

NEW MEXICO STATE UNIVERSITY TERMS AND CONDITIONS FOR CONSTRUCTION AND RELATED SERVICES

1. Applicability. These terms and conditions (Construction Terms and Conditions) apply only to purchases of construction and related services. Terms and conditions applicable to all NMSU purchases are in a separate document entitled: New Mexico State University Standard Terms and Conditions. That document is incorporated by reference into these Construction Terms and Conditions.
2. General Provisions:
 - (a). Definitions:
 - (1). Addendum or Addenda. A change or changes to the Proposal Requirements issued by the Project Architect before the proposal due date.
 - (2). Approved and Directed. Approved and directed by the Project Architect.
 - (3). "As-Built" Drawings. A set of drawings and specifications that are marked up by the Contractor to reflect all the changes made to the Work during the term of the Project.
 - (4). Best, Good, and Proper. In the best possible and most workmanlike manner and using the best materials known to the trade.
 - (5). Change Order. A written order from the Project Architect or RCM to the Contractor issued after execution of the Contract authorizing a change in the Work or an adjustment in the Contract Sum or the Contract Time. For a Change Order to be fully executed, it must be signed by the Contractor, RCM, and the Project Architect, if retained for the Project.
 - (6). Contract. An Agreement between NMSU and Contractor regarding the Work, including Purchase Orders.
 - (7). Contract Documents. The Purchase Order, all additional documents included by reference therein, and all Addenda and Change Orders. The additional documents may include, but are not limited to: the Contract, Standard Terms and Conditions, these Construction Terms and Conditions, completed Bid Form or Proposal Form, Notice to Proceed, Drawings, and Specifications.
 - (8). Contract Sum. The dollar amount stated in the Contract, Purchase Order, or that amount as modified by Change Order(s), including the

Base Proposal, awarded Proposal Lots, Additive Alternates, and applicable Unit Prices.

(9). Contract Time. Unless otherwise provided, the period allotted in the Contract Documents from date of Notice to Proceed to Substantial Completion of the Work, including authorized adjustments thereto.

(10). Contractor. The Seller whose proposal is accepted by NMSU and with whom a Contract is entered.

(11). Drawings. All plans, details, sections, elevations, and other drawings under the title of this Project.

(12). Furnish. To supply and deliver to the Project site, ready for installation.

(13). Install. To place in position, ready for service or use.

(14). New Mexico Gross Receipts Tax (NMGRT). New Mexico Gross Receipts Tax includes all other applicable local options taxes.

(15). NMSU or Owner. The Regents of New Mexico State University and their agents, representatives, and assigns. The term "Owner" may be used in the technical specifications sections of the Contract Documents to mean NMSU.

(16). Notice to Proceed. Written notice to Contractor from the RCM to begin performance of the Work required by the Contract Documents.

(17). Product Data. Illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by Contractor to illustrate materials, products or systems for some portion of the Work.

(18). Proposal Documents. Invitation to Bid or Request for Proposals, Advertisements for Bids or Proposals, completed Bid Form or Proposal Form, the Bid or Proposal, and other information that may be provided to facilitate the Invitation to Bid or Request for Proposals.

(19). The Project. Total construction effort related to the Work. The Work may be all or a part of the Project.

(20). Project Architect. A person licensed to practice architecture in New Mexico, or an entity lawfully practicing architecture in New Mexico, that is engaged by NMSU as its representative for management

of the work. The University Architect may be designated as the Project Architect.

(A). Architect or Engineer. When used alone and without further modification, the term "Architect" means Project Architect.

Frequently, in technical specifications, the Architect is referred to as the Engineer. For project management, the term "Engineer" may also mean the Project Architect.

(21). Provide. To furnish and install, complete and ready for intended use.

(22). RCM. NMSU Representative for Contract Management, who is NMSU's designated representative for management of the Work if no project architect is retained. The RCM will oversee the project architect if one is retained for management of the work. For purposes of these terms and conditions, the term Project Architect will mean RCM if a Project Architect is not retained.

(23). Record Documents. Documents compiled by the Architect or other design professional that conform to information furnished to the Architect or other design professional by the Contractor(s), consisting of specifications, drawings, and other data showing field changes and selections made during the term of the Project.

(24). Samples. Physical examples which illustrate materials, equipment, or workmanship and establish standards by which the Work will be judged.

(25). Shop Drawings. Drawings, diagrams, schedules, and other data specially prepared for the Work by Contractor or any Subcontractor, manufacturer, supplier, or distributor to illustrate some portion of the Work.

(26). Specifications. The written, qualitative requirements for products, materials, and workmanship, as well as the written procedural and administrative requirements of the Work. All Sections of the applicable Project Specifications using the Construction Specifications Institute's Master Format (Divisions 1 through Division 49) are Specifications.

(27). Subcontractor. A person or entity that has a direct or indirect contractual relationship with Contractor to perform any of the Work.

(28). Substantial Completion. When the Work, or designated portion thereof, is certified in writing by the Project Architect or RCM as

sufficiently complete, in accordance with the Contract Documents, so that NMSU can occupy or utilize the Work or designated portion thereof for the intended use.

(29). Substantial Completion Date. The date when Substantial Completion is achieved.

(30). University Architect. The person licensed to practice architecture in New Mexico and employed by NMSU as its immediate representative for planning, design, construction, and related projects. The University Architect may function as the Project Architect for in-house and other projects.

(31). The Work. The construction and services required by the Contract Documents, whether wholly or partially completed, and include all necessary labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

(32). Work Site. The location at which the Work will be delivered.

(b). Miscellaneous

(1). Incorporation of Documents. Notice to Proceed, and the Technical Specification Sections of Divisions 2 through 49, are incorporated herein.

(2). Contradiction with Terms and Conditions. In the event any Contract Document contradicts these Construction Terms and Conditions, these Construction Terms and Conditions will control.

(3). Headings for Convenience. Headings to divisions and paragraphs in the Contract Documents are used solely for convenience and will not be deemed to define or limit the provisions of the Contract Documents. NMSU or Project Architect assumes no responsibility for the omission or duplication made by Contractor or Subcontractors

(4). Drawings and Specifications Complementary and Binding. The Drawings and Specifications complement each other. What is called for by one is as binding as if called for by both. Where conflicting, Specifications take precedence over Drawings, and large-scale Drawings and Details take precedence over small-scale Drawings.

(5). Errors, Omissions, or Inconsistencies. If any error, omission, or inconsistency in the Drawings or Specifications is discovered, it must be brought to the attention of the Project Architect immediately for

interpretation. In general, in the event of any discrepancy, higher quality and larger quantity will be required.

3. Project Architect Responsibilities. The project management will be the responsibility of the Project Architect or the RCM if no project architect is designated.

(a). Project Architect Responsible for Contract Administration. The Project Architect will administer the Contract as described below.

(b). Limitations on Project Architect's Responsibilities. The Project Architect will not be responsible for and will not have control or charge of construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the Work.

(c). Access to the Work by the Project Architect. The Project Architect must have access to the Work and work site at all times.

