

# **PROTECTING THE OWNER: CONSTRUCTION INSURANCE ON A HIGH-RISE OFFICE BUILDING (A Case Study)**

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This presentation is a case study of a construction project owner's insurance program negotiations with a large national contractor. The learning's from those negotiations are discussed. This presentation is not limited to the law of the project's location. The panelists are the project owner's counsel and an insurance consultant hired by the owner. The following topics are discussed: the liability insurance program choices (the traditional insurance approach versus an owner controlled insurance program (OCIP) versus a contractor controlled insurance program (CCIP), including coverage for injuries to contractor and subcontractor employees), additional insured coverage for the owner and adjoining owners, and negotiating premium savings based on evaluating the contractor's insurance program costs; builder's risk insurance; pollution insurance; post-completion loss of use risk protection arising out of construction defects; and the advantages of hiring a third party non-premium fee based insurance consultant.

An Outline of the panelist's discussion as opposed to a scholarly article is posted online at the ACREL private website. Attached to this presentation are the following forms that are the subject of the case study: the customized AIA risk management provisions including insurance provisions; a crane swing license; and a staging license.

## ***About the Panelists***

**Bill Locke** is a shareholder with and Chair of the Real Estate Section of Graves Dougherty Heaton & Moody, located in Austin, Texas. He has written extensively and lectured on risk management issues, including contractual risk allocation through insurance and indemnity provisions. Bill currently is Board Certified in the three specialties of real estate law of the State Bar of Texas, including Commercial Real Estate Law, and is a 25+ year Fellow Member of The College of the State Bar of Texas. He serves as Chair of the ACREL Insurance Committee. Bill has a B.A. in political science and a J.D. (Cum Laude), both from The University of Texas. The *A Dozen Things* article, the forms listed below, and other risk management articles are posted at Mr. Locke's bio at [www.gdhm.com](http://www.gdhm.com).

**Elizabeth A. Lowe** works in diverse areas of risk management, with a particular emphasis on contract compliance, Directors and Officers Liability, Errors and Omissions Coverages, Pollution Legal Liability, Construction Defect coverage and long tail exposure. Elizabeth recently was involved in and oversaw the placement of the Directors & Officers Insurance Program for four of the largest Private Equity Real Estate Funds in the United States. Her construction defect and Pollution Legal Liability work was a harbinger for the breadth of coverage now offered by numerous carriers. Elizabeth is a graduate of The University of Delaware, a Cum Laude graduate of Suffolk Law School, was admitted to both the Federal and Massachusetts Bar, and is a licensed insurance advisor in Massachusetts.

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## **ACREL WEBSITE**

A recording of this presentation together with the Discussion Outline and the above forms are posted on the ACREL Website [www.acrel.org](http://www.acrel.org) and temporarily at [www.gdhm.com](http://www.gdhm.com). Additionally, in connection with the presentation to be made by Bill Locke and Charles E. Comiskey, at the Fall Meeting in Vancouver, posted on the ACREL Website is the article *A Dozen Things You Wish You Had Known About Commercial Project Insurance* and the following forms, which have been annotated with commentary and citations to case and treatise discussions:

## **Liability Insurance Forms:**

ISO CG DS 01 10 01 Commercial General Liability Declarations  
ISO CG 00 01 04 13 Commercial General Liability Coverage Form  
ISO CG 02 05 12 04 Texas Changes - Amendment of Cancellation Provisions or Coverage Change  
ISO CG 04 37 04 13 Electronic Data Liability  
ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition  
ISO CG 20 10 04 13 Additional Insured - Owners, Lessees or Contractors - Scheduled Person Or Organization  
ISO CG 20 11 04 13 Additional Insured – Managers Or Lessors Of Premises  
ISO CG 20 24 04 13 Additional Insured – Owners or Other Interests From Whom Land Has Been Leased  
ISO CG 20 26 04 13 Additional Insured - Designated Person or Organization  
ISO CG 20 33 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement With You  
ISO CG 20 37 04 13 Additional Insured – Owners, Lessees Or Contractors – Completed Operations  
ISO CG 20 38 04 13 Additional Insured – Owners, Lessees Or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement  
ISO CG 21 39 10 93 Contractual Liability Limitation  
ISO CG 21 42 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations)

ISO CG 21 43 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations Excepted)  
ISO CG 21 44 07 98 Limitation of Coverage To Designated Premises Or Project  
ISO CG 22 34 04 13 Exclusion – Construction Management Errors and Omissions  
ISO CG 22 43 04 13 Exclusion – Engineers, Architects or Surveyors Professional Liability  
ISO CG 22 70 04 13 Real Estate Property Managed  
ISO CG 22 79 04 13 Exclusion – Contractors – Professional Liability  
ISO CG 22 94 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf  
ISO CG 22 95 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf – Designated Sites or Operations  
ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others to Us  
ISO CG 24 26 04 13 Amendment of Insured Contract Definition  
ISO CG 25 04 05 09 Designated Location(s) General Aggregate Limit

### **Property Insurance Forms:**

ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page  
ISO IL 00 17 11 98 Common Policy Conditions  
ISO CP 00 10 10 12 Building and Personal Property Coverage Form  
ISO CP 00 30 10 12 Business Income (And Extra Expense) Coverage Form  
ISO CP 00 90 07 88 Commercial Property Conditions  
ISO CP 04 05 10 12 Ordinance or Law Coverage  
ISO CP 04 15 10 12 Debris Removal Additional Insurance  
ISO CP 10 30 10 12 Causes of Loss – Special Form  
ISO CP 12 18 06 07 Loss Payable Provisions  
ISO CP 12 19 06 07 Additional Insured - Building Owner  
ISO CP 00 60 06 95 Leasehold Interest Coverage Form

### **Certificates:**

ACORD 25 (2010/05) Certificate of Liability Insurance  
ACORD 28 (2011/11) Evidence of Commercial Property Insurance  
ACORD 75 (2010/04) Insurance Binder

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## **DISCUSSION OUTLINE:**

### **I. PANEL'S MATERIALS <sup>1</sup>**

- A. Outline format.
- B. ACREL Website – A133-2009 Owner and Construction Manager Agreement, A201-2007 General Conditions; Crane Swing License, Staging License.
- C. ACREL Website – ISO and ACORD Forms.

### **II. PRESENTATION'S OBJECTIVES**

- A. Identify risks typically insured in construction projects.
- B. Explain advantages and disadvantages of three insurance program options.
- C. Review changes to the AIA insurance provisions negotiated to protect the owner.
- D. Review the case study's project insurance specifications implementing the chosen insurance program.

### **III. THE PROJECT**

#### **A. Parties.**

- 1. Owner. Financial institution with insurance department; not a recurrent building developer.
- 2. Contractor. Construction Manager ("CM"): large national contractor with established local reputation.
- 3. Architect. Large national architectural firm.
- 4. Project Manager. Fee developer (entitlement facilitator, construction management, and leasing).
- 5. Insurance Consultant. Non-premium fee based.

#### **B. Site and project.**

- 1. Site. description; former use; tunnel.
- 2. Surroundings. Adjoining owner's ("Third Party") low-rise office and vacant land.
- 3. Off-site. Crane swing over Third Party's property; staging.
- 4. Project delivery system. 16 month construction period. 4/2013 construction commencement. AIA A133-2009 Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price (\$40-\$75 MM).
- 5. Bid. Contractor's bid did not disclose (but bid based on Owner's acceptance of CM's CCIP with imbedded profit in insurance cost pass through). Owner's consultant focused on the delta between an OCIP and the CM's CCIP.

#### **C. Owner's objectives.**

- 1. Cost. Cost confirmation vs. cost savings; and cost savings, if achievable.
- 2. Liability Protection. High level of protection against insurable risks.
- 3. Relocation. Occupancy by bona fide deadline.
- 4. Operations Protection. Protection against risk of loss of use after completed operations if construction defects.

#### IV. INSURANCE PROGRAM

##### A. Insurable risks.

1. Injury risk. Job site injuries; auto injuries.
  - a. Workers.
  - b. Third parties.
2. Damage-to-others' property risk.
3. Environmental risks.
4. Damage to the Work risk.
5. Completion on time and in budget risk.

##### B. Injury risk and damage-to-others' property risk.

1. Three insurance approaches as to non-auto "injury" risk.
  - a. The "traditional" approach.
    - (1) Owner CGL.
    - (2) CM's CGL + CM's Workers' Comp. ("WC") and Employer Liability ("EL") + CM's auto liability ("BAP"); Subcontractor's ("SC") CGL + WC/EL + BAP.
  - b. CIP.<sup>2</sup>
    - (1) Advantages<sup>3</sup> and Considerations.<sup>4</sup> Subcontractors must be enrolled prior to entry on site. Both OCIPs and CCIPs are auditable.
    - (2) OCIP.
      - (a) Owner-administered consolidated CGL program: enrolled subcontractors – OCIP addendum to be attached to GC and SC contracts. Enrollment accomplished by the SC execution of CIP addendum to subcontract but can be followed up by formality of enrolling call.

*Advantages:*

        - (1) Owner is named insured (thus premises liability coverage included in addition to construction site liability) (e.g., "slips, trips and falls").
        - (2) Risk coverages tailored to Owner's objectives: e.g., loss of use coverage; cost savings?
        - (3) Premises liability aggregate reinstated on annual basis (however, only 16 month project).
        - (4) Deductible reduced to \$20,000 (to be contractually allocated to CM).
        - (5) CCIP contains a "builders risk exclusion", this exclusion modifies CGL coverage to exclude property damage to property on which CM or Subs are working and

damages that arise out of those operations – potential risk that BR insurer also denies claims on grounds of faulty workmanship and therefore, neither CCIP nor BR insures against this risk.

*Equalizer technique:* OCIPs may employ a 5-10% (“swing”) audit margin clause – so additional premium is not assessed to the Project if the exposure basis (hard costs) does not increase by more than the swing %; if so, the additional premium is only assessed on value exceeding the swing.

(b) WC/EL outside the CIP in the case study.

(3) CCIP.

(a) Contractor/CM-administered consolidated CGL program:

- [1] Enrolled subcontractors.
- [2] Safety program.

(b) WC/EL inside or outside the CIP.

## 2. The negotiations.

- a. Using approaches #s 1 and 2 to negotiate savings on CCIP.
- b. Review of premium structure charged to CM. Confidentiality agreement required in the case study (perceived as a stall tactic).
- c. “Targeted items” to achieve savings.
  - (1) Excess coverages.
  - (2) Hypothetical premium allocation to this Project vs. true premium allocation.
  - (3) Audit clause: CCIP allocates the increased exposure basis (hard costs) back to the Project at end as a cost of the Work. In case study, used the audit margin clause as tool to negotiate CM bearing the cost of the additional program premium due increased hard costs.

## 3. Resulting liability coverage.

a. CM’s.

(1) CM’s CCIP CGL Program.

(a) Allocated Cost: Contract Documents: A133 § 6.6.1 (p. 7). 1.06 % of Cost of Work. Negotiated reduction of %.

Point of negotiation: CCIP cost allocation includes .21% (or \$80 k) that reimburses CM for \$25 MM Contractors Pollution Policy and \$300 MM excess CGL policy above Contract Documents CGL limits – excess policy not project specific. CM insisted if OCIP that this cost be allocated as Cost of Work.

(b) CGL: Contract Documents: Exhibit A – Insurance Specs ¶ A.1.1 (p. 17) and ¶ A.4 (pp. 19-20). *Limits:* \$5,000,000 primary + Umbrella/excess up to \$40,000,000. 2<sup>nd</sup> level Umbrellas up to an additional \$300,000,000. *Deductible:* \$250,000 (borne by CM).

(c) Additional insureds. Exhibit A – Insurance Specs ¶ A.1.7 (p. 18). “AI” coverage for Owner and Third Parties (adjoining property owners - licensors); with notice of cancellation to AIs.

(2) Traditional WC/EL. Exhibit A – Insurance Specs ¶ A.3 (p. 19): W/C statutory and \$1,000,000 EL.

(3) BAP. *Limits*: \$1,000,000 primary limits + Umbrella up to \$25,000,000.

(4) Indemnity.

(a) Of Owner Parties. Contract Documents: A201 § 3.18.1 (pp. 9-10). Limited form indemnity – excludes negligence of Owner Parties (see ¶ .3). Indemnity over comes “workers comp” bar as to injuries to CM’s employees if CM negligent.

(b) Of Third Parties. Third Parties are the Licensors under the Swing Crane and Staging Licenses. Contract Documents: A201 § 3.18.5 (p. 10). Limited form indemnity as to injuries caused in whole or in part by CM’s or SC’s negligence. Requirement to list Third Parties as AIs for “ongoing operations”.

b. Owner’s. CGL. *Limits*: large, aggregate reinstated annually with renewals. *Coverage*: owner’s premises liability. *Exclusions*: confirmed that there is no “wrap exclusion”.

### C. Environmental risks.

1. Owner - Pollution Legal Liability Policy. Insurer provided all site-specific environmental reports. Sought proposals for 3 yrs., 5 yrs., and \$ 3 MM, \$5 MM, and \$10 MM quotes.

a. Contract Documents: A201 § 10.3.3 (pp. 10-11) Owner’s Hazardous Materials *Indemnity* – indemnifying CM and others for performance of Work in affected area except to extent due to fault or negligence of indemnified party; with indemnity limited to policy with following policy specs - *Basis*: occurrence; *Limits*: \$2,000,000; *Term*: until Work is substantially complete; to contain Contractual Liability Coverage; and COI to CM before Work commences. No separate Exhibit A Insurance Specifications. [Ex. A – Insurance Specifications, ¶ B.4, (p. 25) added spec’s in sample Insurance Specifications.]

b. Actual: *Term*: 5 years (Retroactive Date: none); *Limits*: \$5,000,000 incident/aggregate, *Emergency Response Costs*: \$250,000 incident, \$1,000,000 aggregate. *Deductible*: \$50,000. *Premium*: \$60,000. *Policy*: Binder delivered to CM.<sup>5</sup>

2. CM - Pollution Legal Liability Policy.

a. Contract Documents: A201 § 10.3.5 (p. 11) CM’s Hazardous Materials *Indemnity* – indemnifying Owner Parties except for Owner Parties’ negligence (except if Owner Parties’ negligence is failure to supervise, monitor or control CM); and Exhibit A – Insurance Specifications ¶ A.6 (p. 20): *Basis*: claims-made. *Limits*: \$2,000,000 incident/aggregate; *Endorsements*: waiver of subrogation as to Owner Parties; mold as a covered “pollutant”. [Added additional spec’s in sample Insurance Specifications.]

b. Actual. Same as Contract Documents. *Policy Term*: 1 year expiring 3/31/14, renewal required.

### D. Completion-on-time and in-budget risk.

1. CM’s Professional Liability Insurance.

a. Contract Documents: Exhibit A – Insurance Specs, ¶ A.5 (p. 20) – *Basis*: claims-made; *Limits*: \$2,000,000 per Claim/\$2,000,000 General Aggregate; *Coverage Period*: Retroactive to date of Work commencement and for 10 year Statute of Repose by Project-specific endorsement. [Added additional spec’s in sample Insurance Specifications.]

b. Actual. Same as Contract Documents.

2. Subguard.

- a. CM's view. CM-insisted.
  - b. Owner's view. Owner rejected cost, required payment and performance bonds.
  - c. Subguard premium split with CM. Approx. 1% of subcontract amounts = \$320,000 split 50/50, not to exceed \$160,000. Contract Documents: A133 § 6.6.1 (p. 7).
  - d. Endorsement. Owner third party beneficiary.
- 3. Liquidated Damages. A133 § 2.3.3.7 (p. 6). LD cap negotiated up from CM's fee to \$2,000,000 cap.
- E. Damage-to-the-Work risk.** "Contractor-purchased" Builder's Risk Policy (= Master BR Policy): Premium .145% on \$44,981,301; with \$7,113,570 "soft cost" sublimit – Soft costs worksheet completed to substantiate sublimit.
  - 1. Premium savings – contractor placed vs. owner placed?
  - 2. Coverage goals. If Owner-purchased, Owner would be negotiation-party for losses. If placed OCIP, then best to also to be the purchaser of the BR.
  - 3. Named Insureds. CM and Owner. Subs. not designated.
- F. Proof of insurance.**
  - 1. Policies reviewed.
  - 2. Certificates of Insurance. ("ACORD COIs").

