of which is subject to limitations contained in the United States Bankruptcy Code, 11 U.S.C. § §101-1532. If the Firm is either (i) not a law firm or (ii) a law firm that did not represent the Debtors prior to their bankruptcy filings, my signature below acknowledges that the Firm understands that any and all pre-petition claims that it has against the Debtors will be deemed waived if the Firm's employment is authorized.

11. As of June 16, 2009, which was the date on which the Debtors commenced these chapter 11 cases, the Firm [was/was not] party to an engagement or services agreement with the Debtors. [A copy of such agreement is attached as *Exhibit A* to this Declaration].

12. As of June 16, 2009, the Firm [was/was not] party to an agreement for indemnification with certain of the Debtors. [A copy of such agreement is attached as *Exhibit B* to this Declaration.]

13. If the Firm is not a law firm, the following is a list of all payments which the Firm received from the Debtors during the year prior to the Debtors' bankruptcy filings:



[The Debtors recommend (and the U.S. Trustee requests) that the OCP organize payments in the following columns: invoice date, invoice amount, date(s) of service covered by invoice, payment date and payment amount. Retainers and draws on retainers should be specifically noted as such]

14. The Firm is conducting further inquiries regarding its retention by any creditors of the Debtors, and upon conclusion of that inquiry, or at any time during the period of its employment, if the Firm should discover any facts bearing on the matters described herein, the Firm will supplement the information contained in this Declaration.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: \_\_\_\_\_, 2009

\_\_\_\_\_  
[DECLARANT]

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

|                                           |   |                         |
|-------------------------------------------|---|-------------------------|
| IN RE:                                    | ) |                         |
|                                           | ) | Chapter 11              |
| BUILDING MATERIALS HOLDING                | ) |                         |
| CORPORATION, <i>et al.</i> , <sup>1</sup> | ) | Case No. 09-12074 (KJC) |
|                                           | ) |                         |
| Debtors.                                  | ) | Jointly Administered    |
|                                           | ) |                         |
|                                           | ) |                         |

**VERIFIED STATEMENTS OF CONNECTIONS**

I, \_\_\_\_\_, declare under penalty of perjury:

1. I am a [position] of [insert name of sole proprietorship or company], located at [Street, City, State, Zip Code] (the "*Firm*").
2. Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "*Debtors*") have requested that the Firm provide [specific description of services] to the Debtors, and the Firm has consented to provide such services.
3. If the Firm is a law firm, I state that the Firm [did/did not] represent the Debtors prior to their bankruptcy filings.
4. The Firm may have performed services in the past, may currently perform services and may perform services in the future, in matters unrelated to these chapter 11 cases, for persons that are parties in interest in these chapter 11 cases. The Firm does not perform services for any such person in connection with these chapter 11 cases, or have any relationship with any such person, their attorneys or accountants that would be adverse to the Debtors or their

---

<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

estates. Furthermore, if the Firm is either (i) not a law firm or (ii) a law firm that did not represent the Debtors prior to their bankruptcy filings, the Firm is a "disinterested person" under 11 U.S.C. § 101(14), such that the Firm:

- (a) is not a creditor, an equity security holder, or an insider of any of the Debtors;
- (b) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of any of the Debtors; and
- (c) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the Debtors, or for any other reason.

5. As part of its customary practice, the Firm is retained in cases, proceedings, and transactions involving many different parties, some of whom may represent or be employed by the Debtors, claimants, and parties-in-interest in the Debtors' chapter 11 cases.

6. Neither I nor any principal, partner, director, officer, etc. of, or professional employed by, the Firm has agreed to share or will share any portion of the compensation to be received from the Debtors with any other person other than the principal and regular employees of the Firm.