(d). Certificates for Payment. Based on the Project Architect's observations and an evaluation of the Contractor's applications for payment, the Project Architect will make recommendations to the RCM for determining the amount owing to the Contractor. The RCM will make final determinations of the amount due and will submit signed Certificates for Payment in the determined amount due.

(e). Authority of the Project Architect. The Project Architect has the following authority, without limitation:

(1). To interpret the construction requirements;

(2). To reject work which does not conform to the Contract Documents;

(3). To require inspections and tests of the Work; and

(4). To review and approve or take other appropriate action upon Contractor's submittals, such as shop drawings, product data, and samples. The Project Architect's approval only indicates conformance with the design concept of the Work and with the information given in the Contract Documents. The Project Architect's approval of a specific item does not indicate approval of an assembly of which the item is a component.

(f). Change Orders. The Project Architect or RCM will prepare Change Orders in accordance with NMSU policy, and as provided in Section 13 of these Terms and Conditions.

(g). Completion of the Work. The Project Architect will:

- (1). Conduct inspections to determine the Substantial Completion Date and the date of completion;
- (2). Receive and forward to the University Architect or RCM, for review, all written warranties and related documents required by the Contract Documents and assembled by Contractor; and
- (3). Advise the RCM regarding the issuance of a final Certificate for Payment upon compliance with the requirements as specified in Section 10(e) of these Terms and Conditions.

4. NMSU Rights and Responsibilities.

- (a). Information and Services Required of NMSU. NMSU will furnish information or services under NMSU's control with reasonable promptness to avoid delay in the orderly progress of the Work. Unless otherwise provided in the Contract Documents, Contractor will be furnished, free of charge, digital copies of Drawings and Specifications reasonably necessary for the execution of the Work. Normally, NMSU will forward instructions to the Contractor through the Project Architect.
- (b). NMSU's Right to Stop the Work. NMSU may, at its sole discretion, by written order, direct Contractor to stop the Work, or any portion thereof, if Contractor (1) fails to correct defective Work or (2) fails to carry out the Work in accordance with the Contract Documents. NMSU is not responsible for stopping the Work under any circumstances.
- (c). NMSU's Right to Carry Out the Work. Within seven (7) days of written notice from NMSU, Contractor must commence correction of any failure to carry out the Work in accordance with the Contract Documents. Contractor will be responsible for the cost of correcting the deficiencies, including but not limited to additional project management costs and the Project Architect's additional services made necessary by the deficiencies.

5. Contractor Responsibilities.

- (a). Contractor's Familiarity with Work Site. Contractor represents that he is familiar with the Work Site and local conditions under which the Work is to be performed. Contractor also agrees that the Work Site and local conditions are consistent with the representations in the Contract Documents.
- (b). Review of Contract Documents. Contractor must carefully study and compare the Contract Documents and must immediately report to the Project Architect any error, inconsistency, or omission it may discover. Contractor will be liable to NMSU for any damage resulting from Contractor's failure to report any such errors, inconsistencies, or omissions in the Contract Documents.

(c). Supervision and Construction Procedures. Contractor will be solely responsible for all construction means, methods, techniques, sequences, and procedures, as well as for coordinating all portions of the Work. Contractor will be responsible to NMSU for the acts and omissions of its employees, Subcontractors, and their agents and employees, and other persons performing any of the Work under a contract with Contractor or with a Subcontractor or supplier. Contractor must have a superintendent on site at all times when the Work is being performed. Contractor will always enforce strict discipline and good order. Contractor is ultimately responsible for the performance of the Work.

(d). Labor and Materials. Contractor must provide and pay for all labor, materials, equipment, construction equipment and machinery, and tools necessary for proper execution and completion of the Work.

(e). Workmanship and Materials Standards. Workmanship must conform to industry standards and must be executed by experienced, skilled, and competent craftsmen. Materials must be the best grade, new, or as specified.

(1). Standards. Materials and equipment specified by manufacturer, name, or number will be considered as establishing standards for the Work. No substitute materials or equipment will be used except with prior written approval from the Project Architect. Proposed substitute materials and equipment must be equal in size, grade, and quality. The Project Architect, in his sole discretion, will determine the suitability of materials and equipment for use in the Work.

(2). Requests for Substitutions of Materials. All requests for approval of substitutions of material or equipment must be made no later than 45 days after the Notice to Proceed.

(3). Prompt Submission of Drawings, Product Data, and Samples. Contractor must submit all shop drawings, product data, and samples required by the Contract Documents to the Project Architect for approval with reasonable promptness and in such sequence as not to cause a delay in the Project.

(4). Contractor Warrants Supplier and Subcontractor Drawings, Product Data, and Samples. By submitting suppliers' and Subcontractors' shop drawings, product data, and samples to the Project Architect, Contractor warrants that the submittals comply with the requirements of the Contract Documents.

(5). Contractor Responsibilities for Obtaining Project Architect Approval. The Project Architects' approval of shop drawings, product data, or samples will not relieve Contractor of responsibility for any

deviation from or revisions to the requirements of the Contract Documents, unless Contractor has specifically informed the Project Architect, in writing, of the deviation or revision at the time of submission and obtained the Project Architect's written approval of the deviation. This section does not apply to revisions requested by the Project Architect.

(6). Project Architect Approval Prior to Commencing Work. No portion of the Work requiring submission of a shop drawing, product data, or sample will be commenced until the Project Architect has approved the submittal.

(f). Warranties and Guarantees.

(1). Workmanship Warranty and Materials Guarantee. The Work will be warranted and guaranteed against faulty materials and workmanship for a period of not less than one year from the date of Substantial Completion of the Work. Contractor will require all its suppliers and Subcontractors to provide NMSU at least a one-year workmanship warranty and materials guarantee. All other warranties and guarantees required by the Contract Documents are in addition to the workmanship warranty and materials guarantee. No other Contract Document can reduce or eliminate the warranty and guarantee requirements contained in this section.

(2). Equipment. Equipment incorporated into the Work must be covered by the manufacturer's standard warranty. Upon acceptance of the Work, NMSU will be provided with all brochures, manuals, and operating procedures for equipment incorporated into the Work.

(3). Roofing. Unless specified for a more extended time period, roofing must have a no-dollar limit manufacturer's warranty for at least ten (10) years. Contractor or its roofing Subcontractor must be approved by the manufacturer to install the roofing system.

(4). Carpet. Unless specified for a more extended time period, carpet must have at least a ten (10) year manufacturer's warranty.

(g). Manufacturer's Directions. All manufactured articles, materials, and equipment must be applied, installed, connected, erected, used, cleaned, and conditioned as directed by the manufacturer unless otherwise specified, or directed by the Project Architect.

(h). Defective Performance. All Work not conforming to the Contract Documents, including substitutions not properly approved and authorized, may be considered defective.

(i). Permits, Fees and Notices.

(1). Contractor Responsibility for Permits and Fees. Unless otherwise provided in the Contract Documents, Contractor will secure and pay for all permits and governmental fees, licenses, and inspections necessary for the proper execution and completion of the Work.

(2). Contractor Compliance. Contractor must give all required notices and otherwise comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority bearing on the performance of the Work.