## V. SPECIAL CONTRACT PROVISION NEGOTIATIONS

### A. Indemnity and Insurance Specifications.

- 1. AIA A201 and Insurance Exhibit. Both a modified AIA narrative and Insurance Specifications Exhibit.
- 2. Licenses and Insurance Exhibit.
  - a. Brief insurance narrative plus Insurance Specifications Exhibit.
  - b. Third Party focused on AI designations and COI issuance.

### B. Waiver of consequential damages vs. loss of use due to construction defects. A201 § 15.1.6 (p. 16) Consequential damages waived by Owner except:

- 1. Diminution in value due to construction defects.
- 2. "Loss of use" damages resulting from construction defect:
  - a. Within limits of Contract Documents' insurance. Primary/Umbrellas/Excess to be available for "loss of use" damages. CM originally insisted on no loss of use damages, then negotiated up to 50% of CM fee, then \$10 MM, and then accepted full recourse up to all policies.
  - b. Incurred within 24 months of Substantial Completion.



## **FORMS:**

### **AIA DOCUMENTS. A133 and A201 with Exhibit A Insurance Specifications.**

The following are the primary risk management provisions in the A133 and A201 construction documents negotiated by the parties. They are not held out as “model” provisions, but are set out as a sample. The following conventions are used to illustrate the parties’ drafting: AIA form language that is deleted is shown as ~~strike-outs~~ and new language is shown as underlined or introduced as **NEW** without underlining the text (in order to reduce the visual effect of extensive underlining). Insurance specifications not contained in the case study are set out in Exhibit A in brackets as [ ].

#### **1. AIA DOCUMENT A133 – 2009, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONSTRUCTION MANAGER as CONSTRUCTOR where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price.**

#### **ARTICLE 2 CONSTRUCTION MANAGER RESPONSIBILITIES**

**NEW: § 2.3.3.7 Liquidated Damages.** The Construction Manager acknowledges and agrees that, if the Construction Manager fails to achieve Substantial Completion of a Milestone or the entire Work in accordance Section 2.2.11, as such dates may be amended from time to time in accordance with the Contract Documents, the Owner will sustain extensive damages and serious loss as a result of such failure. The exact amount of such damages will be difficult to ascertain. Therefore, the Owner and Construction Manager agree that, if the Construction Manager shall neglect, fail or refuse to achieve Substantial Completion of a Milestone or the entire Work by the date required by the Contract Documents for Substantial Completion of such Milestone or the entire Work, subject to adjustments in the Contract Time as provided in the Contract Documents, then the Construction Manager (and the Construction Manager's surety in the case of default) agrees to pay to the Owner as liquidated damages, and not as a penalty or forfeiture, the sum(s) set forth in the table below per calendar day for each day of such delay, subject to the limitations and potential reductions set forth in this Section 2.3.3.7. Such liquidated damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work. The Owner may deduct liquidated damages described in this Subsection from any unpaid amounts then or thereafter due the Construction Manager under this Agreement. Any liquidated damages not so deducted from any unpaid amounts due the Construction Manager shall be payable to the Owner at the demand of the Owner, together with interest from the date of the demand at a rate equal to the highest lawful rate of interest payable by the Construction Manager. The liquidated damages established in this Section 2.3.3.7 shall be the Construction Manager’s sole liability for delay in achieving Substantial Completion of the Work by the date required by the Contract Documents. In no event shall Construction Manager be liable for aggregate liquidated damages in excess of \$\_\_\_\_\_.

<b>Milestone</b>	<b>Liquidated Damages</b>
MS 1	\$10,000 per day
MS 2	\$10,000 per day
MS 3	\$5,000 per day
Substantial Completion of the Entire Work	\$3,000 per day

Notwithstanding any provision of the Contract Documents to the contrary, in the event multiple Milestones are subject to an unexcused delay, the Construction Manager shall only be assessed liquidated damages in connection with the Milestone for which the highest total liquidated damages are owed. For example, if MS 1 is delayed by 6 days and MS 2 is delayed by 5 days, Construction Manager shall be assessed \$60,000 in liquidated damages (*i.e.* 6 days x \$10,000). MS 1, MS 2 and MS 3 shall have the meanings assigned to them in Section 2.2.11 herein.

**NEW: § 2.2.11** Except to the extent that Owner and Construction Manager agree otherwise in a Work Authorization Amendment or Guaranteed Maximum Price Amendment, the Work shall be substantially completed as follows, as such Contract Time may be amended from time to time in accordance with the Contract Documents:

<b>Milestones</b>	<b>Substantial Completion Dates (From Commencement of the Construction Phase)</b>
Building Dry-In (“MS 1”)	On or before 359 days from commencement

TCO (including Fire, Life and Safety inspections) for the Garage, Lobby and Floors 7-9 ("MS 2")	On or before 433 days from commencement
TCO (including Fire, Life and Safety inspections) for Floors 1 and 10-13 ("MS 3")	On or before 472 days from commencement
Substantial Completion of the entire Work	On or before 487 days from commencement

## ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

### § 5.1.1 The Construction Manager's Fee:

**NEW:** The "Construction Manager's Fee" for the Work shall be \_\_\_\_ % of the Cost of the Work (including Construction Manager's General Conditions, bonds and insurance). The Construction Manager's Fee shall be the Construction Manager's complete fee (inclusive of compensation for profit and indirect overhead) and, together with the payment for the Cost of the Work for those costs which are expressly set forth in Article 6 of this Agreement, shall constitute Construction Manager's sole reimbursement for the performance of the Work.

## ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

**§ 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 set forth herein or otherwise not higher than the standard 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 Sections 6.1 through 6.7 and Exhibit B hereto.

**NEW:** Owner and Construction Manager have segregated and categorized on Exhibit B General Conditions Worksheet) certain of the Cost of the Work to be incurred by the Construction Manager for administrative and supervisory personnel costs, direct overhead, and other costs and expenses included in the Cost of the Work and incurred by Construction Manager in the performance of its administrative, supervisory, and management responsibilities under the Agreement (called in the Contract Documents "General Conditions") and have agreed that such General Conditions are reimbursable by Owner to the Construction Manager as a stipulated sum in the amount of \$ \_\_\_\_\_, subject to adjustments as expressly authorized by the provisions of the Contract Documents. The General Conditions are to be paid by Owner to the Construction Manager in equal monthly payments over the Contract Time.

### § 6.6 Miscellaneous Costs

~~§ 6.6.1 Premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract. Self insurance for either full or partial amounts of the coverage required by the Contract Documents, with the Owner's prior approval. NEW: Amounts for~~

(1) Construction Manager's insurance coverage program, including but not limited to, General Liability insurance for both Contractor and Subcontractors (as described in the **CCIP Manual**) at the rate of 1.06% of the Contract Sum;

(2) Builder's Risk insurance at the rate of 1.45% of the Contract Sum;

(3) Construction Manager's Payment and Performance Bonds at the rate of .63% of the Contract Sum; and

(4) Subcontractor Default Program at the rate of .55% of Subcontract and supplier agreement values, provided Owner shall not be required to pay more than \$160,000 for such Subcontract Default Program.

Certain insurance coverages for Contractor and Subcontractors shall be provided through a Contractor Controlled Insurance Program ("CCIP").

If Contractor is providing Workers Compensation insurance through its CCIP, Contractor shall have the right to apply the amounts paid by Owner for Contractor's insurance coverage plus the amounts included in its subcontractors' prices for such insurance, and retain those amounts to pay the cost of the CCIP. Contractor shall bear any increase in insurance premiums resulting from an audit.

#### **ARTICLE 8 INSURANCE AND BONDS**

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of AIA Document A201–2007 and as set forth in the **Insurance and Bond Specifications** attached hereto as **Exhibit A** hereto and fully incorporated herein.

## 2. AIA DOCUMENT A201 – 2007 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

### § 3.18 INDEMNIFICATION <sup>6</sup>

§ 3.18.1. TO THE FULLEST EXTENT PERMITTED BY LAW THE CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE OWNER, ARCHITECT, ARCHITECT'S CONSULTANTS, AND AGENTS AND EMPLOYEES OF ANY OF THEM FROM AND AGAINST ITS EMPLOYEES, AND SUCCESSORS ("OWNER PARTIES") FROM AND AGAINST,

.1 ALL CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES ARISING, OR ALLEGED TO ARISE, FROM ANY OF THE FOLLOWING (THE "INDEMNIFIED MATTERS"):

(A) THE ACTS OR OMISSIONS, INCLUDING THE ONGOING OR COMPLETED OPERATIONS, OF CONTRACTOR, SUBCONTRACTORS AND ALL OTHER PERSONS FOR WHOM CONTRACTOR IS LEGALLY LIABLE (A "CONTRACTOR-RELATED PERSON");

(B) NEGLIGENCE, FRAUD, BREACH OF FIDUCIARY DUTY, WILLFUL, RECKLESS, OR CRIMINAL MISCONDUCT, OR ANY ACTIONS OF ANY CONTRACTOR-RELATED PERSON BEYOND THE SCOPE OF WORK;

(C) DEFAULT BY CONTRACTOR UNDER THIS AGREEMENT;

(D) FAILURE BY CONTRACTOR OR ANY SUBCONTRACTOR TO MAINTAIN INSURANCE REQUIRED TO BE MAINTAINED BY IT PURSUANT TO THIS AGREEMENT;

(E) CONTRACTOR'S, SUBCONTRACTOR'S, OR A CONTRACTOR-RELATED PERSON'S VIOLATION OF ANY ORDINANCE, REGULATION, STATUTE OR OTHER LEGAL REQUIREMENTS; OR

(F) RELEASE OR DISTURBANCE OF HAZARDOUS MATERIALS OR SUBSTANCES THAT OCCURS IN OR FROM THE PROPERTY AND ARISES FROM CONTRACTOR'S, SUBCONTRACTOR'S, OR A CONTRACTOR-RELATED PERSON'S ACTIVITIES OR OPERATIONS OR THE REMEDIATION OF SUCH RELEASE OR DISTURBANCE ARISING OUT OF OR RESULTING FROM PERFORMANCE OF THE WORK;

PROVIDED THAT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS ATTRIBUTABLE TO BODILY INJURY, SICKNESS, DISEASE OR DEATH, OR TO INJURY TO OR DESTRUCTION OF ~~tangible~~ PROPERTY (OTHER THAN THE WORK ITSELF), ~~but only to the extent~~ CAUSED IN WHOLE OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF CONTRACTOR, SUBCONTRACTOR, OR A CONTRACTOR-RELATED PERSON ~~anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party described in this Section 3.18.~~

### .2 REGARDLESS OF

(A) WHETHER THE CLAIM IS ALSO CAUSED IN PART BY THE ORDINARY, ACTIVE OR PASSIVE, JOINT, CONCURRENT OR COMPARATIVE NEGLIGENCE OF AN OWNER PARTY;

(B) WHETHER LIABILITY WITHOUT FAULT OR STRICT LIABILITY IS IMPOSED UPON OR ALLEGED AGAINST THE OWNER PARTY; AND

(C) THE SCOPE OF ANY PERSON'S INSURANCE AND IS INDEPENDENT OF INSURANCE;

### .3 BUT WILL NOT BE ENFORCED TO THE FOLLOWING EXTENT ("EXCLUDED MATTERS"):

(A) OF OWNER'S BREACH OF THIS CONTRACT; OR

(B) A LOSS IS CAUSED IN WHOLE OR IN PART BY THE MISCONDUCT OR NEGLIGENCE OF AN OWNER PARTY.

IF LOSSES, DAMAGES, LIABILITIES AND EXPENSES ARISE OUT OF THE CONCURRENT NEGLIGENCE OF BOTH OWNER AND CONTRACTOR OR THE RESPECTIVE PARTIES FOR WHOM EACH IS RESPONSIBLE, CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE OWNER PARTIES ONLY TO THE EXTENT OF CONTRACTOR'S OWN NEGLIGENCE OR THOSE FOR WHICH IT IS RESPONSIBLE HEREUNDER OR UNDER APPLICABLE LAW; PROVIDED, HOWEVER, CONTRACTOR SHALL PROVIDE OWNER AND/OR THE OWNER PARTIES WITH A COMPLETE DEFENSE OF SUCH CONCURRENT NEGLIGENCE CLAIM UNTIL THE CLAIM IS SETTLED OR A FINAL JUDGMENT IS ENTERED ON SUCH CLAIM, AT WHICH TIME OWNER AND/OR ITS INSURANCE CARRIER(S) SHALL REIMBURSE CONTRACTOR AND/OR ITS INSURANCE CARRIER(S) FOR DEFENSE COSTS PROPERLY ALLOCATED TO OWNER AND/OR THE OWNER PARTIES. CONTRACTOR'S INDEMNITY HEREIN IS EXPRESSLY INTENDED TO CONSTITUTE A WAIVER OF ANY IMMUNITY IT MAY HAVE UNDER THE LAW TO THE EXTENT NECESSARY TO PROVIDE OWNER WITH A COMPLETE INDEMNITY FOR THE NEGLIGENCE OF CONTRACTOR OR CONTRACTOR'S EMPLOYEES, TO THE EXTENT OF THEIR NEGLIGENCE.

**NEW: § 3.18.2.** In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

**NEW: § 3.18.3.** Expenses recoverable by the Owner Parties as part of the Contractor's indemnity obligations under this Section 3.18 shall include, without limitation, reasonable attorney's fees and any other costs incurred by such Owner Parties in a legal proceeding brought against the Contractor to enforce this Section 3.18.1. The provisions contained herein shall survive the expiration or earlier termination of this Agreement, the final completion of the Work, and any other services to be provided pursuant to the Contract Documents.

**NEW: § 3.18.4.** The Contractor shall promptly advise Owner in writing of any action, administrative or legal proceeding or investigation as to which this indemnification may apply, and Contractor, at Contractor's expense, shall assume on behalf of the Owner Parties and conduct with due diligence and in good faith the defense thereof with counsel satisfactory to Owner; provided, however, that Owner and the other Owner Parties shall each have the right, at their option, to be represented therein by legal counsel of their own selection and at their own expense. In the event of failure by the Contractor to fully perform in accordance with this Indemnification section, the Owner Parties, at their option, and without relieving Contractor of its obligations hereunder, may so perform, but all costs and expenses so incurred by the Owner Parties in that event shall be reimbursed by Contractor to such Owner Parties, together with interest on the same from the date any such expense was paid by such Owner Parties until reimbursed by Contractor, at the rate of interest provided to be paid on judgments under the laws of the State of [Texas].

**NEW: § 3.18.5.** CONTRACTOR AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE THIRD PARTIES FROM AND AGAINST ANY CLAIMS, DAMAGES OR EXPENSES ATTRIBUTABLE TO BODILY INJURY, DEATH OR DAMAGE TO TANGIBLE PROPERTY TO THE EXTENT SUCH CLAIMS, DAMAGES OR EXPENSES WERE CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF CONTRACTOR OR ITS SUBCONTRACTORS OF ANY TIER, INCLUDING BUT NOT LIMITED TO IN THE OPERATION OF A TOWER CRANE, IN CONNECTION WITH THE PROJECT. CONTRACTOR SHALL NAME THE THIRD PARTIES AS ADDITIONAL INSURED ON CONTRACTOR'S COMMERCIAL GENERAL LIABILITY AND EXCESS LIABILITY INSURANCE POLICIES FOR ONGOING OPERATIONS. The "Third Parties" means the following persons:

## **ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY**

### **§ 10.3 HAZARDOUS MATERIALS**

~~§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.~~ **NEW:** TO THE FULLEST EXTENT PERMITTED BY LAW, THE OWNER SHALL INDEMNIFY AND HOLD HARMLESS THE CONTRACTOR, SUBCONTRACTORS, ARCHITECT, ARCHITECT'S CONSULTANTS AND AGENTS AND EMPLOYEES OF ANY OF THEM FROM AND

AGAINST CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES, ARISING OUT OF OR RESULTING FROM PERFORMANCE OF THE WORK IN THE AFFECTED AREA IF IN FACT THE MATERIAL OR SUBSTANCE PRESENTS THE RISK OF BODILY INJURY OR DEATH AS DESCRIBED IN SECTION 10.3.1 AND HAS NOT BEEN RENDERED HARMLESS, PROVIDED THAT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS ATTRIBUTABLE TO BODILY INJURY, SICKNESS, DISEASE OR DEATH, OR TO INJURY DAMAGE TO OR DESTRUCTION OF TANGIBLE PROPERTY (OTHER THAN THE WORK ITSELF), EXCEPT TO THE EXTENT THAT SUCH DAMAGE, LOSS OR EXPENSE IS DUE TO THE FAULT OR NEGLIGENCE OF THE PARTY SEEKING INDEMNITY. **Notwithstanding any provision of the Contract Documents to the contrary, Contractor's recovery from the Owner under this Section 10.3.3 and Section 10.3.6 hereof is limited to coverage available to Owner under Owner's Pollution Liability insurance, including any deductible required by such policy.** The Owner shall purchase a Pollution Liability insurance policy for this Project with project-specific limits of \$2,000,000 each loss and a \$2,000,000 policy aggregate. Such policy shall be written on an occurrence basis and shall include contractual liability coverage. A certificate of insurance evidencing such coverage and copy of such policy shall be provided to Contractor prior to commencement of the Construction Phase. The Owner will maintain such Pollution Liability insurance until the Work is substantially complete. The policy will be endorsed to provide Contractor with at 30 days' notice of cancellation.