7. In the ordinary course of its business, **[the Firm maintains a database for purposes of performing "conflicts checks."][the Firm confirms conflicts by reviewing its client base]** [The Firm's database contains information regarding the Firm's present and past representations.] Pursuant to Federal Rule of Bankruptcy Procedure 2014(a), I obtained a list of the entities identified in Rule 2014(a) from counsel to the Debtors for purposes of searching the aforementioned database and determining the connection(s) which the Firm has with such entities. The Firm's **[search of the database][review]** identified the following connections:

8. **[ADD ANY NECESSARY DISCLOSURES]**

9. Neither I nor **[any principal, partner, director, officer, etc.]** of or professional employed by, the Firm, insofar as I have been able to ascertain, holds or represents any interest adverse to the Debtors or their estates with respect to the matter(s) upon which this Firm is to be employed. Furthermore, if the Firm is either (i) not a law firm or (ii) a law firm that did not represent the Debtors prior to their bankruptcy filings, I state that neither I nor **[any principal, partner, director, officer, etc.]** of or professional employed by, the Firm, insofar as I have been able to ascertain, holds or represents any interest adverse to the Debtors.

10. The Debtors owe the Firm \$[ ] for prepetition services, the payment of which is subject to limitations contained in the United States Bankruptcy Code, 11 U.S.C. § §101-1532. If the Firm is either (i) not a law firm or (ii) a law firm that did not represent the Debtors prior to their bankruptcy filings, my signature below acknowledges that the Firm understands that any and all pre-petition claims that it has against the Debtors will be deemed waived if the Firm's employment is authorized.

11. As of June 16, 2009, which was the date on which the Debtors commenced these chapter 11 cases, the Firm **[was/was not]** party to an engagement or services agreement with the Debtors. **[A copy of such agreement is attached as *Exhibit A* to this Declaration].**

12. As of June 16, 2009, the Firm **[was/was not]** party to an agreement for indemnification with certain of the Debtors. **[A copy of such agreement is attached as *Exhibit B* to this Declaration.]**

13. If the Firm is not a law firm, the following is a list of all payments which the Firm received from the Debtors during the year prior to the Debtors' bankruptcy filings:

**[The Debtors recommend (and the U.S. Trustee requests) that the OCP organize payments in the following columns: invoice date, invoice amount, date(s) of service covered by invoice, payment date and payment amount. Retainers and draws on retainers should be specifically noted as such]**

14. The Firm is conducting further inquiries regarding its retention by any creditors of the Debtors, and upon conclusion of that inquiry, or at any time during the period of its employment, if the Firm should discover any facts bearing on the matters described herein, the Firm will supplement the information contained in this Declaration.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing  
is true and correct.

Date: \_\_\_\_\_, 2009

\_\_\_\_\_  
[DECLARANT]

## **SCHEDULE 1**

### **Bankruptcy Cases Filed By the Debtor and Affiliates of the Debtor**

The following affiliated debtors contemporaneously have filed chapter 11 petitions in the United States Bankruptcy Court for the District of Delaware:

#### **Affiliated Debtors:**

1. Building Materials Holding Corporation
2. BMC West Corporation
3. SelectBuild Construction, Inc.
4. SelectBuild Nevada, Inc.
5. C Construction, Inc.
6. TWF Construction, Inc.
7. H.N.R. Framing Systems, Inc.
8. SelectBuild Arizona, LLC
9. Illinois Framing, Inc.
10. SelectBuild Northern California, Inc.
11. SelectBuild Southern California, Inc.
12. SelectBuild Illinois, LLC

## **EXHIBIT E – LIST OF INTERESTED PARTIES**

**(i) Debtor entities:**

- Building Materials Holding Corporation
- BMC West Corporation
- SelectBuild Construction, Inc.
- SelectBuild Nevada, Inc.
- C Construction, Inc.
- TWF Construction, Inc.
- H.N.R. Framing Systems, Inc.
- SelectBuild Arizona, LLC
- SelectBuild Northern California, Inc.
- SelectBuild Southern California, Inc.
- SelectBuild Illinois, LLC
- Illinois Framing, Inc.