(3). Contractor Responsibility for Contract's Compliance. It is the responsibility of Contractor to make sure that the Contract Documents are in accordance with applicable laws, statutes, building codes, and regulations. If Contractor believes the proposed Work would violate any applicable laws, statutes, building codes, and regulations, Contractor must promptly notify the Project Architect in writing, and any necessary changes must be accomplished by appropriate modification. If the Project Architect determines that the proposed Work would not violate any applicable laws, statutes, building codes, or regulations, Contractor must continue performance of the Work in accordance with the Contract Documents.

(4). Contractor Responsibility for Work Not in Compliance. If Contractor performs any work that violates any applicable laws, ordinances, rules, and regulations, Contractor will assume full responsibility therefor and will bear all costs attributable thereto.

(5). Testing and Sampling Fees. The Fees for testing and sampling of concrete, soil, and Special Testing required by IBC, Chapter 17, are the responsibility of NMSU.

(j). Wage Rates.

(1). Public Works Minimum Wage Act. For any project exceeding \$60,000 in total costs before taxes, including all Change Orders, the New Mexico Public Works Minimum Wage Act, §13-4-10 through §13-4-17 NMSA 1978, requires all contractors and subcontractors to pay wages in compliance with the Act and to be registered with the Labor and Industrial Division of the New Mexico Department of Labor.

(2). Davis-Bacon and Related Acts. For any project that is paid for with federal funds in excess of \$2,000 the Davis-Bacon Act, 40 U.S.C. 3141 *et seq.*, requires that contractors and subcontractors pay laborers and mechanics employed on the project no less than the locally prevailing

wage and fringe benefits for corresponding work on similar projects in the area, as determined from time to time by the U.S. Department of Labor. Related acts apply these provisions to federally funded or federally assisted construction. These “related acts” include, but are not limited to, the Federal-Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act.

(3). United States Executive Order 13658, Minimum Wage. This paragraph j(3) applies if the Project is funded with federal funds. Executive Order 13658, Minimum Wage, established a minimum wage for Contractors and Subcontractors. The minimum hourly wage amount changes annually. The current amount and any exclusions from the applicability of this requirement are available from the U.S. Department of Labor Wage and Hour Division.

(k). Superintendent. Contractor must employ a competent superintendent and necessary assistants who will be in attendance at the Project site during the progress of the Work. The superintendent will represent the Contractor, and all communications given to the superintendent will be as binding as if given directly to the Contractor. Contractor must maintain a written log of all substantive communication regarding the Work.

(l). Schedule of Values. Contractor, within ten (10) days of the date of Notice to Proceed, must submit to the Project Architect a schedule of values. The schedule details the amount allocated to each portion of the Work. The Project Architect may specify the format of the schedule and nature of the data used to substantiate its accuracy. An updated schedule must accompany Contractor's applications for payment, with columns showing the following for each portion of the Work: 1) scheduled value, 2) amounts included from prior applications for payment, 3) work in place, 4) stored materials, 5) total stored and completed to date, 6) percentage completed, and 7) balance to finish. The Schedule of Values must also include a line item for Contract close-out requirements.

(m). Contract Closeout Requirements. Unless otherwise agreed between the RCM and Contractor, the Contract closeout requirement line item will be three (3%) percent of the total Contract Sum, excluding taxes. Additionally, NMSU will have the right to add additional items to the schedule of values.

(n). Documents and Samples at the Work Site. Contractor must maintain at the Work Site one copy of all Record Documents, addenda, approved shop drawings, product data, samples, Change Orders, and other modifications in good order and kept current to record all changes made during construction. These records must be available to NMSU during the term of the Work. A legible copy of “As-Built” Drawings must be delivered to the Project Architect upon Substantial Completion.

(o). Use of Work Site. Contractor must confine operations at the Work Site to areas permitted by law, ordinances, permits, and the Contract Documents. The Work Site must be maintained in a manner that facilitates orderly completion of the Work.

(p). Work Site Responsibilities of Contractor. Contractor will hold NMSU harmless from damage caused by trespassing on the property of others.

(q). Damage to NMSU's Work or Property. Should Contractor cause damage to the Project, any property of NMSU, or anyone else's property, Contractor must promptly remedy such damage at its own expense.

(r). Cutting and Patching of Work. Unless otherwise specified, the Contractor will be responsible for all cutting, fitting, or patching that may be required to complete the Work or to its various parts fit together properly. Contractor must receive written approval from Project Architect prior to cutting or patching any NMSU property.

(s). Cleanup. Contractor must keep the Work Site free from accumulation of waste materials or rubbish at all times. Upon completion of the Work, Contractor must remove the waste materials, rubbish, tools, construction equipment, machinery, and surplus materials from the Work Site. Any waste materials and rubbish defined as hazardous or with specific disposal requirements must be disposed of in accordance with the applicable laws, ordinances, or regulations. If Contractor fails to clean up upon completion of the Work, NMSU may do so, and Contractor will be responsible for the cost of cleanup. Contractor, at its expense, must properly dispose of all clean, uncontaminated soils excavated and not reused for the Work.

(t). Utility Location and Shutoff.

(1). Utility Location. Contractor must comply with the requirements of §62-14-1 *et. seq.* NMSA 1978; regarding the location, excavation, and protection of utilities. Responsibilities for the location of existing utilities, their protection, and repair of damaged utilities will be assigned in accordance with §62-14-1 *et. seq.* NMSA 1978. The New Mexico One Call number to request the location of utilities is 1-800-321-2357 or 811.

(2). Scheduling Disruptive Activities. Contractor must submit to the Project Architect a written request to schedule construction activities which require interruption of any power, water, sewer, natural gas, steam, chilled water, vacuum, compressed air, HVAC, security systems, fire alarms or suppression, or which will impede pedestrian traffic, emergency egress, or vehicle access of any kind (collectively Disruptive Activities). Unless a more extended time period for notification of request is required by the Contract Documents, Contractor must submit

its written request not less than twenty-one (21) days before any Disruptive Activities. Contractor's request for approval of Disruptive Activities must state the nature of the task, the anticipated duration of the activity, and the impact the Disruptive Activities will have on adjacent facilities and users. Written approval of the Project Architect must be received prior to commencement of any Disruptive Activities.

(3). Utility Shutoff and Resumption by NMSU Personnel. Unless otherwise instructed in writing by the Project Architect, the actual closing and opening of valves and switches for shutoff and reconnection of utilities and services must be performed by NMSU Facilities and Services personnel. Contractor will be solely responsible for all damages associated with unauthorized opening and closing of valves and switches.

(u). Communications. Contractor must forward all communications to NMSU through the Project Architect. Contractor may respond directly to requests from Procurement Services, the University Architect, and the RCM.

(v). Royalties and Infringements. Contractor will pay all royalties and license fees. Contractor will indemnify and hold harmless NMSU and its agents and employees from and against all claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from violation of any intellectual property right.