**§ 10.3.4** The Owner shall not be responsible under this Section 10.3 for materials or substances the Contractor brings to the site ~~unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances or a Contractor-Related Person brings to the site.~~

**§ 10.3.5 INDEMNITY** ~~The Contractor shall indemnify the Owner for the cost and expense~~ THE CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE OWNER PARTIES AGAINST

- .1 THE CLAIM AND FOR THE LOSS THE OWNER INCURS (1) FOR REMEDIATION OF A MATERIAL OR SUBSTANCE CONTRACTOR OR A CONTRACTOR-RELATED PARTY BRINGS TO THE SITE , OR (2) WHERE THE CONTRACTOR FAILS TO PERFORM ITS OBLIGATIONS UNDER SECTION 10.3.1 ~~except to the extent that the cost and expenses are due to the Owner's fault or negligence~~ OR AS REQUIRED BY LAW OR REGULATION
- .2 REGARDLESS OF
  - (A) WHETHER LIABILITY WITHOUT FAULT OR STRICT LIABILITY IS IMPOSED UPON OR ALLEGED UPON CONTRACTOR OR AGAINST THE OWNER PARTY, AND
  - (B) THE SCOPE OF ANY PERSON'S INSURANCE AND IS INDEPENDENT OF INSURANCE;
- .3 BUT WILL NOT BE ENFORCED TO THE FOLLOWING EXTENT ("EXCLUDED MATTERS"):
  - (A) OF OWNER'S BREACH OF THIS CONTRACT; OR
  - (B) A LOSS IS CAUSED IN WHOLE OR IN PART BY THE WILLFUL MISCONDUCT OR NEGLIGENCE OF AN OWNER PARTY.

**NEW:** NOTWITHSTANDING THE FOREGOING LIMITATIONS ON THE INDEMNIFICATION, THE OBLIGATIONS OF THE CONTRACTOR UNDER THIS INDEMNIFICATION WITH REGARD TO THOSE CLAIMS OR LOSSES ASSERTED AGAINST OR INCURRED BY AN OWNER PARTY DUE TO OR ARISING OUT OF (A) ALLEGED FAILURE BY THAT INDEMNIFIED PARTY TO SUPERVISE, MONITOR, OR CONTROL CONTRACTOR'S OR ANY SUBCONTRACTOR'S ACTIVITIES ON OR ABOUT THE SITE OR OTHERWISE IN RESPECT TO PERFORMANCE OF THE WORK, OR (B) ALLEGED FAILURE BY THAT OWNER PARTY TO ENFORCE THE CONTRACTOR'S OBLIGATIONS UNDER THE CONTRACT DOCUMENTS SHALL NOT BE REDUCED BY THE COMPARATIVE NEGLIGENCE OF THE OWNER PARTY ATTRIBUTABLE TO OR RESULTING FROM SUCH OWNER'S ALLEGED FAILURE TO SUPERVISE, MONITOR OR CONTROL THE CONTRACTOR OR SUBCONTRACTOR OR ALLEGED FAILURE TO ENFORCE CONTRACTOR'S OBLIGATIONS UNDER THE CONTRACT DOCUMENTS.

## ARTICLE 11 INSURANCE AND BONDS

**NEW: § 11.0 INSURANCE SPECIFICATIONS** Attached hereto as **Exhibit A** to Agreement are specifications for insurance and bonds to be obtained and maintained by the party identified in the Exhibit. The specifications are in addition to the requirements set out in this Article 11. In the event of any conflict between the specifications in the Exhibit and the requirements set out in the below sections of Article 11, the specifications in Exhibit A to the Agreement control and amend and supersede the conflicting requirements set out in the below sections of Article 11. Commercial General Liability, Worker's Compensation, Automobile Liability and Excess/Umbrella insurance will be provided by or on behalf of all Subcontractors. Contractor will maintain certificates and evidence of insurance from all Subcontractors, enumerating, among other information, the waivers of subrogation in favor of and additional insured status of the Owner Parties (as herein defined), as required by this Agreement. Contractor will make such certificates and evidence of insurance available to Owner Parties upon request. The coverages and limits set forth in Exhibit A are minimum requirements and not a determination as to all of the coverages and maximum limits that Contractor should carry. The failure of a party to demand full compliance by the other party with respect to the minimum coverages outlined in Exhibit A will not constitute a waiver with respect to the other party's obligation to maintain such coverages. Contractor's or its Subcontractors' failure to obtain and maintain the required insurance will constitute a material breach of, and default under, this Agreement. If Contractor or any of its Subcontractors fail to remedy such breach within 5 days after notice from Owner, Owner may, in addition to any other remedy available to it, at the Owner's option, purchase such insurance, at the Contractor's expense. The Contractor will indemnify the Owner, its officers and employees against any Claims arising from the Contractor's failure to purchase and/or maintain the insurance coverages required by this Agreement.

### § 11.1 CONTRACTOR'S LIABILITY INSURANCE

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

- .1 Claims under workers' compensation, disability benefit and other similar employee benefit acts that are applicable to the Work to be performed;
- .2 Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 Claims for damages insured by usual personal injury liability coverage;
- .5 Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 Claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
- .7 Claims for bodily injury or property damage arising out of completed operations; and
- .8 Claims involving contractual liability insurance applicable to the Contractor's obligations under Section 3.18.

**§ 11.1.2** The insurance required by Section 11.1.1 and the Agreement shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor's completed operations coverage, until the expiration of 10 years after final completion of the construction of the Improvements ~~the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Contract Documents.~~ Notwithstanding the foregoing, such coverage required hereunder shall not be written on a claims-made basis without the advance express written consent of Owner, except for the professional liability and pollution liability insurance which may be written on a claims-made basis.

**§ 11.1.3** Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies

will not be canceled by the insurer until at least 30 days' prior written notice has been given to the Owner except in the case of nonpayment of premium by the insured, in which cancel 10 days' prior written notice is to be given to Owner. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 11.1.2. ~~Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness. See attached insurance specifications requirement that the General Aggregate is to be dedicated to this Project.~~

**§ 11.1.4** The Contractor shall cause the commercial liability, auto and umbrella liability coverage required by the Contract Documents to include (1) the Owner Parties (as defined in the Contract Documents), ~~the Architect and the Architect's consultants~~ as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner Parties as ~~an~~ additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations. All such liability policies carried and maintained by Contractor must be endorsed to be primary and noncontributory to any liability insurance policies carried by the additional insureds with respect to Contractor's operations hereunder. Waivers of subrogation shall be provided in favor of the Owner Parties on general, auto, workers' compensation/employers, umbrella and all other liability policies carried and maintained by Contractor where allowed by law.

**NEW: § 11.1.5** If the Contractor fails to purchase and maintain, or require to be purchased and maintained, any insurance required under this Article 11 or the insurance requirements in the Agreement, Owner may, but shall not be obligated to, upon 5 days' written notice to the Contractor, purchase such insurance on behalf of the Contractor and shall be entitled to be reimbursed by the Contractor upon demand.

**NEW: § 11.1.6** When any required insurance, due to the attainment of a normal expiration date or renewal date shall expire, the Contractor shall supply the Owner with certificates of insurance and amendatory riders or endorsements that clearly evidence the continuation of all coverage in the same manner, limits of protection, and scope of coverage as was provided by the previous policy. In the event any renewal or replacement policy, for whatever reason obtained or required, is written by a carrier other than that with whom the coverage was previously placed, or the subsequent policy differs in any way from the previous policy, the Contractor shall also furnish the Owner with a certified copy of the renewal or replacement policy unless the Owner provides the Contractor with prior written consent to submit only a certificate of insurance for any such policy. All renewal and replacement policies shall be in form and substance satisfactory to the Owner and written by carriers acceptable to the Owner.

## **§ 11.2 OWNER'S LIABILITY INSURANCE**

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

## **§ 11.3 PROPERTY INSURANCE**

**§ 11.3.1** ~~Unless otherwise provided, the Owner~~ Contractor shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" [or equivalent policy] form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site, including the value of the existing structure on a replacement cost basis without optional deductibles, except as may be approved by Owner. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

**§ 11.3.1.1** Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, increased cost of construction and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss. Such property



insurance shall not cover any tools, apparatus, machinery, scaffolding, hoists, forms, staging, shoring and similar items commonly referred to as construction equipment, which may be on the site and the capital value of which is not included in the Work. The Contractor shall make its own arrangements for any insurance it may require on such construction equipment. Any such policy obtained by the Contractor under this paragraph shall include a waiver of subrogation in accordance with the requirements of Section 11.3.7.

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

~~§ 11.3.1.3 If the property insurance requires deductibles, the Owner Contractor shall pay the deductible. Owner shall pay costs not covered because of such deductibles.~~

~~§ 11.3.1.4 This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.~~

~~§ 11.3.1.5 Partial occupancy or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to for partial occupancy in accordance with Section 9.9 as a condition of placing the builder's risk policy with the insurer or use that would cause cancellation, lapse or reduction of insurance.~~

#### **§ 11.3.2 BOILER AND MACHINERY INSURANCE**

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

#### **§ 11.3.3 LOSS OF USE INSURANCE**

The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards, however caused, except as set forth in Section 15.1.6 hereof.

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

~~§ 11.3.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or If, after final payment, Owner provides property insurance for the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.~~

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

### § 11.3.7 WAIVERS OF RECOVERY AND SUBROGATION

THE OWNER AND CONTRACTOR (THE “**RELEASING PARTY**”) WAIVE ALL RIGHTS AGAINST THE FOLLOWING PERSONS (THE “**RELEASED PERSONS**”): (1) EACH OTHER AND ANY OF THEIR SUBCONTRACTORS, SUB-SUBCONTRACTORS, AGENTS AND OFFICERS, DIRECTORS AND EMPLOYEES, EACH OF THE OTHER, AND (2) THE SEPARATE CONTRACTORS DESCRIBED IN ARTICLE 6, IF ANY, AND ANY OF THEIR SUBCONTRACTORS, SUB-SUBCONTRACTORS, AGENTS AND EMPLOYEES, FOR DAMAGES CAUSED BY FIRE OR OTHER CAUSES OF LOSS LOSSES AND CLAIMS FOR DAMAGE TO THE WORK UNDER CONSTRUCTION, DAMAGE TO THE COMPLETED WORK, AND DAMAGE TO OR LOSS OF FIXTURES OR MATERIALS, EQUIPMENT OR OTHER PERSONAL PROPERTY TO THE EXTENT COVERED PAID BY PROPERTY INSURANCE OBTAINED PURSUANT TO THIS SECTION 11.3 OR OTHER PROPERTY INSURANCE APPLICABLE TO THE WORK, OR THAT WOULD HAVE BEEN COVERED BY INSURANCE IF THE RELEASING PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGE REQUIRED OF IT BY THIS AGREEMENT EXCEPT SUCH RIGHTS AS THEY HAVE TO PROCEEDS OF SUCH INSURANCE HELD BY THE OWNER OR CONTRACTOR IN GOOD FAITH AS A FIDUCIARY. IN THE EVENT OF PROPERTY DAMAGE POTENTIALLY COVERED BY A PARTY’S PROPERTY INSURANCE POLICY, SUCH PARTY SHALL SUBMIT A CLAIM WITH ITS PROPERTY INSURANCE CARRIER AND USE COMMERCIALY REASONABLE EFFORTS TO SECURE PAYMENT FROM SUCH CARRIER BEFORE PURSUING ANY CLAIM AGAINST THE OTHER PARTY. SUBJECT TO SECTION 11.3.1.3, COSTS NOT COVERED BECAUSE OF DEDUCTIBLES OR SELF-INSURED RETENTIONS SHALL BE “PAID BY PROPERTY INSURANCE” FOR PURPOSES OF THIS SECTION 11.3.7. THE OWNER OR CONTRACTOR, AS APPROPRIATE, SHALL REQUIRE OF THE ~~ARCHITECT, ARCHITECT’S CONSULTANTS,~~ SEPARATE CONTRACTORS DESCRIBED IN ARTICLE 6, IF ANY, AND THE SUBCONTRACTORS, SUB-SUBCONTRACTORS, AGENTS AND EMPLOYEES OF ANY OF THEM, BY APPROPRIATE AGREEMENTS, WRITTEN WHERE LEGALLY REQUIRED FOR VALIDITY, SIMILAR WAIVERS EACH IN FAVOR OF THE RELEASED PERSONS ~~OTHER PARTIES~~ ENUMERATED HEREIN. THE POLICIES SHALL PROVIDE SUCH WAIVERS OF SUBROGATION BY ENDORSEMENT OR OTHERWISE. A WAIVER OF SUBROGATION SHALL BE EFFECTIVE AS TO A PERSON OR ENTITY EVEN THOUGH THAT PERSON OR ENTITY WOULD OTHERWISE HAVE A DUTY OF INDEMNIFICATION, CONTRACTUAL OR OTHERWISE, DID NOT PAY THE INSURANCE PREMIUM DIRECTLY OR INDIRECTLY, AND WHETHER OR NOT THE PERSON OR ENTITY HAD AN INSURABLE INTEREST IN THE PROPERTY DAMAGED. **THE RELEASE IN THIS SECTION WILL APPLY EVEN IF THE LOSS IS CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PERSON.** THE RELEASE IN THIS SECTION SURVIVES COMPLETION OF THE WORK OR TERMINATION OR EXPIRATION OF THIS AGREEMENT. IN NO EVENT SHALL THIS SECTION 11.3.7 OR SECTION 11.3.5 BE INTERPRETED TO WAIVE ANY CLAIM OWNER MAY HAVE AGAINST CONTRACTOR FOR “LOSS OF USE” DAMAGES PURSUANT TO SECTION 15.1.6 HEREOF.

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

§ 11.3.9 If required in writing by a party in interest, the Contractor Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Contractor’s Owner’s duties. ~~The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or as determined in accordance with the method of binding dispute resolution selected in the Agreement between the Owner and Contractor.~~ The cost of required bonds shall be charged against proceeds received as fiduciary. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

§ 11.3.10 The Contractor Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Contractor’s Owner’s exercise of this power; if such objection is made, the dispute shall be resolved in the manner selected by the Owner and Contractor as the method of binding dispute resolution in the Agreement. ~~If the Owner and Contractor have selected arbitration as the method of binding dispute resolution, the Owner as fiduciary shall make settlement with insurers or, in the cases of a dispute over distribution of insurance proceeds, in accordance with the directions of the arbitrators.~~

#### § 11.4 PERFORMANCE BOND AND PAYMENT BOND

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

**NEW:** The payment bond shall be in the statutorily required amount and form and issued by an issuer acceptable to Owner. The payment bond shall not be on an AIA bond form. Any person, firm or corporation executing a performance or payment bond upon the Contractor's Work under the Agreement, shall be deemed to have consented in advance to any changes in the Work made by order of the Owner; any such changes shall in no way alter or impair the obligations of such person, firm or corporation executing such a bond. The amount of the bonds shall be written to increase with Change Orders. Contractor shall obtain and file with Owner bond increase riders for any increases in the Contract Sum as may be necessary to effectuate coverage for increases in the Contract Sum. Issuer must be at least a *Best's Key Rating Guide* A/VII company and listed on the United States Department of the Treasury's List of Acceptable Sureties and Reinsurers (the "T" list). The payment bond shall meet the requirements of Section 53.201 *et seq.* of the Texas Property Code.

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#### § 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

Except as otherwise provided in this Section 15.1.6, the Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

The foregoing Sections 15.1.6.1 and 15.1.6.2 notwithstanding, no waiver contained in this Section 15.1.6 shall be interpreted against Owner to be a waiver of benefit of the bargain damages arising from Contractor's performance of the Work, including but not limited to diminution in the value of the Project resulting from defective construction by Contractor.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents. Notwithstanding any provision of the Contract Documents to the contrary, the Owner does not waive Claims against Contractor for "loss of use" damages incurred by the Owner as a result of a construction defect provided such damages are (a) covered by and within the limits of the insurance required by the Contract Documents, and (b) incurred within 24 months of Substantial Completion.