**(ii) Debtors' prepetition and postpetition secured bank lenders:**

- Wells Fargo Bank
- BNP Paribas
- SunTrust Bank
- American AgCredit
- J.P. Morgan Chase
- U.S. Bank
- LaSalle Bank
- Rabobank
- Raymond James
- Union Bank of California
- Dimaio Ahmad Capital (Duane Street)
- HSBC
- PNC Bank
- Commerzbank
- Guaranty Federal Bank
- Van Kampen American
- Bank of New York (OWS)
- Bank of New York (Blue Mountain)
- Bank of New York (Jersey Street)
- Bank Leumi
- D. E. Shaw Laminar Portfolios
- West Coast Bank
- Whitebox Hedged HY Partnership
- Grandview Capital (Vinacasa, Waterfront)
- Whitney Bank
- Aladdin Capital Mgmt. (Landmark)
- Fraser Sullivan
- Denali Capital
- Phoenix
- PPM American
- Bank of America
- ACA Management
- Gulf Stream Asset Mgmt.
- Alliance Bernstein LP
- AIB Debt Management
- PHL Variable Insurance
- Morgan Stanley
- State Street (Qualcomm)
- Columbus Nova
- Third Avenue Spec. Sit. Fund
- Edwards Angell Palmer & Dodge (Marlborough St.)
- MFS
- The Hartford
- GPX LIX LLC
- Lehman Commercial Paper
- Bayside Capital (Grace Bay Holdings)

**(iii) Holders of more than 5% of the Debtors' equity securities:**

- Schneider Capital Management Corporation
- Daniel T. Shelly Trust
- Howard H. Leach



(iv) **Current officers and directors of the Debtors and individuals who have served as officers or directors of the Debtors in the past two years:**

- Robert E. Mellor
- William M. Smartt
- Stanley M. Wilson
- Paul S. Street
- Mark R. Kailer
- Michael D. Mahre
- Jeffrey F. Lucchesi
- Steven H. Pearson
- John D. Fa
- Danny McQuary
- Randy Folts
- Randall Shipp
- Doug Richards
- Ward Cole
- Michael Kearney
- Mike Landgren
- Robert Garcia
- John Volkman
- Steve Webster
- Alan Bruce Willard
- Jon Stone
- John Herring
- Tony Spagnola
- Robert Blose
- Edward Levato
- Keith Kotche
- Gerald Riggs
- Rick Jepson
- Sean Cavanaugh
- Jim Clevan
- Gary Burleson
- Robert R. Thomas
- Henry F. Rice
- Lawrence Calof
- Sara L. Beckman
- Eric S. Belsky
- James K. Jennings, Jr.
- Norman J. Metcalfe
- David M. Moffett
- R. Scott Morrison, Jr.
- Peter S. O'Neill
- Richard G. Reiten
- Norman R. Walker

(v) **Parties to significant litigation with the Debtors:**

- DR Horton
- Brett Laso
- Merrill Bauchert
- Campbell Companies
- Weis Builders, Inc.
- Chanen Construction
- Fifth Third Bank

(vi) **The Debtors' 50 largest unsecured creditors on a consolidated basis as identified in their chapter 11 petitions:**

- Weyerhaeuser Company
- Robert Garcia
- Boise Cascade
- CalPortland
- Ellis C. Goebel
- Steven H. Pearson
- Simpson Strong Tie, Inc.
- James Hardie Building Products
- Michael D. Mahre
- Milgard Manufacturing
- Sauder Mouldings
- Masonite
- Marvin Windows & Doors
- Michael D. Badgley
- White Cap
- Barr Lumber Co., Inc.

- Ready Mix, Inc.
- David G. Ondrasek
- Joseph James Zuendel
- Cemex Inc.
- Jimmy D. Pask
- Coffman Stairs LLC
- Douglas Alan Davidson
- Daniel McQuary
- ProBuild
- James A. Lee
- Roy E. Gardner
- Mark D. Whaley
- Leroy D. Custer
- Louisiana Pacific Corp.
- Dakeryn Industries Ltd.
- Columbia Forest Products
- David B. Bello
- Lumber Products
- Atrium Companies, Inc.
- Jack D. LaRock
- True Value
- Professional Building Solutions – Scott Axelrod
- Logan D. Bailor
- Grove Lumber
- John M. Volkman
- Mitek Industries, Inc.
- Robert L. Becci
- ODL, Inc.
- Neil B. Watterson
- Jerry Baird
- Exterior Wood, Inc.
- Cedar Creek Lumber, Inc.
- Hardwood Specialty Products
- Primesource