(w). Indemnification. Contractor will indemnify and hold harmless NMSU and its agents and employees from and against all claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work. Such obligation will not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity, which would otherwise exist as to any party or person, described in the Contract Documents. Any and all liability of NMSU arising from the Contract Documents, the Work, or the Project, including any obligation to indemnify Contractor, is subject to the immunities and limitations of the Tort Claims Act, §41-40-1 *et. seq.* NMSA 1978, and any amendments thereto.

6. Subcontractor Responsibilities.

(a). Requirement for Written Agreement. All Subcontractors must enter into a written agreement with Contractor providing for the performance of the Work. That agreement must incorporate by reference the Contract Documents and require the Subcontractor to comply with the Contract Documents. All Subcontractors must incorporate the Contract Documents and their agreement with Contractor into any further subcontract.

(b). Subcontractors Fair Practices Act. If Contractor wants to perform the Work instead of a listed Subcontractor, to add a Subcontractor, or to replace a listed

Subcontractor, NMSU must give prior written consent to the substitution in accordance with the Subcontractors Fair Practices Act, §13-4-31 to §13-4-42 NMSA 1978. Requests for consent of NMSU to substitute Subcontractors, or to perform in-house work of a Subcontractor, or supplement a Subcontractor must be submitted to the NMSU Director of Procurement Services, New Mexico State University, Box 30001, MSC 3890, Las Cruces, New Mexico 88003-0001. All costs, including attorney's fees, incurred by NMSU because of Contractor's failure to comply with the Subcontractors Fair Practices Act will be paid by Contractor, and may be deducted from any amount due.

7. Work by NMSU or by Other Contractors.

(a). NMSU Right To Perform Work And To Award Separate Contracts. NMSU reserves the right to perform work related to the Project with its own forces, or to award separate contracts in connection with other portions of the Project or other work on the site under these or similar conditions of the Contract Documents. NMSU will provide for the coordination of the work of its own forces and of each other contractor. Contractor must cooperate with NMSU and with all other contractors with whom NMSU may have contracted.

(b). Mutual Responsibility.

(1). Space for Work and for Materials. Contractor will afford NMSU and other contractors reasonable space for the introduction and storage of their materials and equipment and the execution of the Project. Contractor will connect and coordinate its Work with all other work on the Project. NMSU will not be liable for off-site storage space.

(2). Coordination of Work. If any part of Contractor's Work depends upon proper execution or results of the work of NMSU or of any other contractor, Contractor must, before proceeding with the Work, promptly report to the Project Architect or RCM any apparent discrepancies or defects in such other work that render it unsuitable. Failure of Contractor to report discrepancies or defects will constitute an acceptance of NMSU's or any other contractor's work as fit and proper to receive its work except as to defects which may subsequently become apparent in such work by others.

(3). Improperly Scheduled Work. Any costs incurred due to improperly scheduled work will be borne by the party that improperly scheduled the work.

(4). Damage to NMSU's Work or Property. Contractor is responsible for all damage to the Work and the property of NMSU caused by Contractor.

8. Miscellaneous Provisions.

(a). Prompt Payment Act. Contractor and its subcontractors must comply with all applicable provisions of the Prompt Payment Act, §57-28-1 to §57-28-11 NMSA 1978, including, without limitation, payment provisions therein, and must ensure that their construction contracts comport with the provisions of the Act.

(b). New Mexico Gross Receipts Taxes. Contractor will be required to pay applicable New Mexico Gross Receipts Tax. NMSU will reimburse Contractor for New Mexico Gross Receipts Tax on amounts due Contractor pursuant to the Contract Documents. New Mexico Gross Receipts Tax must be shown as a separate amount on each billing or request for payment.

(c). Equal Employment Opportunities. Section A 7 regarding equal employment opportunities applies to Contractor and Subcontractors at any tier.

(d). Prohibition of Assignment. Contractor may not assign the Contract in whole or in part. Contractor may not assign any monies due or to become due to it under the Contract Documents.

(e). Written Notice. All notices to NMSU must be given to the RCM in writing and must be sent by certified mail, return receipt requested, postage prepaid, overnight courier, fax, or email.

(f). Default by Contractor. If Contractor defaults or breaches the terms of the Contract Documents, Contractor must commence and continue correction of such default or breach with diligence and promptness, but in no case later than seven (7) days after written notice from the RCM of the default or breach. Contractor must bear the cost, including architectural fees, of correcting any default or breach. If Contractor fails to remedy breach from the first seven days' notice from NMSU, NMSU will issue a second seven (7) day notice. If Contractor fails to remedy the default or breach following the second seven-day notice, the Contractor may be removed from the Work and will be responsible for all costs incurred by NMSU to finish the Work.

(g). Rights and Remedies.

(1). Rights and Remedies Not Limited by Contract Documents. The duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder will be in addition to and not a limitation of any duties, obligations, rights, and remedies otherwise imposed or available by law.

(2). No Waiver of Rights except by Specific Writing. No action or failure to act by NMSU or Project Architect will constitute a waiver of any right or duty afforded to them under the Contract Documents.

(3). Attorney Fees in Event of Default or Violation by Contractor. If Contractor is in default of the Contract Documents, Contractor agrees to pay reasonable attorney's fees and expenses so incurred by NMSU.

(h). Liquidated Damages as a Result of Delay by Contractor. Parties to this Contract acknowledge that it is difficult to determine actual damages, Should Contractor fail to perform by the date(s) specified in the Contract Documents. Parties further agree that the amount specified for liquidated damages is not unreasonable, nor punitive in nature.

(i). Tests and Inspections.

(1). Cost of Tests and Inspections; Notice to Project Architect. If the Contract Documents, the laws, ordinances, rules, regulations, or orders of any public authority having jurisdiction require any portion of the Work to be inspected, tested, or approved, Contractor must give the Project Architect timely notice of its readiness so the Project Architect may observe such inspection, testing, or approval. Contractor will bear all costs associated with such inspections, tests, or approvals.

(2). Right of Project Architect to Require Inspection or Testing. If the Project Architect determines that any work requires special inspection, testing, or approval, he will, upon written authorization from NMSU, instruct Contractor to order such special inspection, testing, or approval, and Contractor must give timely notice of the special inspection, testing, or approval. If such special inspection or testing reveals a failure of the work to comply with the requirements of the Contract Documents, Contractor will bear all costs of special inspection, testing, or approval and all remedial measures, including Project Architect fees made necessary by such failure; otherwise NMSU will bear such costs of the special inspection, testing, or approval, and an appropriate Change Order will be issued.

(3). Certificates of Inspection or Testing. Contractor must secure required certificates of inspection, testing or approval and promptly deliver the required certificates to the Project Architect.

(4). Right of Project Architect to Observe. The Project Architect may, from time to time, observe the inspections, tests, or approvals required by the Contract Documents.

9. Commencement and Progress.

(a). Time of the Essence. All time limits stated in the Contract Documents are of the essence.

(b). Date of Commencement. Work must commence not later than ten (10) days after the date of the Notice to Proceed.

(c). Delays and Extensions of Time.

(1). Delay Not Caused by Contractor. If Contractor is delayed by any causes beyond Contractor's control, then the Contract Time may be extended by Change Order for such reasonable time as NMSU may determine. Time to obtain a permit is not considered beyond Contractor's control.