### 3. EXHIBIT A TO CONSTRUCTION CONTRACT INSURANCE SPECIFICATIONS

This Exhibit is attached as an Exhibit to the AIA A133 and its AIA A201 as part of the Contract Documents executed by and between Owner and Construction Manager (also referred to as the “**Contractor**”). References to sections (“§”) below are references to sections in the A201. In the event of conflict between any of the following Insurance Specifications with any provision in the Contract Documents, these Insurance Specifications control, amend and supplement the conflicting provision.

#### A. Specific Requirements

The following insurance shall be maintained by the party specified below with limits not less than those set forth below for the time periods set forth below.

No.	Specifications	Coverages, Limits & Other Requirements								
A. LIABILITY										
1.	<b><u>Commercial General Liability.</u></b> Construction Manager <sup>7</sup> is to maintain commercial general liability insurance (“CGL”) <sup>8</sup> issued on an Occurrence Basis <sup>9</sup> meeting at least the following specifications, but only to the extent permitted by law.									
1.1	<b>Minimum Limits</b>  See A201 § 11.1.1.2.	<p>The minimum limits of coverage are not to be less than the following amounts:</p> <table><tr><td>\$5,000,000</td><td>Per Occurrence</td></tr><tr><td>\$5,000,000</td><td>General Aggregate.</td></tr><tr><td>\$5,000,000</td><td>Products/Completed Operations Aggregate<sup>10</sup></td></tr><tr><td>\$2,000,000</td><td>Personal and Advertising Injury Limit.</td></tr></table> <p>and with minimum limits increased to \$40,000,000 by Umbrella Policy (See 4.1 below - Liability insurance may be written on a combination of primary and excess limits to meet the total limit requirement). Construction Manager shall provide CGL and Umbrella/Excess insurance coverage for the on-site exposures of Construction Manager and all enrolled Subcontractors through a Contractor Controlled Insurance Program (“CCIP”). Construction Manager’s CCIP is further described in its <b>CCIP Manual</b> entitled “Controlled Insurance Program Requirements &amp; Forms for General Liability Only (Oct. 8, 2012 ed.), which manual is hereby incorporated by reference as if fully set forth at this point. A copy of Construction Manager’s CCIP Manual will be provided to the Owner.</p>	\$5,000,000	Per Occurrence	\$5,000,000	General Aggregate.	\$5,000,000	Products/Completed Operations Aggregate <sup>10</sup>	\$2,000,000	Personal and Advertising Injury Limit.
\$5,000,000	Per Occurrence									
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\$5,000,000	Products/Completed Operations Aggregate <sup>10</sup>									
\$2,000,000	Personal and Advertising Injury Limit.									
1.2	<b>Deductible</b>	May not contain a SIR. <sup>11</sup> May not contain a deductible greater than \$500,000, which deductible shall be borne by Construction Manager.								
1.3	<b>General Aggregate</b>	If the CGL insurance contains a General Aggregate Limit, it shall apply separately to this Project and job site by an aggregate limit per project endorsement on ISO form ISO CG 25 04 05 09, or equivalent form. <sup>12</sup>								
1.4	<b>Post-Completion Coverage</b> <sup>13</sup>  See A201 § 11.1.1.7.	Construction Manager agrees to maintain Products-Completed Operations coverage with respect to “Bodily Injury” and “Property Damage” caused, in whole or in part, by Construction Manager’s work at the Premises and Property for a period of 10 years after final completion of the construction of the Improvements. This insurance is to be endorsed with an ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations endorsement, or equivalent form, to schedule Owner as an additional insured for the entirety of this post-completion period. <sup>14</sup>								
1.5	<b>Form</b>	This insurance is to be issued on an ISO CG 00 01 or a substitute providing equivalent coverage, <sup>15</sup> and shall cover liability arising from premises, operations, Owner’s & Contractor’s Protective Liability for contractor’s liability arising out of the hire of subcontractors (independent contractors coverage), <sup>16</sup> incidental design liability arising from the contractor’s construction means and methods, <sup>17</sup> products-completed operations, personal and advertising injury, and liability assumed under an insured contract (including tort liability of another assumed in a business contract).								

No.	Specifications	Coverages, Limits & Other Requirements
1.6	<b>Insured Contracts</b>  See A201 § 11.1.1.4.	Coverage shall include, but not be limited to, liability assumed by Construction Manager under the Construction Documents (including the tort liability of another assumed in a business contract). <sup>18</sup>  The contractual liability exclusion with respect to personal injury will be deleted.
1.7	<b>Additional Insureds</b> <sup>19</sup>  See A201 § 11.1.4.	This insurance is to be endorsed with an ISO CG 20 10 <sup>20</sup> 04 13 <sup>21</sup> (as to ongoing operations) and ISO CG 20 37 04 13 (as to completed operations)] <del>, or equivalent forms</del> , Additional Insured Endorsements listing the Owner Parties as additional insureds. There shall be no exclusion for the acts or omissions of the additional insured. Defense will be provided as an additional benefit and not included within the limit of liability.
1.8	<b>Primary</b> <sup>22</sup>	This insurance shall be endorsed with an ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition, or equivalent form, to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance held by Owner Parties shall be excess, secondary and non-contributory.
1.9	<b>Waiver of Subrogation</b> <sup>23</sup>  See A201 § 11.1.4.	This insurance is to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to the Owner Parties. <sup>24</sup>
1.10	<b>Notice</b>	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Owner required for cancellation. <sup>25</sup>
1.11	<b>Prohibited Endorsements</b>	The following exclusions/limitations (or their equivalents) are not permitted:  a. ISO CG 21 39 Contractual Liability Limitation. <sup>26</sup>  b. ISO CG 24 26 Amendment Of Insured Contract Definition. <sup>27</sup>  [c. ISO CG 21 44 Limitation of Coverage to Designated Premises or Project.]  [d. Any endorsement modifying the Employer's Liability exclusion or deleting the exception to it.]  [e. Any "Named Insured vs. Named Insured" exclusion.]  f. Any type of punitive, exemplary or multiplied damages exclusion.  g. Limiting the scope of coverage for liability arising from explosion, collapse, underground property damage, or damage to work.  [h. ISO CG 22 34 Exclusion – Construction Management Errors and Omission.]  [i. ISO CG 22 94 or CG 22 95 Exclusion – Damage to Work Performed by Subcontractors On Your Behalf.]  [j. ISO CG 21 42 or CG 21 43 Exclusion – Explosion, Collapse and Underground Property Damage Hazard.]  [k. Any Classification limitation.]  [l. Any Habitational or Residential Exclusion.]  [m. Any Subsidence exclusion.]
1.12	<b>Electronic Data Endorsement</b>	This insurance is to include an ISO CG 04 37 Electronic Data Liability endorsement with coverage to the full limits of the policy.]
1.13	<b>Certificate of Insurance</b> <sup>28</sup>	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Contractor to Owner.

No.	Specifications	Coverages, Limits & Other Requirements				
2.	<b><u>Business Auto Liability.</u></b> Contractor is to maintain a Business Auto Policy <sup>29</sup> issued on an Occurrence Basis meeting at least the following specifications.  See A201 § 11.1.1.6.					
2.1	<b>Minimum Limits</b>	Limits of coverage are to be not less than \$1,000,000 per Accident and increased to \$25,000,000 by Umbrella Policy.				
2.2	<b>Form</b>	This insurance is to be issued on the current edition of the ISO TE 00 01.				
2.3	<b>Scope</b>	This insurance is to cover damages because of Bodily Injury or Property Damages caused by an accident and resulting from the ownership, maintenance or use of any auto, including owned, hired and nonowned. <sup>30</sup>				
2.4	<b>Waiver of Subrogation</b>	This insurance is to include a waiver of subrogation by insurer as to the Owner Parties issued on an ISO [Texas: <u>TE 20 46A</u> ] Change in Transfer of Rights of Recovery Against Others To Us.				
2.5	<b>Additional Insureds</b>	Owner and Owner's Project Manager are to be listed as additional insureds on a [Texas: <u>TE 99 01B</u> ] Additional Insured – Business Auto Coverage Form.				
3.	<b><u>Workers' Compensation and Employer's Liability.</u></b>  Construction Manager is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.					
3.1	<b>WC Limits</b>	The minimum limits of this insurance shall be no less than the statutory limits. <sup>31</sup>				
3.2	<b>EL Limits</b>	The minimum limits are not to be less than \$1,000,000 each Accident <sup>32</sup> or Disease. <sup>33</sup>				
[3.3]	<b>Territory</b>	Where work is to be performed must be listed under Item 3.A. on the Information Page of the policy.]				
3.4	<b>Scope</b> See A201 § 11.1.1.1. See A201 § 11.1.1.2.	This insurance is to cover liability arising out of the Construction Manager's employment of workers and anyone for whom the contractor may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance is permitted.				
[3.5]	<b>Leased Employees</b>	Where a Professional Employer Organization ("PEO") or "leased employees" are utilized, Construction Manager shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of Owner.]				
[3.6]	<b>Notice</b>	Contain a provision for 30 days' prior written notice by insurance carrier to the Owner required for cancellation.]				
3.7	<b>Waiver of Subrogation</b> See A201 § 11.1.4.	Include a waiver of subrogation by insurer as to the Owner Parties and other persons as may be designated by Owner to Construction Manager.				
4.	<b><u>Umbrella.</u></b> Construction Manager is to maintain liability coverage under an umbrella policy <sup>34</sup> issued on an Occurrence basis meeting at least the following specifications.					
4.1	<b>Scope of Coverage</b>	<div>The minimum limits of coverage are not to be less than the following amounts:<table><tr><td>\$40,000,000</td><td>Per Occurrence</td></tr><tr><td>\$40,000,000</td><td>General Aggregate.</td></tr></table></div> <div>Liability insurance may be written on a combination of primary and excess limits to meet the total limit requirement. Such insurance shall be excess over and be no less broad than all coverages described above.</div>	\$40,000,000	Per Occurrence	\$40,000,000	General Aggregate.
\$40,000,000	Per Occurrence					
\$40,000,000	General Aggregate.					
4.2	<b>Coverage Period</b>	Inception and expiration dates will be the same as the CGL insurance.				

No.	Specifications	Coverages, Limits & Other Requirements				
4.3	Following Form	Coverage must “drop down” for exhausted aggregate limits under the liability coverages referenced above; and must contain “follow form” statement.				
4.4	Limits Allocated to Project	Aggregate limit of insurance per project endorsement.				
4.5	Waiver of Subrogation	Include a waiver of subrogation by insurer as to the Owner Parties and other persons as may be designated by Owner to Construction Manager.				
4.6	Additional Insureds	Policy shall list as additional insureds and shall cover such persons as additional insureds as they are required above to be listed as additional insureds on the CGL policy.				
4.7	Notice	Contain a provision for 30 days’ prior written notice by insurance carrier to the Owner required for cancellation.				
5.	<b><u>Professional Liability.</u></b> Construction Manager is to maintain professional liability insurance meeting at least the following specifications.					
5.1	Limits	<div>The minimum limits of coverage are not to be less than the following amounts:<table><tr><td>\$2,000,000</td><td>Per Claim</td></tr><tr><td>\$4,000,000</td><td>General Aggregate.</td></tr></table></div>	\$2,000,000	Per Claim	\$4,000,000	General Aggregate.
\$2,000,000	Per Claim					
\$4,000,000	General Aggregate.					
[5.2	Scope of Coverage	<div>Such insurance shall cover all services rendered by the Contractor and its Subcontractors under the Contract Documents. This insurance shall not include any type of exclusion or limitation of coverage applicable to claims arising from:<ul style="list-style-type: none"><li>a. Bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors.</li><li>b. Habitational or residential operations.</li><li>c. Mold, microbial matter, fungus or biological substance.</li><li>d. Punitive, exemplary or multiplied damages.]</li></ul></div>				
5.3	Coverage Period	Coverage is to be retroactive to the earlier of the date of this Construction Contract or the commencement of the Construction Manager’s services for the Project.				
5.4	Post-Completion Coverage	Policy to be maintained for 10 years after the date of final payment under the Construction Contract.				
5.5	Claims Made	[Policies written on a claims-made basis shall have an extended reporting period of at least two years beyond termination of the Agreement. Vendor shall trigger the extended reporting period if identical coverage is not otherwise maintained with the expiring retroactive date.]				
6.	<b><u>Pollution Liability.</u></b> Construction Manager is to maintain pollution liability insurance meeting at least the following specifications.					
6.1	Limits	<div>The minimum limits of coverage are not to be less than the following amounts:<table><tr><td>\$2,000,000</td><td>Per Claim.</td></tr><tr><td>\$4,000,000</td><td>General Aggregate.</td></tr></table></div>	\$2,000,000	Per Claim.	\$4,000,000	General Aggregate.
\$2,000,000	Per Claim.					
\$4,000,000	General Aggregate.					

No.	Specifications	Coverages, Limits & Other Requirements
6.2	<b>[Scope of Coverage]</b>	<p>Policy must provide coverage for:</p> <ul style="list-style-type: none"> <li>a. The full scope of the Named Insured's operations (ongoing and completed) as described within the scope of work for this Agreement.</li> <li>b. Loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall.</li> <li>c. Third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations.</li> <li>d. Diminution of value and Natural Resources damages.</li> <li>e. Contractual liability.</li> <li>f. Claims arising from owned and non-owned disposal sites utilized in the performance of this Agreement.]</li> </ul>
[6.3	<b>Prohibited Matters</b>	<p>This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:</p> <ul style="list-style-type: none"> <li>a. Insured vs. insured actions. However exclusion for claims made between insured within the same economic family are acceptable.</li> <li>b. Impaired property that has not been physically injured.</li> <li>c. Materials supplied or handled by the Named Insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the Insured shall be reviewed by the Owner for approval.</li> <li>d. Property damage to the Work performed by the Construction Manager.</li> <li>e. Faulty workmanship as it relates to clean up costs.</li> <li>f. Punitive, exemplary or multiplied damages.</li> <li>g. Work performed by Subcontractors.]</li> </ul>
6.4	<b>Waiver of Subrogation</b>	Include a waiver of subrogation by insurer as to the Owner Parties and other persons as may be designated by Owner to Construction Manager.
[6.5	<b>Additional Insureds</b>	Owner Parties shall be listed as additional insureds and be primary and noncontributory to all coverage available to the additional insureds. There shall be no separate limitation for the time period of this additional insured status within the additional insured endorsement.]
[6.6	<b>Notice</b>	This insurance is to be endorsed to give Owner at least 30 days' advance notice of cancellation.]
[6.7	<b>Claims made</b>	If coverage is provided on a claims-made basis, coverage will at least be retroactive to the earlier of the date of this Agreement or the commencement of Construction Manager's services.]
[6.8	<b>Reporting</b>	The policy will offer an extended discovery or extended reporting clause of at least three years.]
[6.9	<b>Completed Operations</b>	Completed operations coverage shall be maintained through the purchase of renewal policies to protect the insured and the additional insureds for at least two years after the Owner accepts the Project or this Agreement is terminated. The purchase of an extended discovery period or an extended reporting period on a claims made policy or the purchase of occurrence based Contractors Environmental Insurance will not be sufficient to meet the terms of this provision.]
7.	<b><u>Subcontractor's Insurance.</u></b> Construction Manager will provide enrolled Subcontractors' on-site CGL coverage through the Construction Manager's CCIP. Enrolled and non-enrolled Subcontractors shall be required to provide certain other coverages as outlined in the Construction Manager's CCIP.	



No.	Specifications	Coverages, Limits & Other Requirements
7.1	Coverage	Construction Manager shall cause each Subcontractor employed by it to purchase and maintain insurance of the type in Construction Manager’s CCIP Manual.
7.2	Waiver of Subrogation  See A201 § 11.3.7.	Each Subcontractor’s insurance shall contain a waiver of subrogation by its insurer as to the Construction Manager, Construction Manager’s other Subcontractors of every tier, the Owner Parties, Owner’s consultants, the Architect, the Architect’s consultants, their officers, directors and employees, and other persons as may be designated by Owner.
7.3	Evidence of Insurance	Construction Manager shall provide Owner certificates of insurance as to each first tier Subcontractor performing Work prior to the Subcontractor’s entry on the Project.