(vii) **The unions with whom the Debtors have collective bargaining agreements:**

- Chicago Regional Council of Carpenters
- General Teamsters
- Lumber, Production & Industrial Workers Union
- U.B.C. Industrial
- Western Council of Industrial Workers

(viii) **The Debtors' landlords:**

- 3 Boulders, LLC
- Ralph Road LLC
- Gregg Street LLC
- ER Management/Federal Blvd Properties LP
- SRC Oates LLC
- Space Center Mira Loma, Inc.
- Hawley Family Trust
- MW LLC
- 2930 Marco St, LLC
- Northpark, LLC
- Eugene MonKarsh
- David Eckenrode
- JH Associates LLC
- Greenwood & McKenzie Real Estate Investments
- Darryl Crow
- Opus West Corporation
- Cactus Bloom LLC
- Scottsdale Ridge Prop Off LLC
- Condos LLC
- Walter Sargent
- John David Gillis
- Boston Properties
- Price Lakeshore LLC
- Sundance Investments L.P.
- Wooten Properties LLP
- WS Properties
- Union Pacific Railroad
- Massie & Co
- Houston Distributing Company, Inc.
- The Home Emporium

- Steve & Becky Studebaker
- Waycon Development
- SRC Polaris LLC
- VEPA III, LLC
- SRC Pellisier, LLC
- Leaman Building Materials, L.P.
- Thunderhead Holdings
- Westland Enterprises
- The Gateway
- David & Patricia Kubich
- Randolph Davis, Sandra Davis,  
George Davis & Jody Davis
- 3 Boulders, LLC
- Boulders West, LLC
- San Marcos Plaza /JVP LLC
- SSS Properties LLC
- SRC Spencer LLC
- Southwest Land Development
- RAMI Enterprises
- Lone Butte Industrial Park
- Beck Properties
- ViaWest
- Dependable Sheet Metal
- B&T LLC
- MK Plaza Trust
- Nyle Tanner
- The Outfitters Building
- Stutzman Properties, LLC
- Modern Building Systems, Inc.

- Intermountain Design & Display  
Center, LLC
- Dan Treinen
- Resun Leasing Inc.
- Youngquist Investments, Ltd.
- Elwood HA, LLC
- Hillcrest Partners Joint Venture
- NWV Center LTD
- Douglas C Moore
- Tivydale Business Park
- Sam Golden
- RUMA, Ltd.
- Railroad Management Company  
LLC
- Braker Center LP
- Chase Merritt/PW Plaza Phase I,  
Ltd.
- Kevin Mendenhall
- Steel Yards LLC
- Your Daily Home Show LLC
- Union Pacific Railroad
- Aramark-Wahweap Marina
- San Joaquin Valley RR Co
- CRP Holdings B.L.P
- LF Limited LP
- Cedar Mill Lumber & Hardware Co.,  
Inc.
- RRW LLC

(ix) **The Debtors' utility providers:**

- AHA Macav Power Service
- Allied Waste Services # 538
- APS
- Black Hills Energy
- Araphahoe County
- Atmos Energy
- Bermuda Water Company
- Board of Water Works
- Bona Vista Water District
- CenterPoint Energy
- Central Texas Electric
- City Of Abilene
- City of Austin
- City of Boise
- City of Burlington
- City of Cedar Park  
(Whitestone)  
(Brushy Creek)
- City of Charlotte
- County of Mecklenburg
- City of Coppell
- City of Fort Collins
- City of Fresno
- City of Frisco
- City of Helena
- City of Houston