(2). Claim for Extension of Time. The Contractor must submit a written claim requesting an extension of the Contract Time to the Project Architect within twenty (20) days of the commencement of the delay. The claim must include an estimate of the probable effect of the delay on the Work.

(3). Recovery of Damages Caused by Delay Not Limited. This Section does not preclude the recovery of damages for delay under any other provisions of the Contract Documents.

10. Payments and Completion.

(a). Contract Sum. The Contract Sum stated in the NMSU Purchase Order, including all Change Orders, is the maximum amount payable by NMSU for the performance of the Work.

(b). Applications for Payment.

(1). Submission of Applications for Payment. Contractor will submit to the Project Architect a notarized application for payment. Each payment application must be supported by the current schedule of values statement and such other data substantiating Contractor's right to payment or as the Project Architect may require.

(2). Period of Work. The period of work covered by each application for payment is the calendar month within which the payment application is made. Application for payment should be received on or before the twenty-fifth (25th) day of the period of work, and the progress payment will be made within 21 days thereafter in accordance with the Prompt Payment Act, §57-28-1 to §57-28-11 NMSA 1978.

(3). Payment for Materials or Equipment not yet Incorporated in the Work. With advance written approval of the Project Architect, payment will be made for materials or equipment not yet incorporated in the Work but delivered and suitably stored at the Work Site or other approved

location. Payments for materials or equipment stored on the Work Site will be conditioned upon submission by Contractor of a manufacturer's or supplier's invoice or such other procedures satisfactory to NMSU to establish NMSU title and access to such materials or equipment or otherwise protect NMSU's interest. Payments for materials or equipment stored off-site will only be made to Contractor if a Financing Statement and Security Agreement approved by NMSU is properly signed and filed. NMSU may impose other conditions it determines appropriate prior to payment.

(4). Warranty of Clear Title. Contractor must warrant that title to all Work, materials, and equipment covered by an application for payment will pass to NMSU, free and clear of all liens, claims, security interests or encumbrances, either by incorporation in the construction or upon the receipt of payment by Contractor, whichever occurs first.

(5). Certificates for Payment. The Project Architect will, after the receipt of Contractor's application for payment, make recommendations to the RCM for a determination of the amounts due to Contractor. NMSU will either issue a Certificate for Payment, with a copy to Contractor, for the amount the RCM determines is due, or notify Contractor in writing of the reasons for withholding a Certificate for Payment. NMSU's determination is final. By issuing a Certificate for Payment, NMSU does not represent that the Project Architect has: made exhaustive or continuous on-site inspections, reviewed the construction means, methods, techniques, sequences or procedures, or made any examination to ascertain how or for what purpose Contractor has used the monies previously paid.

(6). Certificates Withheld. The RCM may decline to certify payment or, because of subsequently discovered evidence or subsequent observations, with recommendations of the Project Architect he may nullify the whole or any part of any Certificate for Payment previously issued, to the extent as may be necessary in his opinion to protect NMSU from loss because of: (1) defective work not remedied; (2) third-party claims filed or reasonable evidence indicating probable filing of such claims; (3) failure of Contractor to make payments properly to Subcontractors for labor, materials or equipment; (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum; (5) damage to NMSU or another contractor; (6) reasonable evidence that the Work will not be completed within the Contract Time, (7) persistent failure to carry out the Work in accordance with the Contract Documents; or (8) any other condition or event which may cause loss to NMSU. NMSU may make partial payment to

Contractor.

(7). Timely Payment of Employees and Subcontractors. Contractor must timely pay Subcontractors and laborers. Contractor must, by an appropriate agreement with each Subcontractor, require each subcontractor to make payments to its laborers, subcontractors at any tier, and suppliers, in a similar manner pursuant to Subcontractors Fair Practices Act.

(8). Joint Checks. NMSU, in its sole discretion, may issue joint checks to a governmental agency, the courts, Subcontractors, or suppliers.

(9). NMSU Payment Responsibility Limited to Contractor. NMSU will have no obligation to pay or to see to the payment of any monies to any individuals, laborers, Subcontractors, suppliers, or any entity entitled to payment, except Contractor.

(10). Information to Subcontractors. The Project Architect, RCM or both may, on request and at its discretion, furnish to any Subcontractor, if practicable, information regarding the percentages of completion or the amounts applied for by Contractor and the action taken thereon by the Project Architect on account of work done by such Subcontractor.

(11). Progress Payment Not Acceptance of Work. No certificate for a progress payment, nor any progress payment, nor any partial or entire use or occupancy of the Project by NMSU, will constitute an acceptance of any work not in accordance with Contract Documents.

(c). Substantial Completion.

(1). Inspection by Project Architect Required. When Contractor believes Substantially Complete has been achieved, Contractor must call for an inspection by the Project Architect.

(2). Certificate of Substantial Completion. When the Project Architect determines that Substantial Completion has been achieved, the Project Architect will prepare a Certificate of Substantial Completion and a punch list of items to be completed or corrected. The Certificate of Substantial Completion must be submitted to RCM and Contractor for their written acceptance of the responsibilities assigned to them. Substantial Completion is not effective until accepted in writing by the RCM.

(3). Omissions by Project Architect. The Project Architect's omission of any items on Substantial Completion punch list will not alter the

responsibility of Contractor to complete all work in accordance with the Contract Documents.

(4). Responsibilities at Substantial Completion. At the sole discretion of NMSU, the Project Architect may state in writing the responsibilities of NMSU and Contractor for security, maintenance, heat, utilities, damage to the Work, and insurance, and will fix the time within which Contractor must complete or correct the items listed on the punch list.

(5). Effective Date of Warranties. Warranties required by the Contract Documents will commence on the Date of Substantial Completion unless otherwise provided in the Certificate of Substantial Completion or contract change order.

(6). Payment for Substantial Completion. Upon Substantial Completion and upon application by Contractor and certification by the RCM, NMSU will make payment to Contractor.

(d). Application For Final Payment. Contractor must submit a final application for payment upon completion of the Project including all punch list items and delivery of all warranties and closeout documents to NMSU, including: (1) release of liens, (2) warranties, (3) operation and maintenance manuals, (4) release of surety, and (5) as-built or record documents to the Project Architect. The Project Architect must review the final application and must contain

a certification of accuracy of the final application. Contractor understands and agrees that NMSU, from time to time, may require Contractor to furnish additional closeout documents. NMSU will be entitled to hold the final payments until the closeout document has been presented to NMSU.

(e). Final Completion and Payment.

(1). Final Inspection by Project Architect Required. Contractor must give written notice to the Project Architect when the Work is ready for final inspection. When the Project Architect determines that the Work is acceptable under the Contract Documents and the Contract has been fully performed, the Project Architect will promptly advise the RCM to issue a final Certificate for Payment.