B. PROPERTY														
1.	<b><u>Builder’s Risk Insurance.</u></b> Construction Manager is to maintain builder’s risk insurance <sup>35</sup> meeting at least the following specifications.													
1.1	Amount  See A201 § 11.3.7.	Limits of coverage is to be the initial Contract Sum, plus an amount to be acceptable to Owner, to increase by amount of subsequent modification of Contract Sum. Coverage shall be provided in amount equal at all times to the full replacement value <sup>36</sup> and costs of debris removal for any single occurrence. Coverage is to include Construction Manager’s overhead and profit.												
1.2	Covered Property	The following property is to be insured: <sup>37</sup>  a. All structure(s) under construction, including the existing structure itself, retaining walls, paved surfaces and roadways, bridges, glass, foundation(s), footings, pilings, underground pipes and wiring, excavations, grading, backfilling or filling. b. All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site. c. All property including materials and supplies on site for installation. d. All property including materials and supplies at other locations but intended for use at the site. e. All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit. f. Other Work at the site. g. Other property for which an insured is liable regarding the project. [h. Sod, trees, shrubs and plants.]												
1.3	Deductibles	Deductibles shall not exceed the following: <table><tr><td>Coverage</td><td>Maximum Deductible</td></tr><tr><td>All risk of direct damage per Occurrence</td><td>\$ 10,000</td></tr><tr><td>Flood per Occurrence</td><td>\$ 25,000</td></tr><tr><td>Earthquake and earthquake sprinkler leakage per Occurrence</td><td>\$ 25,000</td></tr><tr><td>Water damage</td><td>\$100,000</td></tr><tr><td>Named windstorm</td><td>\$ 25,000</td></tr></table>	Coverage	Maximum Deductible	All risk of direct damage per Occurrence	\$ 10,000	Flood per Occurrence	\$ 25,000	Earthquake and earthquake sprinkler leakage per Occurrence	\$ 25,000	Water damage	\$100,000	Named windstorm	\$ 25,000
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1.4	Insureds	Insureds shall include: <sup>38</sup>  a. Owner, Construction Manager and all Loss Payees and Mortgagees as Named Insureds.  b. Subcontractors and suppliers of all tiers. <sup>39</sup>												

No.	Specifications	Coverages, Limits & Other Requirements																														
1.5	Form	<p><u>Causes of Loss – Special Form.</u><sup>40</sup> Coverage on this insurance is to be written to cover “all risks” of physical loss except those specifically excluded in the policy, and all exclusions must be pre-approved by Owner and Construction Manager and coverage shall be at least as broad as an unmodified ISO Causes of Loss – Special Form, and shall insure at least against the perils of fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, theft, vandalism, malicious mischief, and collapse and such additional perils and coverages as indicated below with each of the perils added as a cause of loss, if not otherwise listed in the policy as a cause of loss.</p> <p>a. <u>Completed Value Basis.</u><sup>41</sup> This insurance is to be written on a Completed-Value, Non-Reporting form basis.<sup>42</sup></p> <p>b. <u>Insureds Other Insurance Excess and Noncontributing.</u> Builder’s Risk shall be primary to any other insurance coverage available to the named insured parties, with that other insurance being excess, secondary and non-contributing.</p> <p>c. <u>Prohibited.</u> No protective safeguard warranty is permitted.<sup>43</sup></p> <p>d. <u>Required Endorsements as to Coverage &amp; Limits.</u> To include</p> <table><tr><th>Coverage</th><th>Minimum Sublimit<sup>44</sup></th></tr><tr><td>Additional expenses due to delay in completion of project and contract penalties</td><td>25% of the loss subject to a maximum limit of \$5,000,000.</td></tr><tr><td>Agreed Value</td><td>Included without sublimit.</td></tr><tr><td>Business income/rental value</td><td>\$7,113,570.</td></tr><tr><td>Collapse<sup>45</sup></td><td>Included without sublimit.</td></tr><tr><td>[Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse.]</td><td>[Included without sublimit.]</td></tr><tr><td>Debris removal including demolition as may be made legally necessary by operation of any law, ordinance, or regulation<sup>46</sup></td><td>25% of the loss subject to a maximum limit of \$10,000,000.</td></tr><tr><td>Expediting/extra expense.</td><td>25% of the loss subject to a maximum limit of \$5,000,000.</td></tr></table> <table><tr><td>[Faulty or defective planning, designs, materials or maintenance resulting in damage to Covered Property, including collapse and ensuing loss.]</td><td>[Included without sublimit.]</td></tr><tr><td>Flood<sup>47</sup></td><td>Included without sublimit.</td></tr><tr><td>Freezing</td><td>Included without sublimit.</td></tr><tr><td>Mechanical breakdown, including [hot &amp;] cold testing.</td><td>Included without sublimit.</td></tr><tr><td>Occupancy pre-completion clause<sup>48</sup></td><td>Included.</td></tr><tr><td>Ordinance or law<sup>49</sup></td><td>\$5,000,000.</td></tr><tr><td>Pollutant cleanup and removal</td><td>\$500,000.</td></tr></table>	Coverage	Minimum Sublimit <sup>44</sup>	Additional expenses due to delay in completion of project and contract penalties	25% of the loss subject to a maximum limit of \$5,000,000.	Agreed Value	Included without sublimit.	Business income/rental value	\$7,113,570.	Collapse <sup>45</sup>	Included without sublimit.	[Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse.]	[Included without sublimit.]	Debris removal including demolition as may be made legally necessary by operation of any law, ordinance, or regulation <sup>46</sup>	25% of the loss subject to a maximum limit of \$10,000,000.	Expediting/extra expense.	25% of the loss subject to a maximum limit of \$5,000,000.	[Faulty or defective planning, designs, materials or maintenance resulting in damage to Covered Property, including collapse and ensuing loss.]	[Included without sublimit.]	Flood <sup>47</sup>	Included without sublimit.	Freezing	Included without sublimit.	Mechanical breakdown, including [hot &] cold testing.	Included without sublimit.	Occupancy pre-completion clause <sup>48</sup>	Included.	Ordinance or law <sup>49</sup>	\$5,000,000.	Pollutant cleanup and removal	\$500,000.
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No.	Specifications	Coverages, Limits & Other Requirements																						
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1.6	<b>Waiver of Subrogation</b> <sup>51</sup>  See A201 11.3.7.	To the extent of insurance proceeds received, a waiver of subrogation by insurer as to Construction Manager, Construction Manager’s Subcontractors of all tiers, Owner Parties, Owner’s subcontractors of any tier, Owner’s consultants (including the Project Representative, their officers, directors and employees, and other persons as may be designated by Owner.																						
1.7	<b>Notices</b>  See A201 §§ 11.1.3 and 11.3.6.	30 days prior written notice to each insured of cancellation.																						
1.8	<b>Term and Termination</b> <sup>52</sup>	<p>The termination of coverage provision shall be endorsed to permit occupancy of the covered property being constructed. This insurance shall be maintained in effect, unless otherwise provided for the Contract Documents, until the earliest of the following dates:</p> <p>a. The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;</p> <p>b. The date of final payment, as provided for in the Contract Documents; or</p> <p>c. The date on which the insurable interests in the Covered Property of all insureds other than Construction Manager have ceased.</p>																						
1.9	<b>Tenant Finish-Out</b>  See A201 § 11.3.1.5.	Builder’s risk policy shall specifically permit partial occupancy by tenants in connection with construction of finish-out of leased premises.																						
2.	<b><u>Boiler and Machinery Insurance.</u></b> Construction Manager is to maintain is to maintain boiler and machinery insurance during installation and until final acceptance by Owner. This risk may be included in the builder’s risk policy.																							
[ 3.	<b><u>Construction Manager’s Pollution Legal Liability.</u></b> Construction Manager is to maintain Contractor’s Pollution Liability insurance <sup>53</sup> issued meeting at least the following specifications.																							

No.	Specifications	Coverages, Limits & Other Requirements				
[3.1]	Coverage	Construction Manager shall provide Contractor’s Pollution Liability (“CPL”) insurance providing third party liability coverage for bodily injury, property damage, clean up expenses, and defense arising from the operations of the Construction Manager. Coverage provided in the policy shall apply to operations and completed operations of the Construction Manager without separate restrictions for either of these time frames. Mold, microbial matter, fungus and biological substances shall be specifically included within the definition of “pollutants” in the Policy.]				
[3.2]	Limits	Coverage is to be provided with a limit of not less than \$1,000,000.]				
[3.3]	Form	This insurance shall include prior acts coverage sufficient to cover all services rendered by the Construction Manager and by its consultants. This coverage may be provided on a claims-made basis.]				
[3.4]	Endorsements	Owner shall be listed as an additional insured. There shall be no separate limitation for the time period of this additional insured status within the additional insured endorsement.]				
[3.5]	Notice	This insurance is to be endorsed to give Owner at least 30 days’ advance notice of cancellation of [or material change] in coverage.]				
[3.6]	Waiver of Subrogation	This insurance is to be endorsed to waive subrogation against the Owner Parties.]				
[4.]	<b><u>Owner’s Pollution Legal Liability.</u></b>	Owner is to maintain pollution legal liability insurance issued on an Occurrence Basis meeting at least the following specifications.]				
[4.1]	Minimum Limits	<div>The minimum limits of coverage are not to be less than<table><tr><td>\$2,000,000</td><td>Each Claim</td></tr><tr><td>\$2,000,000</td><td>Annual Aggregate</td></tr></table></div>	\$2,000,000	Each Claim	\$2,000,000	Annual Aggregate
\$2,000,000	Each Claim					
\$2,000,000	Annual Aggregate					
[4.2]	Scope	This insurance is to cover any environmental loss to the Property.]				
[4.3]	Defense Costs	Coverage of defense costs is to be provided outside of the limit of liability coverage.]				
[4.4]	Notice	This insurance is to contain a provision for 30 days’ prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal [or material change].]				
[4.5]	Waiver of Subrogation	This insurance is to include a waiver of subrogation by insurer as to the Contractor.]				

## B. General Insurance Requirements

### 1. Definitions. For purposes of the Contract Documents:

a. **Owner Parties.** "Owner Parties" means (a) \_\_\_\_\_ ("Owner"), (b) Owner's project representative, (c) any lender whose loan is secured by a lien against the Property, (d) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, and (e) any directors, officers, employees, or agents of such persons or entities.

b. **Construction Manager.** "Construction Manager" means (a) \_\_\_\_\_ and (b) subcontractors of any tier.

c. **ISO.** "ISO" means Insurance Services Office. <sup>54</sup>

### 2. Policies.

a. **Insurer Qualifications.** <sup>55</sup> All insurance required to be maintained by Construction Manager must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in the State in which the Improvements are located. <sup>56</sup>

**b. No Waiver.** Failure of Owner to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Owner to identify a deficiency from evidence that is provided shall not be construed as a waiver of Construction Manager's obligation to maintain such insurance.

**c. Delivery Deadlines.** Construction Manager shall provide Owner within 10 days of Owner's request with certified copies of all insurance policies. Renewal policies, if necessary, shall be delivered to the Owner prior to the expiration of the previous policy.

**d. Occupancy.** Commencement of occupancy without provision of the required certificate of insurance and/or required endorsements, or without compliance with any other provision of the Contract Documents, shall not constitute a waiver by any Owner Party of any rights. The Owner shall have the right, but not the obligation, of prohibiting the Construction Manager or any subtenant from occupying the Property until the certificate of insurance and/or required endorsements are received and approved by the Owner.

### **3. Limits, Deductibles and Retentions.**

**a. Coverage Limits.** The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein.

**b. Deductible and Retention Limits.** No deductible or self-insured retention shall exceed the amount specified in Paragraph A without the prior written approval of the Owner, except as otherwise specified herein. All deductibles and/or retentions shall be paid by, assumed by, for the account of, and at the Construction Manager's sole risk. The Construction Manager shall not be reimbursed for same.

**c. Policy Limits.** "Limits" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Construction Manager or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to Owner and Owner the limits specified below as the minimum limits are increased to the greater limits.

### **4. Forms.**

**a. Approved Revisions and Substitutions.** If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Owner will have the right to require other equivalent forms.

**b. Approved Forms.** Any policy or endorsement forms other than a form specified in this Exhibit must be approved in advance by Owner.

**c. Compliance with Laws.** If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to the Contract Documents, shall be reformed to provide the maximum amount of protection to the Owner as allowed under the law.

### **5. Evidence of Insurance.** Insurance must be evidenced as follows:

**a. Form.** Liability insurance: ACORD™ Form 25 (2010/05) *Certificates of Liability Insurance* for liability coverages. Property Insurance: ACORD™ Form 28 (2011/11) *Evidence of Commercial Property Insurance* for property coverages.

**b. Delivery Deadlines.** Evidence to be delivered to Owner prior to entry on Property and thereafter at least [30] days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Owner's request for an updated certificate.

**c. Certificate Requirements.** Certificates must:

- (1) **Insured.** State the insured's name and address.
- (2) **Insurer.** State the name of each insurance company affording each coverage, policy number of each coverage, policy dates of each coverage, all coverage limits and sublimits, if any, by type of coverage, and show the signature of the authorized representative signing the certificate on behalf of the insurer.
- (3) **Additional Insured Status and Subrogation Waiver.** Specify the additional insured status and waivers of subrogation as required by these specifications.
- (4) **Primary Status.** State the primary and non-contributing status required herein.
- (5) **Deductibles and Self-Insured Retentions Stated.** State the amounts of all deductibles and self-insured retentions.
- (6) **Copy of Endorsements and Policy Declaration Page.** Be accompanied by certified copies of all required endorsements and policy declaration page reflecting issuance of the endorsements.
- (7) **Notices.** Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation and material change will be sent to the certificate holder.
- (8) **Certificate Holder.**<sup>57</sup> Be addressed to the Owner as the certificate holder and show Owner's correct address. A separate certificate is to be addressed and delivered to Owner's lender.
- (9) **Producer.**<sup>58</sup> State the producer of the certificate with correct address and phone number listed.
- (10) **Authorized Representative.**<sup>59</sup> Be executed by a duly authorized representative of the insurers.

**6. Construction Manager Insurance Representations to Owner.**

**a. Minimum Requirements.** It is expressly understood and agreed that the insurance coverages required herein (a) represent Owner's minimum requirements and are not to be construed to void or limit the Construction Manager's indemnity obligations as contained in the Contract Documents nor represent in any manner a determination of the insurance coverages the Construction Manager should or should not maintain for its own protection; and (b) are being, or have been, obtained by the Construction Manager in support of the Construction Manager's liability and indemnity obligations under the Contract Documents. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of the Construction Manager, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of the Contract Documents.

**b. Defaults.** Failure to obtain and maintain the required insurance shall constitute a material breach of, and default under, the Contract Documents. If the Construction Manager shall fail to remedy such breach within five business days after notice by the Owner, the Construction Manager will be liable for any and all costs, liabilities, damages and penalties resulting to the Owner from such breach, unless a written waiver of the specific insurance requirement is provided to the Construction Manager by the Owner. In the event of any failure by the Construction Manager to comply with the provisions of the Contract Documents, the Owner may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to the Construction Manager, purchase such insurance, at the Construction Manager's expense, provided that the Owner shall have no obligation to do so and if the Owner shall do so, the Construction Manager shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.

**c. Survival.** This Exhibit is an independent contract provision and shall survive the termination or expiration of the Construction Contract.

## CRANE SWING LICENSE

This Crane Swing License (this "License") is entered into by and among \_\_\_\_\_, a \_\_\_\_\_ ("Owner") and \_\_\_\_\_, a \_\_\_\_\_ ("Third Party"), in consideration of the covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each party. Owner and Third Party are sometimes individually referred to as a "Party" and collectively as the "Parties."

### RECITALS

A. Owner is the owner of the land described in Exhibit A attached hereto (the "Project Site"), and Third Party is the owner of the land described in Exhibit B attached hereto (the "Third Party's Property"). The Project Site and the Third Party's Property are sometimes collectively referred to as the "Property".

B. Owner and Third Party anticipate that all or portions of the Property will at some future date be developed with new buildings and improvements. Owner has finalized conceptual plans for development on a portion of the Project Site, as shown in the site plan attached hereto as Exhibit C (the "Construction Concept Plan"), approved by Site Development Permit No. \_\_\_\_\_.

C. During the course of development of the Project Site and/or the Third Party's Property, it is contemplated that such development will involve and necessitate certain rights and licenses on and with respect to each such Property.