- City of Hurst
- City of Issaquah
- City of Kent
- City of Killeen
- City of Missoula
- City of Modesto
- City of North Las Vegas
- City of Orem
- City of Poway
- City of Rexburg
- City of Rosenberg
- City of Shelley
- City of Sparks
- City of Terrell
- City of Thornton
- City of West Jordan
- City Waste Paper, Inc
- Clark Public Utilities
- Clark Regional Waste Water
- Colorado Springs Utilities
- CPS Energy
- Douglas County
- Duke Energy
- Duncan Disposal
- EDCO Waste & Recycling Service
- El Paso Electric Company
- El Paso Water
- Evergreen Disposal
- Evergreen Metro District
- Flathead County Water
- Flathead Electric Cooperative, Inc.
- Gas Company
- Hargus Disposal
- Harris County Mud 366
- Idaho Power
- Imperial Irrigation District
- Indio Water Authority
- Intermountain Gas
- Intermountain Rural Electric Association
- Lakeview Light & Power
- Lakewood Refuse Service
- Las Vegas Valley Water District
- Modesto Irrigation District
- Mountain Water Co.
- New Braunfels Utilities
- NorthWestern Energy
- NW Harris Co. Mud # 6
- NW Natural
- Pedernales Electric
- PG & E
- PGE Portland General Electric
- Piedmont Natural Gas
- Pierce County
- Pride Disposal Company
- Puget Sound Energy
- Questar Gas
- Riverside Public Utilities
- Rocky Mountain Power
- Rubatino Refuse Removal Inc
- Sammamish Plateau
- San Diego Gas & Electric
- Sierra Pacific Power Co.
- Snohomish County
- Southern California Edison
- Southwestern Electric Power (American Electric Inc)
- Strategic Energy
- Texas Gas Service
- Truckee Meadows Water
- Tualatin Valley Water District
- United Power
- United Water
- Utility Services
- Waste Connections - Vancouver District 210
- Waste Management
- West Haven Special District
- WTU Retail Energy
- Xcel Energy
- ADG Communications
- AllTel
- Arkadin Global
- ATT
- ATT Mobility
- Broadwing/L3 Communications
- CCI Network Services
- Cellular One

- CenturyTel
- eFax Corporate
- Embarq
- Excel
- Frontier
- Gila River Telecom
- Granite
- Integra Telecom
- InteCall
- Matrix Telecom Inc

- MetTel
- NTS Communications Inc
- PAETEC Communications
- Qwest
- Sprint-Nextel
- TelePacific Communications
- TW Telecom
- UCN Inc
- Verizon
- Westel Fiber

(x) **The Debtors' insurers and insurance brokers:**

- Marsh USA, Inc.
- Integro USA, Inc.
- Aon, Inc.
- ACE American Insurance Co.
- Westchester Surplus Lines Ins. Co.
- All Risks Ltd.
- AXIS Surplus Insurance Company
- Max Specialty Insurance Company
- Aspen Insurance UK Limited
- Marsh Global Markets (Dublin) Limited
- Lexington Insurance Company UKB
- Marsh Ltd.
- Tower Place
- London, N/A EC3R 5 BU
- XL Europe Limited
- Catlin Insurance Company (UK) Ltd.
- Max Re Ltd.
- SR International Business Insurance
- Marsh AG
- AIG Excess Liability Insurance Company Ltd.
- American Int'l Specialty Lines Ins. Co.
- Western Risk Specialists Inc.
- XL Specialty Ins. Co.
- W Brown & Associates Insurance Service
- Federal Ins. Co.
- National Union Fire Insurance Co. of Pittsburgh PA
- Arch Ins. Company
- XL Insurance Ltd.
- Starr Excess Liab Ins Co Ltd.
- Old Republic Insurance Company
- Zurich American Ins. Co.
- Swiss Re
- AIGCEL
- Midwest Employers Casualty Co.
- AIG Environmental
- Chubb Group of Insurance Companies
- AIG Cat Excess
- Indemnity Ins. Co. of N.A. (ACE)

(xi) **The Debtors' 50 largest customers:**

- Western National Contractors
- D.R. Horton, Inc.
- K B Home
- The Chanen Corporation
- The Ryland Group Inc.
- Barratt American Incorporated
- Mel-Re Construction, Inc.
- Wilshire Homes Of Texas Ltd.
- The Astoria Corporation
- Woodrow Taylor Homes Inc.
- Pulte Homes, Inc.
- Woodside Group Inc.
- Ff Development L.P.
- Van Guard Construction, LLC