(2). Contractor Requirements to Receive Final Payment. The final payment will not become due until Contractor submits through the Project Architect: (A) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work have been paid or otherwise satisfied, and (B) other data establishing payment or satisfaction of all other contract obligations, such as receipts, release and waivers of liens and release of surety arising out of the Contract, to the

extent and in such form as may be designated by NMSU. NMSU, at its discretion, may require releases of lien or waivers from Subcontractors. If any Subcontractor refuses to furnish a release or waiver, Contractor may furnish a bond satisfactory to NMSU to indemnify it against any claims by the Subcontractor. If any Subcontractor claims remains unsatisfied after all payments are made by NMSU to the Contractor, Contractor must refund to NMSU all monies that NMSU may be compelled to pay in discharging the Subcontractor's claim including all costs and reasonable attorneys' fees.

(3). Effect of Final Payment on Contractor Claims. The acceptance of final payment will constitute a waiver of all claims by Contractor except those previously made in writing and identified by Contractor as unsettled at the time of the final application for Payment.

11. Protection of Persons and Property.

(a). Safety Precautions and Safety Education Programs. Contractor will be responsible for initiating, maintaining, and supervising all safety precautions and safety education programs in connection with the Work.

(b). Safety of Persons and Property.

(1). Safety Precautions. Contractor must take all reasonable precautions for the safety of, and must provide all reasonable protection to prevent damage, injury or loss to: (A) all employees on the Work and all other persons who may be affected; (B) all work and all materials and equipment to be incorporated therein, whether in storage on or off the site, under the care, custody or control of Contractor or anyone directly contracting with, or indirectly employed by Contractor, and (C) other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

(2). Safety Compliance and Notices. Contractor must give all required notices and comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the safety of persons or property or their protection from damage, injury or loss.

(3). Safeguards and Signage. Contractor must erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations, and notifying NMSU and users of adjacent utilities.

(4). Use of Specialized Equipment. When the use of specialized lifting equipment (aerial lifts, cranes, scaffolds, platforms, etc.), is used for the execution of work and could potentially affect or create a hazard to NMSU property outside the construction zone, Contractor must first notify the NMSU Environmental Health and Safety Officer by contacting the RCM.

(5). Use and Storage of Hazardous Materials. When the use or storage of hazardous materials is necessary for the execution of the Work, Contractor must exercise the utmost care and carry out such activities under the supervision of properly qualified personnel. When using or storing hazardous materials at the job site, Contractor must first notify the NMSU Environmental Health and Safety Officer by contacting the RCM.

(6). Site Safety Coordinator. Contractor must designate a responsible member of its organization at the site whose duty will be to prevent accidents.

(7). Safety in Loading NMSU Property with Materials. Contractor must not load or permit any part of the Work or other NMSU property to be loaded so as to endanger its safety. This includes, but is not limited to, the placement of roofing materials on roofs. All materials must be distributed in such a manner so as to prevent overloading of the designed capacity of the supporting element(s).

(c). Safety and Environmental Requirements.

(1). Compliance with Safety Requirements. Contractor will provide for the safety of workers, NMSU personnel, and the public. Contractor must comply with the requirements of regulating agencies for public health and safety, the Occupational Safety and Health Administration's (OSHA) rules and regulations, and with all applicable safety laws and regulations.

(2). Temporary Enclosures or Barricades. Contractor must provide and maintain temporary enclosures or barricades at excavations, at the perimeter of all construction zones dedicated for the contractor's use, pathways, building and area entries, walkways subject to falling objects and hazardous material removal sites.

(3). Environmental Requirements. Contractor and Subcontractors at any tier must abide by all applicable regulations of: (A) the Department of Transportation; and (B) the Environmental Protection Agency when transporting hazardous material. In the event the Contract Documents require transportation of hazardous materials, before such transportation,

Contractor must submit the following to the RCM for approval by the NMSU Environmental Health and Safety Officer:

(A). Proof of a Department of Transportation (DOT) Registration Number.

(B). Proof of a DOT Hazardous Material Transportation Security Plan, if applicable.

(C). Proof of Contractor's personnel receiving DOT Hazardous Material Transportation Training, and, if applicable, DOT Specific Security Plan Training and;

(D). Proof of an Environmental Protection Agency (EPA) Identification Number.

(4). Encountering Certain Hazardous Materials on Site. If Contractor encounters at the Work Site material reasonably believed to contain asbestos containing material (ACM), presumed asbestos containing material (PACM), lead paint, or polychlorinated biphenyl (PCB) which has not been rendered harmless and is not scheduled during the performance of the Work to be rendered harmless and the hazardous material must be disturbed for performance of the Work, Contractor must immediately stop work in the area affected and report the condition to the Project Architect in writing. Work in the affected area will not resume until the material is rendered harmless, and it is agreed in writing by the RCM and Contractor that Work in the affected area can safely resume.

(5). Prohibition on Introducing Certain Hazardous Materials to the Work Site. Contractor must not bring to the Work Site, nor allow to be incorporated into the Work, any material containing ACM, lead paint, or PCB. Any materials incorporated into the Work, and later found to contain ACM, lead paint, or PCB will be removed at the expense of Contractor, including all containment, air clearances, and disposal, without any additional or incidental costs to NMSU.

(6). Precluding or Minimizing Lead and Mercury in Equipment and Fixtures. Light fixtures, mechanical and electrical equipment supplied or installed must not contain lead or mercury. For example, non-mercury thermostats should be installed. Light bulbs certified as "low mercury," i.e., with industry standard green tips/green labeling, may be used with RCM approval.

(7). Lead-free Plumbing. Fixtures, piping, solder and flux provided under this Contract and used in the installation of systems delivering water for human consumption must be lead-free. The term lead-free is

defined as pipe and fixtures that do not contain more than 8.0% lead and solder, and flux that does not contain more than 0.2% lead.

(8). Storm Water Control at Site. The Clean Water Act, 33 U.S.C 1342 *et. seq.*, prohibits the discharge of any pollutants to navigable waters from a point source unless discharge is authorized by a National Pollutant Discharge Elimination System (NPDES) permit. Phase II of the NPDES stormwater program covers small construction activities disturbing 1 to 5 acres. Contractor(s) must comply with all regulations and requirements of Phase II, including the following: (A) submission of a Notice of Intent; (B) development implementation and inspection of a Storm Water pollution prevention plan; (C) applying and receiving a permit; and (D) submission of Notice of Termination.

(d). Emergencies. In any emergency affecting the safety of persons or property, Contractor must act to prevent threatened damage, injury or loss. Any additional compensation or extension of time claimed by Contractor on account of emergency work will be determined as provided elsewhere for changes in the Work.

12. Bonding and Insurance.

(a). Requirements for Bonding. When Contractor is awarded a Contract in excess of Twenty-Five Thousand Dollars (\$25,000), the following surety bonds must be delivered to NMSU, in force for the Contract Time and in the amount of the Contract Sum, including any applicable taxes. The bonds will become binding on the parties upon the execution of the Contract.

(1). Performance Bond. A bond as security for the faithful performance of the Contract (Performance Bond) satisfactory to NMSU, in an amount equal to the Contract Sum; and

(2). Material and Payment Bond. A Material and Payment Bond satisfactory to NMSU, in an amount equal to the Contract Sum, for the protection of all persons supplying labor and material for performance of the Work for Contractor or its Subcontractors at any tier.