D. Owner and Third Party each has agreed to grant to the other the rights and licenses set forth herein, subject to the terms and conditions of this License.

### AGREEMENT

#### 1. Crane Swing License.

1.1. Grant of License by Third Party. Third Party hereby grants to Owner a nonexclusive license (the "Owner's Swing License") to use, on a nonexclusive basis and upon the conditions hereinafter provided, the portions of the air space over the Third Party's Property and improvements located thereon from time to time within the grey radius depicted on Exhibit B-1 attached hereto (the "Owner's Swing Licensed Premises"). The rights established by the Owner's Swing License allow only the tail (the non-load-bearing end) of a crane to enter the airspace over the Owner's Swing Licensed Premises, except in cases where applicable law requires the crane to operate in "weather-vaning" mode, in which case the arm of the crane, without a load, will be permitted to cross the Owner's Swing Licensed Premises.

1.2. Commencement Date; Use of Owner's Swing Licensed Premises. Owner shall notify Third Party at least 30 days prior to installing a crane that will utilize the Owner's Swing Licensed Premises; such notice shall specify the date on which the use will commence. Owner may exercise its rights under the Owner's Swing License multiple times during the term of the Owner's Swing License, and Owner shall deliver the commencement notice specified in this Section above prior to each exercise of its rights. Owner's use of the Owner's Swing License shall be in accordance with the crane safety and use requirements set forth in Exhibit D attached hereto, as well as all applicable law. In no event shall Owner be entitled to utilize the Owner's Swing License for transporting construction loads, other than the counterweights associated with any aerial crane equipment, over any portion of the Owner's Swing Licensed Premises. Owner shall dismantle and remove its crane within a commercially reasonable time after the completion of each of its construction projects.

1.3. Termination Date. The Owner's Swing License shall terminate on the date that is 30 years after the Effective Date, unless sooner terminated pursuant to the terms of this License.

1.4. Costs and Liabilities. All costs and liabilities associated with the use of the Owner's Swing License shall be borne by Owner and its contractors.

1.5. Obligations After Transfer. The covenants and obligations of Third Party shall be binding upon each owner of any portion of the Owner's Swing Licensed Premises for the duration of such owner's ownership and until the expiration of the Owner's Swing License. Upon the transfer of all or any portion of the Third Party's Property by its owner, the new owner of the transferred property shall be deemed to have assumed and agreed to perform and be bound by all obligations pertaining to the owner of such property arising under this License during the new owner's period of ownership and until the expiration of the Owner's Swing License. The preceding owner of the transferred property shall be released from all obligations arising under this License on and after the date of the transfer (but not from obligations accrued during its period of ownership).

2. Construction Crane License.

2.1. Grant of License by Owner. Owner hereby grants individually and separately to each of the parties comprising Third Party a nonexclusive license (the "Third Party's Crane Swing License") to use, on a nonexclusive basis and upon the conditions hereinafter provided, the air space over the Project Site and improvements located thereon from time to time (the "Third Party's Crane Swing Licensed Premises"). The rights established by the Third Party's Crane Swing License allow only the tail (the non-load-bearing end) of a crane to enter the airspace over the Third Party's Crane Swing Licensed Premises, except in cases where applicable law requires the crane to operate in "weather-vaning" mode, in which case the arm of the crane, without a load, will be permitted to cross the Owner's Swing Licensed Premises.

2.2. Commencement Date; Use of Construction Licensed Premises. Third Party shall notify Owner at least 30 days prior to installing a crane that will utilize the Third Party's Crane Swing Licensed Premises; such notice shall specify the date on which the use will commence. The Third Party's Crane Swing License may be exercised by one or more of the parties comprising Third Party, either acting individually or collectively. Third Party may exercise its rights under the Third Party's Crane Swing License multiple times during the term of the Third Party's Crane Swing License, and Third Party shall deliver the commencement notice specified in this Section above prior to each exercise of its rights. Third Party's use of the Third Party's Crane Swing License shall be in accordance with the crane safety and use requirements set forth in Exhibit D attached hereto, as well as all applicable law. In no event shall Third Party be entitled to utilize the Third Party's Crane Swing License for transporting construction loads, other than the counterweights associated with any aerial crane equipment, over the portion of the Third Party's Crane Swing Licensed Premises. Third Party shall dismantle and remove its crane within a commercial reasonable time after the completion of each of its construction projects.

2.3. Termination Date. The Third Party's Crane Swing License shall terminate on the date that is 30 years after the Effective Date, unless sooner terminated pursuant to the terms of this License.

2.4. Costs and Liabilities. All costs and liabilities associated with the use of the Third Party's Crane Swing License shall be borne by Third Party and its contractors.

2.5. Obligations After Transfer. The covenants and obligations of Owner shall be binding upon each owner of any portion of the Third Party's Crane Swing Licensed Premises for the duration of such owner's ownership and until the expiration of the Third Party's Crane Swing License. Upon the transfer of all or any portion of the Project Site by Owner, the new owner of the transferred property shall be deemed to have assumed and agreed to perform and be bound by all obligations pertaining to the owner of such property arising under this License during the new owner's period of ownership and until the expiration of the Third Party's Crane Swing License. The preceding owner of the transferred property shall be released from all obligations arising under this License on and after the date of the transfer (but not from obligations accrued during its period of ownership).

3. Cooperation for Use of Multiple Cranes. If at any time during the terms of the Owner's Swing License and the Third Party's Crane Swing License, both Owner and Third Party are using a crane simultaneously, then each party agrees that it will use commercially reasonable efforts to (i) coordinate the swing radii of the cranes so that they may safely operate in proximity to each other and in accordance with all applicable rules, ordinances, and laws; (ii) cause its crane to be installed, operated, and dismantled in a manner that does not unreasonably interfere with the construction activities of the other party; and (iii) otherwise cooperate with the other party so that both parties may reasonably pursue their separate construction projects without delay or interference.



4. Limits on License Rights.

4.1. Owner's Swing License. The license granted to Owner in Section 1 above is nonexclusive and is expressly subordinate to the right of Third Party and its successors and assigns to maintain, use, and operate the buildings and other facilities presently or hereafter situated on the Third Party's Property. Third Party reserves for itself and its heirs, successors, and assigns the right to continue to use and enjoy the surface of the Third Party's Property in accordance with applicable laws, ordinances, and rules, and Owner's use of the Owner's Swing License shall not unreasonably interfere with such enjoyment.

4.2. Third Party's Crane Swing License. The license granted to Third Party in Section 2 above is nonexclusive and is expressly subordinate to the right of Owner and its successors and assign to maintain, use, and operate the buildings and other facilities presently or hereafter situated on the Project Site. Owner reserves for itself and its successors and assigns the right to continue to use and enjoy the surface of the Project Site in accordance with applicable laws, ordinances, and rules, and Third Party's use of the Third Party's Crane Swing License shall not unreasonably interfere with such enjoyment.

5. Insurance.

5.1. Construction Insurance. Upon notice by Owner to Third Party of commencement of the Owner's Swing License, Owner at its expense throughout the term of such license shall obtain and maintain insurance in conformity with the requirements set forth in Exhibit E attached hereto. The coverage may be provided in the form of a rider and/or endorsement to a previously existing insurance policy. The insurance must cover all perils arising from the activities of Owner, its agents, contractors, and invitees, related to such license. In the event of any insurance claim, Owner agrees to pay all deductibles stated in the policy. The insurance specifically shall name each of the parties comprising Third Party as an additional insured, and a certificate of insurance evidencing coverage shall be provided by the insurance company to all additional insureds by not later than the date of commencement of the license. To the extent obtainable based on reasonable efforts, all required insurance is to include a clause stating that in the event of cancellation or material change that reduces or restricts the insurance afforded by the insurance policy, the insurer agrees to mail prior written notice of cancellation or material change that reduces or restricts the insurance afforded to Third Party as additional insureds at least 30 days in advance to Third Party.

5.2. Insurance. In this Section, "Third Party" refers to only the Third Party parties that are utilizing the Third Party's Crane Swing License at any moment in time under this License. Upon notice by Third Party to Owner of commencement of the Construction License, Third Party at its expense throughout the term of such License shall obtain and maintain insurance in conformity with the requirements set forth in Exhibit E attached hereto. The coverage may be provided in the form of a rider and/or endorsement to a previously existing insurance policy. The insurance must cover all perils arising from the activities of Third Party, its agents, contractors, and invitees, related to the license. In the event of any insurance claim, Third Party agrees to pay all deductibles stated in the policy. The insurance specifically shall name Owner as an additional insured, and a certificate of insurance evidencing coverage shall be provided by the insurance company to Owner by not later than the date of commencement of the license. To the extent obtainable based on reasonable efforts, all required insurance is to include a clause stating that in the event of cancellation or material change that reduces or restricts the insurance afforded by the insurance policy, the insurer agrees to mail prior written notice of cancellation or material change that reduces or restricts the insurance afforded to Owner as additional insureds at least 30 days in advance to Owner.

6. Indemnification and Repair of Damage.

6.1. Indemnity of Third Party. To the extent permitted by law, Owner hereby agrees fully to indemnify, defend, save, and hold harmless Third Party, its heirs, executors, administrators employees, owners, officers, directors, managers, agents, lessees, licensees, lenders, and invitees (collectively called "Third Party Indemnitees") against any and all liability, damage, loss, claims, demands, and actions of any nature whatsoever, including reasonable attorneys' fees, on account of personal injury (including without limitation, workers' compensation and death claims) or property loss or damage of any kind whatsoever, which arises, or is claimed to arise, out of or is, or is claimed to be, in any manner connected with: (i) Owner's use of the Owner's Swing License; (ii) any act, omission, or negligence of Owner or its agents, contractors, or invitees; (iii) any activities of Owner or

its agents, contractors, or invitees conducted on or about the Third Party's Property; or (iv) any breach or default of the terms of this License by Owner or its agents, contractors, and invitees. **TO THE EXTENT PERMITTED BY LAW, THE INDEMNITY IN THIS PARAGRAPH SHALL APPLY REGARDLESS OF WHETHER THE LOSS IN QUESTION ARISES OR IS ALLEGED TO ARISE IN PART FROM ANY NEGLIGENT ACT OR OMISSION OF THIRD PARTY OR THEIR AGENTS OR EMPLOYEES, FROM STRICT LIABILITY OF ANY SUCH PERSONS OR OTHERWISE; PROVIDED, HOWEVER, THAT SUCH INDEMNITY SHALL NOT INCLUDE ANY CLAIMS THAT ARISE FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THIRD PARTY OR THEIR AGENTS OR EMPLOYEES.** Owner must, at its own expense, investigate all such claims and demands, attend to their settlement or other disposition, defend all actions based thereon, and pay all attorneys' fees and all other cost and expenses of any kind arising from any aforesaid liability, damage, loss, claims, demands or actions. This indemnification provision shall not permit Third Party to recover from Owner any damages, costs, losses, expenses or other amounts for which the Third Party Indemnitees have been compensated by insurance provided by Owner under Section 5.1 above. The foregoing indemnity shall survive after the later of the expiration or termination of the Owner's Swing License for the duration of all applicable statutes of limitation.

6.2. Indemnity of Third Party. In this Section, "Third Party" refers to only the persons that are utilizing the Third Party's Crane Swing License at any moment in time under this License. To the extent permitted by law, Third Party hereby agrees fully to indemnify, defend, save, and hold harmless Owner, its employees, owners, officers, directors, managers, agents, lessees, licensees, lenders, and invitees (collectively called "Owner Indemnitees") against any and all liability, damage, loss, claims, demands, and actions of any nature whatsoever, including reasonable attorneys' fees, on account of personal injury (including without limitation, workers' compensation and death claims) or property loss or damage of any kind whatsoever, which arises, or is claimed to arise, out of or is, or is claimed to be, in any manner connected with: (i) Third Party's use of the Third Party's Crane Swing License; (ii) any act, omission, or negligence of Third Party or its agents, contractors, or invitees; (iii) any activities of Third Party or its agents, contractors, or invitees conducted on or about the Project Site; or (iv) any breach or default of the terms of this License by Third Party or its agents, contractors, and invitees. **TO THE EXTENT PERMITTED BY LAW, THE INDEMNITY IN THIS PARAGRAPH SHALL APPLY REGARDLESS OF WHETHER THE LOSS IN QUESTION ARISES OR IS ALLEGED TO ARISE IN PART FROM ANY NEGLIGENT ACT OR OMISSION OF OWNER OR ITS AGENTS OR EMPLOYEES, FROM STRICT LIABILITY OF ANY SUCH PERSONS OR OTHERWISE; PROVIDED, HOWEVER, THAT SUCH INDEMNITY SHALL NOT INCLUDE ANY CLAIMS THAT ARISE FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF OWNER OR ITS AGENTS OR EMPLOYEES.** Third Party must, at its own expense, investigate all such claims and demands, attend to their settlement or other disposition, defend all actions based thereon, and pay all attorneys' fees and all other cost and expenses of any kind arising from any aforesaid liability, damage, loss, claims, demands or actions. This indemnification provision shall not permit Owner to recover from Third Party any damages, costs, losses, expenses or other amounts for which the Owner Indemnitees have been compensated by insurance provided by Third Party under Section 5.2 above. The foregoing indemnity shall survive after the expiration or termination of the Third Party's Crane Swing License for the duration of all applicable statutes of limitation.

6.3. Repair of Damage. Owner, at its sole cost, shall repair or replace any damage to the Third Party's Property and any surrounding areas caused by the activities of Owner in the exercise of its rights under this License. The Third Party utilizing the Third Party's Crane Swing License at any moment in time under this License, at its sole cost, shall repair or replace any damage to the Project Site and any surrounding areas caused by the activities of Third Party in the exercise of its rights under this License. If either Owner or Third Party fails to repair any damage for which such party is responsible within fifteen days after receipt of written notice from the other party (or, if such repair reasonably requires more than fifteen days to complete, fails to commence repair within such fifteen-day period and diligently pursue such repair to completion), then the notifying party may elect to repair such damage at the cost of the other party. If a notifying party makes repairs as provided in this Section 6.3, the other party shall reimburse the notifying party for the reasonable cost of such repairs within thirty days after receipt of an invoice for same. Notwithstanding the foregoing, if a party, in the exercise of its rights under this License, becomes aware of a condition which that party reasonably believes (a) constitutes an imminent threat to the health, safety or welfare of any persons or property, and (b) resulted from a breach by the other party of its obligations under this License, the non-breaching party shall use reasonable efforts to notify the other party of such condition by telephone, electronic mail or other immediate means of communication. If the other party is not

available or does not immediately begin to remedy such emergent and hazardous condition, then the non-breaching party may remedy such condition and receive reimbursement from the other party as provided above.

7. Termination. The licenses granted herein shall terminate on the scheduled termination dates specified in Section 1.3 and Section 2.3 above.

8. Default. If either Owner or Third Party fails to comply with any of the terms and conditions herein, then the other party may give the defaulting party written notice of such default. The defaulting party will have fifteen days from the date of such notice to take action to remedy the default. If the defaulting party does not satisfactorily remedy such default within such fifteen-day period the non-defaulting party may seek specific performance of this agreement, including by restraining orders or injunctions (temporary or permanent) prohibiting interference and commanding compliance. In addition to obtaining restraining orders and injunctions and the remedy of specific performance, the non-defaulting party shall be entitled to recover from the defaulting party all reasonable costs and expenses incurred in remedying the default or pursuing its remedies under this License. **EXCEPT FOR THE EXPENSE REIMBURSEMENT IN THE PREVIOUS SENTENCE, NO PARTY UNDER THIS LICENSE MAY PURSUE AN ACTION FOR ANY FORM OF MONETARY DAMAGES, INCLUDING ACTUAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES.**

9. General Matters.

9.1. Compliance with Laws. Owner and Third Party each agrees and covenants that all activities related to its use of the license granted to it herein shall be done in compliance with all applicable city, county, state and/or federal laws, ordinances, regulations and policies now existing or later adopted.

9.2. Venue. Venue for all lawsuits concerning this License shall be in the state district courts of \_\_\_\_\_, \_\_\_\_\_ County, \_\_\_\_\_.

9.3. Waiver of Default. Either party may waive any default of the other party at any time, without affecting or impairing any right arising from any subsequent or other default. The failure at any time of either party to enforce any provision hereof, whether a violation is known or not, shall not constitute a waiver or estoppel of the right to do so.