- Phi Holding Inc.
- Ashton Woods USA L.L.C.
- J.F. Shea Construction, Inc.
- Nevis Homes, LLC
- Ducati Development Group, LLC
- Framemax, Inc.
- Weekley Homes, L.P.
- David Powers Homes L.E., Ltd.
- Prime Investors & Developers Inc.
- Ivory Homes, Ltd.
- Weyerhaeuser Company
- W1 Homes LLC
- Storybook Homes LLC
- Toll Brothers, Inc.
- Main Street Ltd.
- Mansions Custom Homes Iv LLC
- Borm Associates Inc.
- Olson Urban Housing LP
- Highway One Construction, Inc.

- M.D.C. Holdings, Inc.
- Bonadelle Development Corp.
- Core Construction Svcs Nev Inc.
- Lyle Homes, Inc.
- Prescott Homes Inc.
- Fantasy Construction Inc.
- Colrich Construction, Inc
- Mhi Mortgage
- Highland Homes, Ltd.
- Meritage Homes Corporation
- Davidson Communities LLC
- Standard Pacific Corp.
- Pannunzio, Inc.
- Greystone Multi-Family Builders, Inc.
- Summit Companies Of Jacksonville, Inc.
- Centex Corporation
- Signature Properties, Inc.

(xii) **The Debtors' 50 largest vendors:**<sup>1</sup>

- Weyerhaeuser NR Company
- Boise Cascade BMDD
- General Electric Co.
- Marvin Windows & Doors
- JP Morgan Chase Bank
- Masonite
- Hampton Distribution Companies
- James Hardie Building Products
- Guardian Building Products
- Bluelinx Corporation
- Louisiana Pacific Corp.
- DW Distribution
- SB Mira Loma Reload
- Columbia Forest Products
- Ainsworth Lumber Co Ltd.
- Mitek Industries Inc.

- Huttig Building Products
- Jeld Wen Windows & Doors
- American Intl. Forest Products
- Swanson Group
- Milgard Manufacturing Inc.
- SB Dist Nevada LBM
- Silver State Materials Corp.
- JM Thomas Forest Products
- Lumber Products
- Potlatch Land & Lumber LLC
- Orepac Bldg Products
- White Cap
- True Value
- Sauder Mouldings
- Therma Tru Corp.
- West Fraser Mills Ltd.
- All Coast Forest Products

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<sup>1</sup> The Debtors' 50 largest vendors were determined by reference to the amount paid to vendors during the one-year period from April 2008 to March 2009.

- Taiga Forest Products Ltd.
- Woodgrain
- Sun Mountain Lumber Company
- Sierra Pacific Industries
- Db Constructors Inc.
- Capital Lumber Company
- Martco Partnership
- Coffman Stairs LLC
- Atrium Companies Inc.
- Riley Creek Co.
- Aristokraft
- Masonite Entry Systems
- Cedar Creek Lumber Inc.
- Lifetime Doors Inc.
- Ferguson Enterprises Inc.
- Lumber Yard Supply Co.
- Ready Mix Inc.

(xiii) **Professionals to be employed by the Debtors in these Chapter 11 Cases:**

- Gibson, Dunn & Crutcher, LLP
- Young Conaway Stargatt & Taylor, LLP
- The Garden City Group, Inc.
- Alvarez and Marsal North America, LLC
- Peter J. Solomon Company
- PricewaterhouseCoopers LLP
- KPMG LLP
- Kekst and Company, Inc.

(xiv) **Other significant parties:**

- GE Capital Corp.
- Penske
- Prudential
- Microsoft
- CIT Technology Financing Services, Inc.

100630374\_6.DOC



LEGAL DEPARTMENT  
720 PARK BLVD., SUITE 200  
BOISE, ID 83712

September 3, 2009

Burch & Cracchiolo, PA  
702 East Osborn Road, Suite 200  
Phoenix, AZ 85014

**RE: ORDER ALLOWING BMHC TO RETAIN YOUR LAW FIRM  
IMMEDIATE ACTION REQUIRED**

Dear Counsel:

Our records indicate that your law firm performs services for Building Materials Holding Corporation ("BMHC") or one of its subsidiaries listed on the enclosed Schedule 1. As you know, we filed a voluntary petition under Chapter 11 of the Bankruptcy Code on June 16, 2009. The Bankruptcy Court has authorized us to continue to engage and pay your law firm while the Chapter 11 proceedings are pending. A copy of that Order (with Supplement) is attached. You can access information on the bankruptcy filing and the docket at [www.bmhcrestructuring.com](http://www.bmhcrestructuring.com).