(3). Requirements of Surety Company. Bonds must be issued to NMSU and be executed by a surety company authorized to do business in the State of New Mexico in accordance with the New Mexico Insurance Code, Chapter 59A NMSA 1978, and listed in U.S. Treasury Circular 570.

(b). Power of Attorney. An attorney-in-fact, who signs the Contract, or Performance or Payment bonds, must deliver to NMSU a notarized copy of the power of attorney.

(c). Contractor's Insurance. Contractor must have in force during Contract Time insurance as required by the Contract Documents.

(d). Contractor's Liability Insurance.

(1). Required Insurance. Contractor must purchase and maintain statutory limits of workers' compensation, public liability, and automobile liability insurance approved by NMSU at the time of signing of the Contract Documents. All certificates of insurance must be executed by an insurance company authorized to do business in the State of New Mexico. NMSU must be included as an additional insured. Contractor must furnish NMSU with certificates of insurance with the Contract Documents prior to the commencement of the Work. NMSU requires at least ten (10) days' notice of cancellation.

(2). Minimum Coverage Limits. Public Liability and Automobile Liability insurance must include at least the following coverage:

(A). Bodily injury, each occurrence, excluding medical and medically related expenses: \$750,000.

(B). Medical and medically related expenses: \$300,000.

(C). Property Damage, each occurrence: \$200,000.

(3). Builder's Risk Coverage. Builder's Risk insurance is the responsibility of Contractor through the date of final payment.

13. Changes in the Work.

(a). Change Orders. NMSU, without invalidating the Contract Documents, may order changes in the Work within the general scope of the Contract Documents consisting of additions, deletions or other revisions, adjusting the Contract Sum and the Contract Time accordingly. All changes in the Work must be authorized by a written Change Order. By signing a Change Order, Contractor indicates its agreement with the Change Order, including any adjustment in the Contract Sum or the Contract Time. Contractor understands that NMSU will not order changes to the Work that include adjustments to the Contract Sum or extensions of the Contract Time inconsistent with the intent of the Contract Documents.

(b). Claims for Adjustment to Contract Sum.

(1). Notice to the Project Architect. If Contractor believes it has a claim for an increase in the Contract Sum, including weather delays, he must give the Project Architect written notice of the change within fourteen (14) days after the occurrence of the event giving rise to such claim. This

notice must be given by Contractor before proceeding to execute the work giving rise to the claim giving an increase to the Contract Sum, except in an emergency endangering life or property. In an emergency, Contractor must proceed in accordance with other applicable provisions of this Document.

(2). Method to Determine Amount of Change. The cost or credit to NMSU resulting from a change in the Work will be determined by mutual agreement between NMSU and Contractor. Such adjustments will be determined by one of the following methods at the sole discretion of NMSU:

(A). Prices based on percentages or fractions of prices used in the Original Proposal by which the Project was awarded to Contractor, for deletion of, or the addition of work;

(B). A lump sum amount, agreed to by the contracting parties; or

(C). Contractor's estimate for cost of labor, material, rentals, and equipment plus overhead and profit combined and added as one percentage sum only (not compounded). The Project Architect has the right to require Contractor to provide breakdowns of the estimated costs of labor and materials.

(3). Overhead and Profit. Allowances for overhead and profit may be made only on Change Orders resulting in net increases to the Contract Sum, based on the following schedule:

<u>Change Order Amount Before Markup</u>	<u>Contractor/ Subcontractor O/H & Profit for Work by Own Forces</u>	<u>Contractor O/H & Profit for Work by Subcontractors</u>
Less than \$20,000	12%	8%
\$20,001 or greater	7%	5%

(A). Overhead is defined as General Overhead Cost (Indirect Expenses) to include: Contractor or Subcontractor's office expenses (office rent or lease expense, office supplies, utilities, insurance, communication, office equipment, furniture, and taxes); Contractor's staff salary expenses (executives, administrative staff, purchasing staff, bookkeepers, office located project managers, scheduler, estimators, and miscellaneous office staff not directly

employed on the project); and miscellaneous expenses (legal fees, license or association fees, consultant such as accountant, auditors, and information technology, depreciation expense, travel expense, and donations).

(B). Acceptable Temporary Facilities (Direct Expenses) applied to Change Orders may include the following costs as they apply to a specific Change Order request, and calculated on a prorated basis: site-located owned or leased office space, site-located storage buildings, sanitary facilities, drinking water and cups, travel or per diem expenses. Proration calculation: $(\text{original item cost}) / (\# \text{ of original days estimated}) = (\text{daily item cost})$. $(\text{accepted } \# \text{ of calendar day extension}) \times (\text{daily item cost}) = (\text{Change Order item amount})$.

(C). Acceptable Labor (Direct Expenses) applied to Change Orders may include established hourly wage rate cost, plus actual burden, multiplied by the amount of time the individual is expected to work on the Change Order request. On-site expenses may be applied to the on-site personnel, including the jobsite superintendent, foreman, field engineer, or other site personnel.

(4). Equitable Adjustment of Unit Prices. If unit prices are stated in the Contract Documents or subsequently agreed upon, and if the quantities originally contemplated are so changed in a proposed Change Order that application of the agreed unit prices to the quantities of work proposed will cause substantial inequity to NMSU or Contractor, the applicable unit prices will be equitably adjusted.

(c). Concealed Conditions. By agreement of the parties, the Contract Sum may be equitably adjusted by Change Order upon claim by either party made within fourteen (14) days after the first observance of the following: (1) concealed conditions encountered in the performance of the Work below the surface of the ground at variance with the conditions indicated by the Contract Documents; or (2) concealed unknown conditions of an unusual nature, differing from those ordinarily encountered and generally recognized as typical in work of the character indicated by the Contract Documents.

14. Uncovering and Correction of Work.

(a). Uncovering of Work.

(1). Required in Contract Documents. If any portion of the Work is covered contrary to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Project Architect, be uncovered for observation by the Project Architect, and will be replaced at Contractor's expense.

(2). Not Required in Contract Documents. If any other portion of the Work has been covered which the Project Architect has not specifically requested to observe before being covered, the Project Architect, with prior approval of NMSU, may request to see such work, and it must be uncovered by Contractor. If such work is found to be in accordance with the Contract Documents, the cost of uncovering and replacement will, by appropriate Change Order, be charged to NMSU. If such work is not in accordance with the Contract Documents, Contractor must pay all costs of uncovering the work and the costs of bringing the Work into compliance with the Contract Documents.

(b). Correction of Work.

(1). Contractor's Responsibility. Contractor must promptly correct all work rejected by the Project Architect or RCM as defective or failing to conform to the Contract Documents whether observed before or after Substantial Completion, and whether or not fabricated, installed or completed. Contractor will bear all costs of correcting the rejected work, including compensation for the Project Architect's additional services made necessary thereby.

(2). Guarantee or Warranty Periods. If, during the guarantee period, or within such more extended period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be defective or not in accordance with the Contract Documents, Contractor must correct it promptly. This obligation will survive termination of the Contract.