9.4. Notice. Notice may be given by fax, hand delivery, or certified mail, postage prepaid, and is deemed received on the day faxed or hand delivered or when deposited in the Post Office or other depository under the care or custody of the United States Postal Service, enclosed in a wrapper with proper postage affixed and addressed, if sent certified mail. Either party may change the addressee or address for notices, by notice to the other party as provided herein. Notice must be sent as follows:

If to Owner:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile Number: \_\_\_\_\_  
E-Mail Address: \_\_\_\_\_

With copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile Number: \_\_\_\_\_  
E-Mail Address: \_\_\_\_\_

If to Third Party:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile Number: \_\_\_\_\_  
E-Mail Address: \_\_\_\_\_

With copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile Number: \_\_\_\_\_  
E-Mail Address: \_\_\_\_\_

9.5. Interpretation. This License, in the event of any dispute over its meaning or application, shall be interpreted fairly and reasonably, and neither more strongly for nor against any party.

9.6. Application of Law. This License is governed by the laws of the State of \_\_\_\_\_. If the final judgment of a court of competent jurisdiction invalidates any part of this License, then the remaining parts must be enforced, to the extent possible, consistent with the intent of the parties as evidenced by this License.

9.7. Cooperation and Consents. Owner and Third Party each agrees to cooperate fully with and assist each other and execute such documents as may be necessary to further the express purposes of this License, which cooperation and assistance shall not be unreasonably withheld, conditioned or delayed.

9.8. Severability. If any provision of this License shall for any reason be held to be invalid, illegal or unenforceable by any court of competent jurisdiction, the validity of the other provisions of this License shall in no way be affected thereby. **To the extent that Code applies, then the indemnity and additional insured coverage is to be limited by the statute's limitations and the indemnity and additional insured coverage are to be enforced to the extent permitted.**

9.9. Counterparts; Signatures. This License may be executed in any number of identical counterparts by the handwritten signature of each party, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. This License may be executed by the handwritten signature of the parties and transmitted by facsimile or e-mail.

9.10. Attorneys' Fees. If any action shall be commenced to enforce the terms of this License or to declare the rights of the parties hereunder, the prevailing party shall be entitled to recover all of its costs and expenses (including, but not limited to, reasonable attorneys' fees) from the nonprevailing party. In addition to the foregoing award of attorneys' fees and other litigation costs to the prevailing party, the prevailing party in any lawsuit on this License shall be entitled to its reasonable attorneys' fees and other litigation costs incurred in any post-judgment proceedings to collect or enforce the judgment. This provision is separate and several and shall survive the merger of this License into any judgment on this License, and shall survive the termination of this License.

9.11. No Third Party Rights. Nothing in this License shall be construed to confer any rights, benefits or remedies upon any person or entity other than the parties hereto and their respective successors and assigns as owners of their respective Property.

9.12. Entire Agreement. This License and all documents referred to herein: (i) constitute and are intended as a final expression and a complete and exclusive statement of the understanding and the agreement between the parties hereto with respect to the subject matter hereof; (ii) supersede all prior or simultaneous

understandings, correspondence, letters of intent, negotiations, or agreements, whether oral or in writing between the parties respecting the subject matter of this License; and (iii) may not be modified, amended or otherwise changed in any manner except by a writing specifically setting forth such modification, amendment or change and executed by the handwritten signature of each of the parties hereto. The parties further agree that neither shall claim that the other waived any rights under this License, whether by inconsistent actions or otherwise, unless a written amendment is executed in accordance with this paragraph.

9.13. Liability of Third Party Parties Not Joint and Several. In the event that one or more of the parties comprising Third Party under this License breaches or defaults an obligation under this License with respect to only the portion of the Third Party's Property owned by such defaulting party, any liability of such defaulting party to Owner shall be personal to such defaulting party and shall not be joint and several with the other parties comprising Third Party. In such event, Owner's cause of action for breach or default shall be commenced against only such defaulting party and not all of the parties comprising Third Party.

9.14. Recordation. Either party may record this License in the Official Public Records of \_\_\_\_\_ County, \_\_\_\_\_. After recordation, the recording Party shall deliver a copy of the recorded document to the other Party or Parties.

9.15. Third Party Beneficiary. For so long as \_\_\_\_\_ is a tenant of \_\_\_\_\_, \_\_\_\_\_ shall be a third-party beneficiary of this License for purposes of the obligation of Owner to \_\_\_\_\_ pursuant to Sections 5.1 and 6.1, and but for such consideration, \_\_\_\_\_ would not consent to this License.

9.16. List of Exhibits. The exhibits identified below and attached hereto are incorporated herein by this reference.

- Exhibit A - Project Site
- Exhibit B - Third Party's Property
- Exhibit C - Construction Concept Plan
- Exhibit D - Crane Safety and Use and Requirements
- Exhibit E - Insurance Requirements

Executed to be effective \_\_\_\_\_ (the "Effective Date").

[Signature pages follow.]

### **Tenant Consent to Owner's Swing License**

Reference is made herein to that certain Lease Agreement dated \_\_\_\_\_, by and between \_\_\_\_\_, as "Landlord," and \_\_\_\_\_, as "Tenant," pertaining to the premises located at \_\_\_\_\_, described as \_\_\_\_\_ (the "Lease Premises"). The Lease Premises is the same real property described as "\_\_\_\_\_" in the Owner's Swing License which this Consent is attached (the "License").

Tenant, as the holder of a leasehold interest in the Lease Premises, consents to the grant of the rights set out in the License, including all of the terms and conditions of such grant, for all purposes, in exchange for being named as an additional insured under Owner's insurance as set forth in the License. Tenant further waives any right that it may have in its License to object to or interfere with the exercise of the rights granted in the License for so long as Owner is in compliance with the same. Tenant acknowledges and agrees that the rights granted in the License include the right for Owner to install a construction crane that will use a portion of the air space over the Lease Premises and the improvements thereon.

TENANT

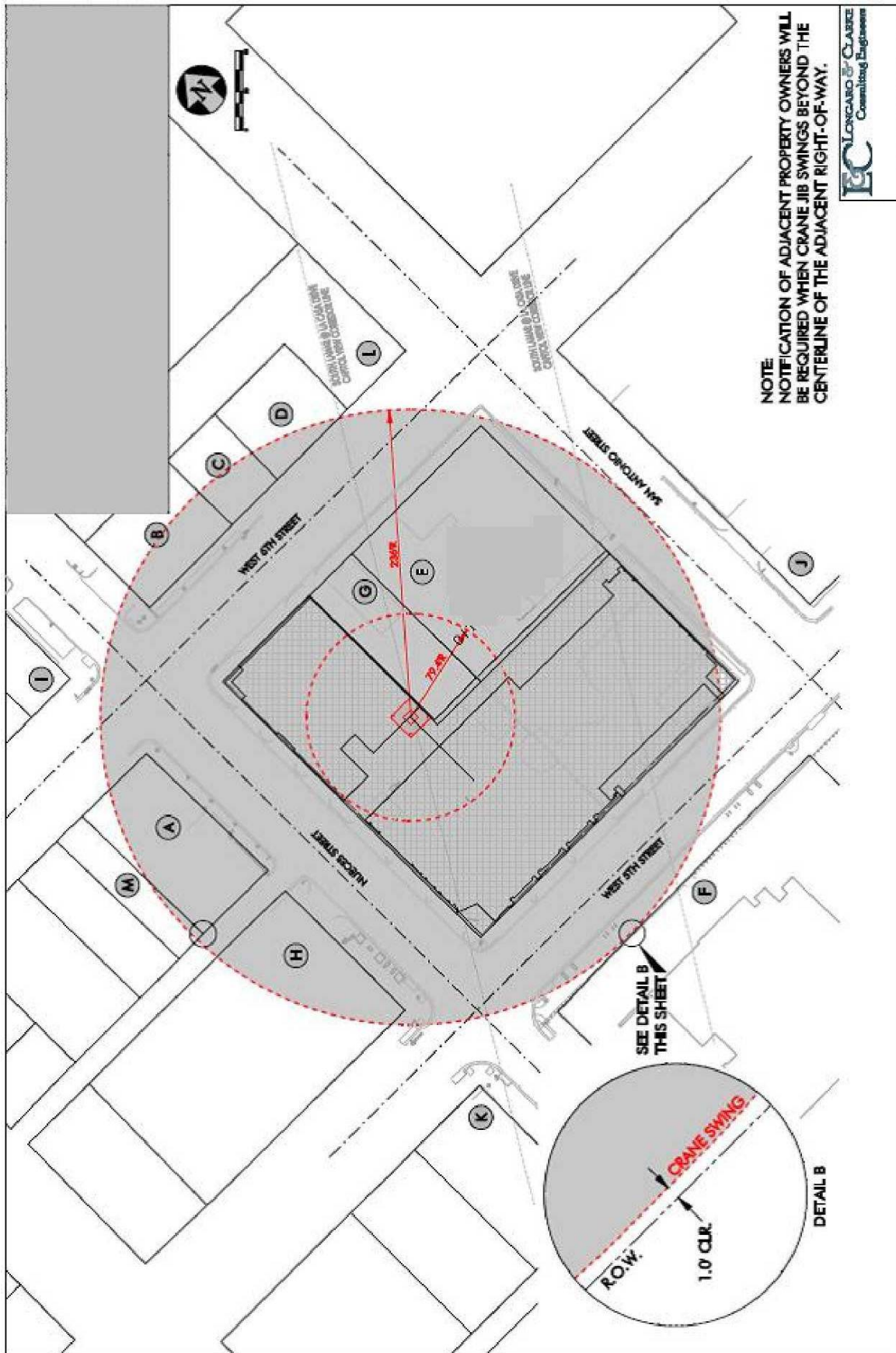
By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Print Title: \_\_\_\_\_

**Exhibit A**

Project Site

[legal description], and identified as the cross-hatched area in Exhibit A-1 attached hereto.

Exhibit A-1



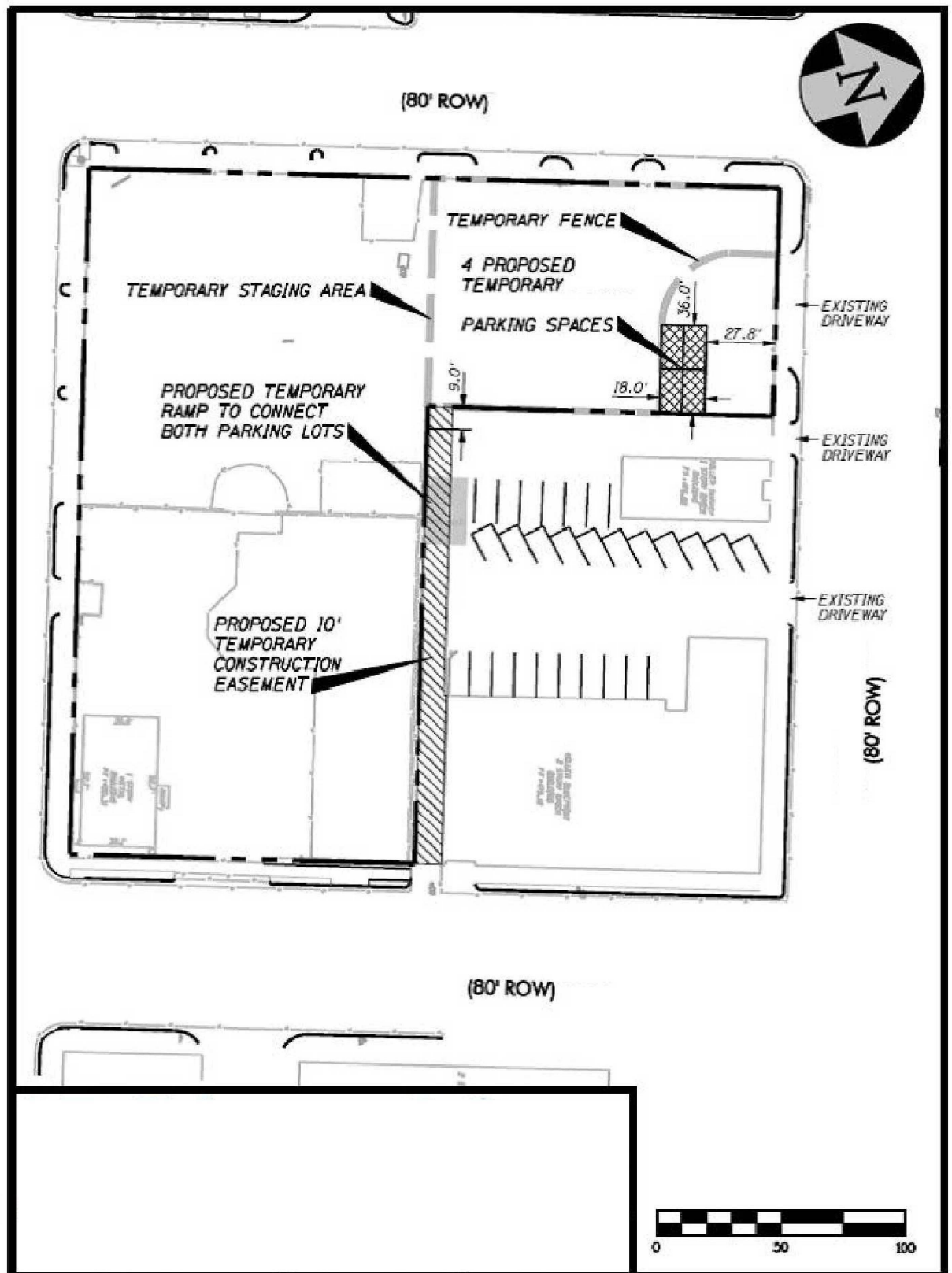


**Exhibit B**

Third Party's Property

[legal description], and identified as the cross-hatched area in Exhibit B-1 attached hereto.

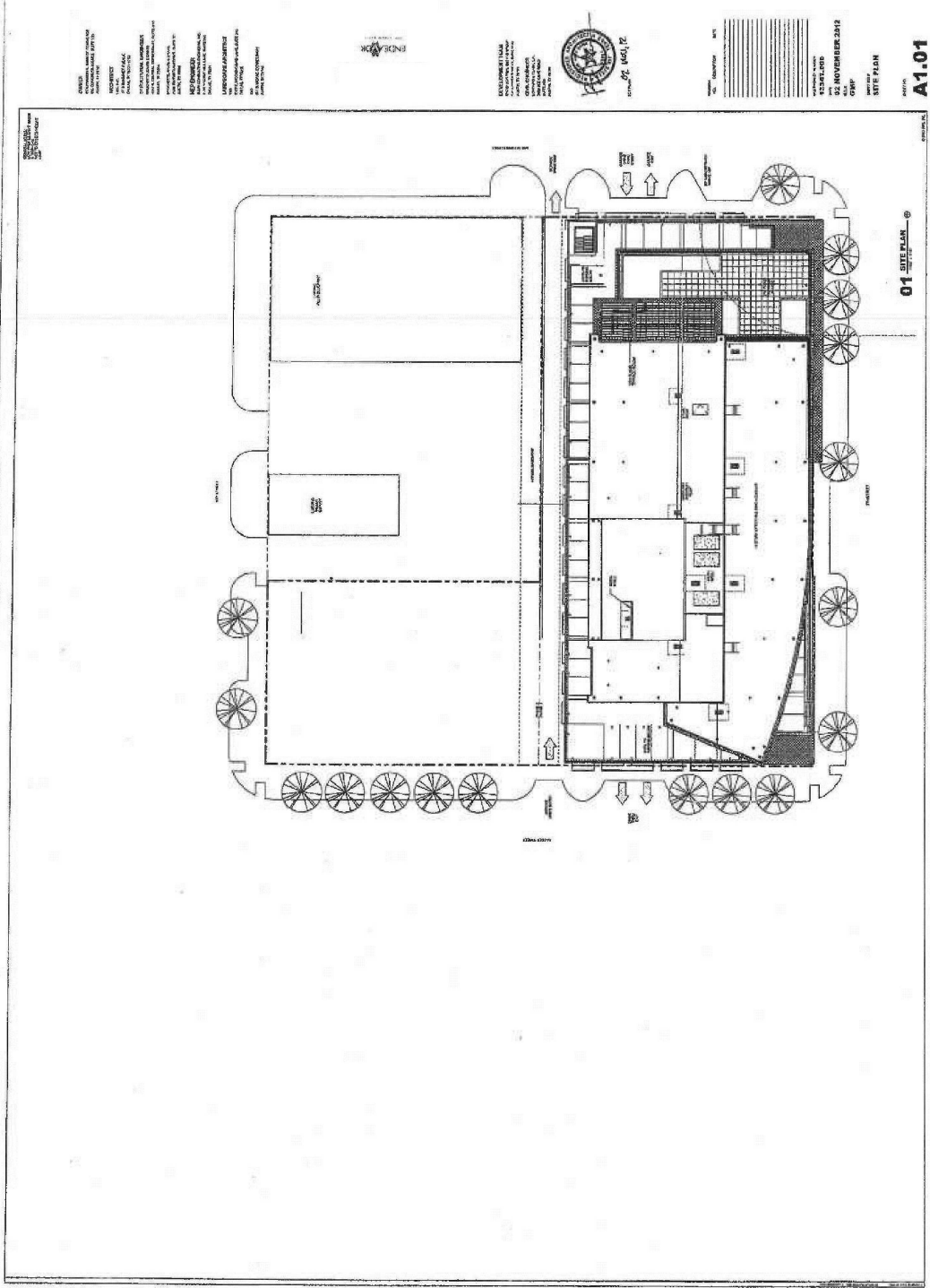
Exhibit B-1



**Exhibit C**

**Construction Concept Plan**

[see attached]