**The Court requires that your law firm prepare a Verified Statement of Connections in the form of the attached affidavit and file it no later than October 2, 2009. This form is available electronically; simply email your request for the form to Lesa Thomas at [thomas@bmhc.com](mailto:thomas@bmhc.com). Please email your completed Verified Statement of Connections directly to Robert Poppiti of Young Conaway Stargatt & Taylor, LLP at [RPoppiti@ycst.com](mailto:RPoppiti@ycst.com) for electronic filing.**

**EXCEPT AS SET FORTH BELOW, YOU MAY NOT MAKE ANY CHANGES TO THE FORM OR TEXT OF THE AFFIDAVIT OR IT WILL BE REJECTED BY THE COURT AND WE WILL NOT BE ABLE TO PAY YOUR LAW FIRM.**

Section 1 – insert your name, title and the name and address of your law firm.

Section 2 – insert the description of services your firm provides by referring to the description set forth next to your law firm's name on Exhibit A of the attached Order.

Section 3 – indicate whether your firm "did" or "did not" represent our company prior to June 16, 2009.

Section 7 – select either the first or second option depending on whether your firm uses a database or performs conflict searches manually.

Section 8 - review the attached list of Rule 2014(a) entities and list any entities from that list that are or were clients of your law firm.



Section 9 – insert the correct term depending on what type of legal entity you have established for your law firm.

Section 10 – insert the amount our company presently owes your law firm for services performed or expenses advanced prior to June 16, 2009. Note that the date of your invoice is not relevant; it is the date you performed the work. Do not include fees and expenses that you bill to and are paid directly by any of our insurance carriers.

Section 11 – select either the first or second option depending on whether you have a signed engagement letter on file from our company.

Section 12 – insert “was not.” If you believe the correct answer for your firm is “was” please contact me to discuss.

Section 13 – NOTE: this Section is not applicable to law firms.

Sign and date the affidavit - a notary is not required.

If you have any questions, please email Lesa Thomas at [thomas@bmhc.com](mailto:thomas@bmhc.com) or call 208-331-4382. Thank you for your cooperation.

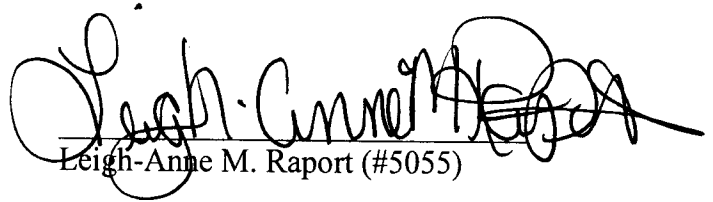
Very truly yours,



Paul S. Street  
*Senior Vice President, Chief Administrative Officer,  
General Counsel and Corporate Secretary*

**CERTIFICATE OF SERVICE**

I, Leigh-Anne M. Raport, hereby certify that on October 30, 2009, I caused one copy of the foregoing document to be served upon the parties on the attached service list in the manner indicated.

  
Leigh-Anne M. Raport (#5055)

BMHC 2002 Service List  
Case No. 09-12074  
Avery Labels 5162

Christopher M. Alston, Esq.  
Foster Pepper PLLC  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101  
(Counsel to JELD-WEN, inc.)  
**First Class Mail**

David G. Aelvoet, Esq.  
Linebarger Goggan Blair & Sampson LLP  
Travis Building, 711 Navarro, Suite 300  
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**First Class Mail**

Robert McL. Boote, Esq.  
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**First Class Mail**

Brian W. Bisignani, Esq.  
Post & Schell, P.C.  
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(Counsel to Aon Consulting)  
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