(3). Removal by Contractor. Contractor, at its own expense, must remove from the site all portions of the Work which are defective or nonconforming.

(c). Acceptance of Defective or Non-Conforming Work. If NMSU prefers to accept defective or non-conforming work, it may do so instead of requiring the work's removal and correction, in which case a Change Order will be issued to reflect a reduction in the Contract Sum where appropriate and equitable. If final payment has been made, Contractor must reimburse NMSU for its damages.

15. Termination of the Contract.

(a). Termination by Contractor. If a permit is not issued for the commencement of any portion of the Work, or if the Work is stopped for a period of thirty (30) days under an order of any court or other public authority having jurisdiction, or as a result of an act of government, such as a declaration of a national emergency making materials unavailable, through no act or fault of Contractor or anyone directly contracting with, or indirectly employed by it, or by anyone for whose acts Contractor is responsible for, then Contractor may, upon seven (7) additional days' written notice to NMSU to the Project Architect, terminate the Contract and recover from NMSU payment for reasonable, actual expenses to that date.

(b). Termination by NMSU.

(1). Best Interests of NMSU. If NMSU, in its best interests, requires termination of this Contract, the Contract may be terminated after giving Contractor and its surety, if any, seven (7) days' written notice. NMSU may require Contractor's surety to complete the Work. NMSU may also take possession of the site and of all materials, equipment, tools, construction equipment, and machinery thereon owned by Contractor and may finish the Work by whatever method they may deem expedient. In either case, Contractor will not be entitled to receive any further payment until completion of the Work.

(2). Payments after Termination by NMSU. After performance of the Work and reimbursement of all costs of completion have been made, including payment to all persons directly contracting with, or indirectly employed by Contractor for performance of the Work who Contractor did not pay for work performed, the unpaid balance of the Contract Sum, if any, must be paid first to the surety if surety completes the Work, and if any balance remains it will be paid to Contractor.

(3). Costs of Completion Exceeding Unpaid Balance. If the costs of completion of the Work exceed the unpaid balance of the Contract Sum, Contractor must pay the difference to NMSU. The amount to be paid to contractor, the surety, or to NMSU must be as recommended by the Project Architect and certified by the RCM upon application, in the manner provided elsewhere in these Terms and Conditions. This obligation for payment survives the termination of the Contract.

16. Brand Name and Equipment Specified.

(a). Proprietary Items. It has been determined that some of the equipment or materials identified in the Proposal Documents for this project are required to interface with the existing equipment or materials, and are considered proprietary.

Therefore, substitutions of those items of equipment or materials will not be accepted. Proprietary items are:

(1). Builders Hardware

(A). Cylindrical Locks: Yale Lever, 5400 Series, Augusta Trim

(B). Locks specific to Housing/Dormitory projects only: Marks Survivor 195 series cylindrical locks and Marks 55CL92F series mortise locksets.

(C). Keyways: Yale Restricted for all new Las Cruces campus projects. Contractor to furnish a new cylinder for each opening. Owner shall furnish key cores and install the final keyed cylinders.

(D). Keyways: Yale Restricted for all new DACC Community College and NMSU Satellite Campus projects. Contractor to furnish and install new cylinders and cores keyed to facility requirements.

(E). Finishes: All Hardware Finish, US26D

(F). Deadbolts: Lori, Single or Double Cylinder to accept the Yale Mortise Cylinder

(G). Deadbolts: Locks specific to Housing/Dormitory projects only: Schlage Deadbolts capable of accepting a Yale Restricted keyway

(H). Door Closers and Associated Components: LCN 4040 Series

(I). Exit Devices: Rim or Mortise Type only; Von Duprin 99 Series, no vertical rods installations allowed.

(2). Power Door Operators: Horton Series 7100 normal duty/4100 Heavy duty with the CL200 Card

(3). Door Card Readers: Blackboard – SA3000 Door Access System. NMSU will provide the Power Supplies, Master Controllers, SM88's, Door Controllers, and Card Swipes for the project as these are proprietary to NMSU

(4). Facilities Management Systems: The subcontractors providing building automation services must be listed under the Owner's BACnet Prequalification program, which includes specifications of acceptable building automation devices. The firms listed under the program are:

- (A). Automated Control Systems (Alerton), Albuquerque, NM
 - (B). Control and Equipment Co (Schneider Invensys), El Paso, TX
 - (C). PC Automated Control (Automated Logic), El Paso, TX
 - (D). Trane (Trane) – El Paso, TX
 - (E). Energy Control Inc. (Delta) – Las Cruces, NM
 - (F). GEW Mechanical (Reliable) - Albuquerque, NM
 - (G). NSW Controls (Reliable) – Albuquerque, NM
 - (H). Johnson Controls (Johnson Controls) – Albuquerque, NM
 - (I). ThermAir (Distech) Mesa, AZ
- (5). Medium Voltage Distribution Equipment: by S&C or G&W with Elastomer
- (6). Contractor-supplied Fire Alarm Control Panel:
- (A). Firelite 9200UD with ECC-50/100 Voice Evac Panel
 - (B). Notifier NFS 2-640 with Firelite ECC-50/100 Voice Evac Panel
 - (C). Gamewell E3
- (7). Utility Metering Systems:
- (A). Meters for all Las Cruces campus projects are owner-furnished and contractor-installed equipment.
 - (B). Meters for all DACC Community College and NMSU Satellite Campuses are contractor-furnished and installed equipment.
 - (C). Contact the Project Representative for the requirements and the location of individual meters in all locations.
- The following meter brands are provided for the basis of design and construction information only. See each manufacturer's product guidelines and/or specifications for general rough-in and installation requirements.
- (D). Electrical Meters, as manufactured by Eaton Metering Systems.

(E). Chilled Water Meters, as manufactured by Onicon.

(F). Condensate meter, as manufactured by Cadillac.

(8). Light Poles:

(A). Street, Parking lot and specialty light poles, as manufactured by Ameron Pole Products, Centrecon Series

(B). M – Series Round Pole – Embedded: MER08.5

(C). M – Series Round Pole – Base Mounting: MBR7.5

(D). M – Series Specifications: Mix (7R31): Valley Red, exposed aggregate finish with Amershield anti-graffiti coating

(E). Street, Parking lot and specialty light pole arms, as manufactured by American LitePole, Design number: UP6S or UP6D

(9). Stripping Solvent for ACM Mastic: AMW-98 by American Coating Corporation

17. Disputes.

In the event that a dispute arises with respect to any of the provisions contained in this contract (other than Termination as set forth in Section 15) or any other matter affecting this contractual relationship between NMSU and Contractor, the Parties agree that prior to filing any court action to enforce the contract or rights under the contract, they will use the services of a mediator. The mediator will either be certified as a mediator or will have experience as a mediator. The Parties will mutually agree upon the choice of mediator. In the event the parties have not agreed to a mediator within ten days of written notice to the other regarding the dispute, a list of seven potential mediators will be obtained from a professional association, and the Parties will use a striking process until a mediator is agreed upon. Each party will be responsible for half of all mediation costs.