## **Exhibit D**

### **Crane Safety and Use Requirements**

1. **Tower Crane Operations.** Each overhead tower crane utilized by or on behalf of a Party shall be erected on the land owned by such Party. There shall be no more than two horizontal, overhead tower cranes in use at any one time by any Party in connection with the construction of improvements on the portions of the Property owned by such Party. Each Party shall cooperate with the other Parties to agree upon the operational height of each horizontal beam for a crane to provide proper safety and to allow, during concurrent mutual terms of the Owner's Swing License and the Construction Crane License, the use of cranes to construct improvements located on the Project Site and the Third Party's Property simultaneously.
2. **Height of Horizontal Beam.** In no event shall the operational height of a horizontal beam for a crane be lower than thirty-two feet above the highest level of improvements located on the portions of the Construction Crane Licensed Property or Owner's Swing Licensed Property utilized by such crane, except in connection with the erection or removal of such crane. The Parties understand and agree that each crane may be erected in parts prior to operation of each crane, and that each subsequent addition of a section of a crane does not constitute "erection" of the entire crane.
3. **No Construction Loads May Moved Over Limited Use Premises.** At no time may any crane operated by Owner carry construction materials and/or supplies or any other load over the Third Party's Property. At no time may any crane operated by Third Party carry construction materials and/or supplies or any other load over the Project Site.
4. **Hours of Operation of Cranes.** The cranes shall be operated during the hours permitted by applicable laws, rules, regulations, ordinances or authorizations of the City of \_\_\_\_\_.
5. **Safety.** The cranes shall at all times be erected and operated in accordance with all applicable safety laws, rules, regulations and ordinances. Only trained and qualified personnel (in accordance with applicable law) shall be permitted to operate cranes governed by this License.
6. **Maintenance and Repair.** The parties shall require that the crane contractors, crane owners, and crane operators adequately maintain and repair the cranes at all times.

## **Exhibit E to Owner's Swing License**

### **Insurance Specifications**

Below are specifications for insurance to be maintained pursuant to the Owner's Swing License (the "License") by Owner under § 5.1 or by Third Party under § 5.2, as the insuring party (the "Insuring Party") as to the premises (the "Licensed Premises") owned by the persons designated below as the "Property Owner" and licensed to the Insuring Party for its use for the limited purposes set out in the License. Both the Insuring Party and contractors ("Contractor") hired by the Insuring Party that are performing work or operations on or above the Licensed Premises are to obtain and maintain insurance meeting these Insurance Specifications. In the event of any conflict between these Insurance Specifications and other provisions of the License, the other provisions of the License controls. The term "Additional Insured" as used below refers to the persons listed below as additional insureds on the insurance to be maintained or caused to be obtained and maintained pursuant to the License by the person listed below as Insuring Party:

<b>Insuring Party:</b>	<b>Additional Insured or Property Owner:</b>
Owner under § 5.1 of the License	<div>_____ ("<u>Third Party</u>") Attn: _____ _____ _____ Facsimile Number: _____ E-Mail Address: _____  Tenant</div>
Third Party under § 5.2 of the License	<div>_____ ("<u>Owner</u>") Attn.: _____ _____ _____ Facsimile Number: _____ E-Mail Address: _____</div>

The following are specifications for insurance to be maintained by the Insuring Party or its Contractor, except that in the case of Third Party being the Insuring Party, the Workers' Compensation, Employer's Liability and Business Auto Liability insurance specifications apply to insurance to be maintained by Third Party's Contractor (\*specifications of "minimum limits" or "no less than" means that the insurance is to have limits of no less than the limit specified, but that if the Insuring Party or Contractor, as the case may be, has greater limits, then the greater limits are specified and apply hereunder):

#	Specification	Additional Details
1.	Commercial General Liability Insurance ("CGL")	
1.1	Occurrence Basis	The CGL is to be issued on an occurrence basis.
1.2	Minimum limits*	
		\$ 5,000,000 per occurrence.*
		\$ 5,000,000 products/completed operations.*
		\$ 5,000,000 personal and advertising injury.*
1.3	General Aggregate	If the CGL insurance contains a general aggregate limit, it shall apply separately to this project, and shall be no less than \$5,000,000.*
1.4	Form	CGL is to be on an ISO form CG 00 01, or a substitute providing equivalent coverage, and shall cover liability arising from premises, operations, and contractor's

		liability arising out of the hire of contractors (independent contractors coverage). If available at no extra cost, CGL shall cover sudden and accidental pollution.
1.5	Term	The policy's effective date/expiration date shall cover the entire term of construction operations at the project's location, and for a period of no less than 2 years after completion of construction operations.
1.6	Insured Contracts	Coverage shall include but not be limited to insurable assumed contract liability to the Additional Insureds, and their officers, directors and employees.
1.7	Primary	The CGL shall be endorsed to provide that it is primary and non-contributing coverage (other insurance of the Additional Insured is not required to contribute or share with the CGL's limits).
1.8	Waiver of Subrogation	CGL shall be endorsed with an ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by the insurer as to claims against the persons designated herein to be Additional Insureds, and their officers, directors and employees.
1.9	Prohibited Endorsements	The following exclusions/limitations (or their equivalents) are not permitted without the prior consent of the Additional Insured; if the Insuring Party's insurer refuses to delete any of the endorsements below, the Additional Insured agrees to consult with and cooperate with Insuring Party to reach a commercially reasonable resolution:
		a. Contractual Liability Limitation, CG 21 39.
		b. Amendment Of Insured Contract Definition, CG 24 26 or 33 90.
		c. Any endorsement modifying or deleting the exception to the Employer's Liability exclusion.
		d. Any "Insured vs. Insured" exclusion.
		e. Any type of punitive, exemplary or multiplied damages exclusion.
		f. An exclusion for the type of operations contemplated by the License to be undertaken by the Insuring Party's Contractor.
1.10	Additional Insured	
	(1) Insuring Party's CGL:	Additional insured coverage is to be provided to the Additional Insured for the term of the Insuring Party's obligations under the License and for at least 2 years thereafter, and shall be written:
		a. with respect to liability arising out of the ownership, maintenance or use of that part of the licensed premises licensed to the Insuring Party and shown in the Schedule on an ISO CG 20 11 modified to change the reference "premises leased to you" to "premises licensed to you" listing the Additional Insured as additional insureds.
		b. as to "ongoing operations" on an ISO CG 20 26 Additional Insured – Designated Person or Organization modified to change the reference "premises rented to you" to "premises licensed to you" and listing the Additional Insured as additional



		insureds.
		c. as to “completed operations” coverage of hazards within the “products-completed operations hazard” for work performed by or for the Insuring Party at or around the licensed premises under the License, listing the Additional Insured as additional insureds.
1.10	(2) Insuring Party Contractor’s CGL:	Additional insured coverage is to be provided for the term of the Contractor’s obligations under the construction contract with the Insuring Party and for at least 2 years thereafter, and shall be written:
		a. with respect to liability arising in whole or in part out of the Contractor’s acts or omissions on an ISO CG 20 10 04 13 listing the Additional Insured as additional insureds.
		b. as to “completed operations” on an ISO CG 20 37 04 13 listing the Additional Insured as additional insureds.
1.11	Notice	The policy shall provide for 30 days’ prior written notice by the insurer to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
1.12	Excess or Umbrella	CGL limits may be covered under a combination of primary and excess/umbrella policies. Excess/umbrella policy is to be written on an occurrence basis. Such insurance shall be excess over and be no less broad than all coverages described above for the base policy. The policy limits for the primary and excess/umbrella policy may be allocated between the primary and excess/umbrella as selected by the named insured. The policy shall list the Additional Insured as additional insureds. This insurance shall be endorsed to provide primary and non-contributing liability coverage as to any other insurance of the Additional Insured. It is the specific intent of the parties to this License that all insurance held by the Additional Insured shall be excess, secondary and not contribute to the insurance provided by the Insuring Party. Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits of the base policy. This policy shall include a duty to defend any insured. The policy shall include a waiver of subrogation by insurer against the additional insureds. The policy shall contain a provision for 30 days’ prior written notice by insurance carrier to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
<b>2.</b>	<b>Workers’ Compensation (“<u>WC</u>”) and Employer’s Liability (“<u>EL</u>”)</b>	
2.1	Limits	WC – statutory limits. EL – \$1,000,000 each accident and disease.
2.2	Territory	State where work is to be performed must be listed under Item 3.A. on the Information Page.
2.3	Scope	Such insurance shall cover liability arising out of the Insuring Party’s employment of workers and anyone for whom the Party may be liable for workers’

		compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance shall be permitted.
2.4	Leased Employees	Where a Professional Employer Organization or "leased employees" are utilized, Named Insured shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement.
2.5	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Property Owner required for cancellation or substantial modification.
2.6	Waiver of Subrogation	Include a waiver of subrogation by insurer as to the Property Owner, its officers, directors and employees.
<b>3.</b>	<b>Business Auto Liability ("BAL")</b>	
3.1	Minimum Limit*	\$5,000,000 per accident*
3.2	Form	The BAL is to be written on a Current ISO edition of CA 00 01, or equivalent.
3.3	Scope	The BAL is to cover liability arising out of any auto (including owned, hired and nonowned).
3.4	Additional Insured	The Additional Insured is to be designated as an additional insured on the BAL. Additional insured coverage is to be provided by the Insuring Party for the term of the Insuring Party's obligations under the License and for at least 2 years thereafter; and by the Contractor for the entire term of construction operations at the project's location, and for a period of no less than 2 years after completion of construction operations.
3.5	Primary	This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this License that all other insurance held by an Additional Insured shall be excess and secondary to the coverage provided by the BAL to the Additional Insured.
3.6	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
3.7	Waiver of Subrogation.	Include a waiver of subrogation by insurer as to the Additional Insured, and its officers, directors and employees.
<b>4.</b>	<b>Certificate of Insurance ("COI")</b>	
4.1	Form	The Insuring Party is to provide the Additional Insured with evidence of insurance by a completed ACORD™ Form 25 (2010/05) <i>Certificates of Liability Insurance</i> prior to the Insuring Party's, or its contractors, commencing operations on the Additional Insured's property, and shall refresh the COI by delivering an updated COI prior to the expiration date of the respective insurance policy set out in the previously provided COI.

4.2	Certificate holder	The COI is to be addressed to the Additional Insured at its above address as Certificate Holder.
4.3	Information	The COI shall be fully completed and shall state that the Additional Insured is an additional insured on the named insured's policy; the named insured's coverage, including the additional insured coverage, is primary and does not provide for contribution by the additional insured's other insurance.
4.4	Endorsements	Accompanying the COI shall be a copy of the following endorsements: the additional insured endorsements, the waiver of subrogation endorsements, and the endorsements to give the Additional Insured advance notice of cancellation or material modification of the policy.
4.5	Declaration Page	Accompanying the COI shall be a copy of the policy's Declaration Page and any supplemental page listing endorsements to the policies.
<b>5.</b>	<b>General Specifications</b>	
5.1	Policies	The Additional Insured shall be entitled to communicate directly with the insurance agents of the Insuring Party, its contractors and subcontractors to verify amounts, coverages, deductibles, and other terms of insurance carried by the Insuring Party, its contractors, and their subcontractors. Failure of the Additional Insured to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Additional Insured to identify a deficiency from evidence that is provided shall not be construed as a waiver of the Insuring Party's obligation to maintain such insurance. The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein. The Limits set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If the Insuring Party or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to the Additional Insured. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, the Additional Insured will have the right to require other equivalent forms. Any policy or endorsement forms other than a form specified in this exhibit must be approved in advance by the Additional Insured. If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to this License, shall be reformed to provide the maximum amount of protection to the Additional Insured as allowed under the law. <b>To the extent that</b>

		<b>_____ Code applies, then the additional insured coverage is to be limited by the statute's limitations.</b>
5.2	Insurer Qualifications	All insurance required to be maintained by the Insuring Party must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in Texas.
5.3	ISO	These insurance specifications are stated in terms of coverage provided by the specified Insurance Service Office ("ISO") forms. Terms used herein have the meaning specified at the following webpage for the International Risk Management Institute, Inc.: <a href="http://www.irmi.com/forms/online/insurance-glossary/terms.aspx">http://www.irmi.com/forms/online/insurance-glossary/terms.aspx</a>

## STAGING LICENSE

This Staging License (this "License") is entered into by and among \_\_\_\_\_, a \_\_\_\_\_ ("Owner"), and \_\_\_\_\_, a \_\_\_\_\_ ("Third Party"), in consideration of the covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each party. Owner and Third Party are sometimes individually referred to as a "Party" and collectively as the "Parties."

## RECITALS

A. Owner is the owner of the land described in Exhibit A attached hereto (the "Project Site") and Third Party is the owner of the land described in Exhibit B attached hereto (the "Third Party's Property"). The Project Site and the Third Party's Property are sometimes collectively referred to as the "Property".

B. Owner has finalized conceptual plans for development on a portion of the Project Site, as shown in the site plan attached hereto as Exhibit C (the "Construction Concept Plan"), approved by Site Development Permit No. \_\_\_\_\_.

C. During the course of development of the Project Site, it is contemplated that such development will involve and necessitate certain rights and licenses on and with respect to the Third Party's Property.

D. Third Party has agreed to grant to Owner the rights and licenses set forth herein, subject to the terms and conditions of this License.

## AGREEMENT

### 10. Staging License.

10.1. Grant of License by Third Party. Third Party hereby grants to Owner a nonexclusive license (the "Staging License"), to use, on a nonexclusive basis and upon the conditions hereinafter provided, the portion of the Third Party's Property depicted on Exhibit C-1 attached hereto (the "Staging Licensed Premises"). The Staging License shall be appurtenant to the Project Site and for the sole purpose of providing access and Staging over, on and under the Staging Licensed Premises in connection with the development of the Project Site.

10.2. Commencement Date; Use of Licensed Premises. Owner shall notify Third Party at least 30 days prior to commencing its use of the Staging Licensed Premises; such notice shall specify the date on which the use will commence. If Owner has not delivered the commencement notice to Third Party on or before the day that is 180 days after the Effective Date, then the Staging License granted in this License shall automatically terminate without need for any written notice to be delivered by Third Party. Owner's use of the Staging License shall be in accordance with Exhibit D attached hereto.

10.3. Termination Date. The Staging License shall terminate on the earlier of (i) the date specified by Owner in a notice to Third Party or (ii) the date that is 18 months after the commencement date specified in the commencement notice from Owner to Third Party delivered pursuant to Section 1.2 above, unless sooner terminated pursuant to the terms of this License.

10.4. Cost and Liabilities. All costs and liabilities associated with the use of the Staging License shall be borne by Owner and its contractors.

10.5. Obligations After Transfer. The covenants and obligations of Third Party shall be binding upon each owner of any portion of the Staging Licensed Premises for the duration of such owner's ownership and until the expiration of the Staging License. Upon the transfer of all or any portion of the Third Party's Property by its owner, the new owner of the transferred property shall be deemed to have assumed and agreed to perform and be bound by all obligations pertaining to the owner of such property arising under this License during the new owner's period of ownership and until the expiration of the Staging License. The preceding owner of the transferred property shall be released from all obligations arising under this License on and after the date of the transfer (but not from obligations accrued during its period of ownership).

11. Limits on License Rights. The license granted to Owner in Section 1 above is nonexclusive and is expressly subordinate to the right of Third Party and its successors and assigns (i) to have at all times egress and ingress to and from the Third Party's Property and (ii) to develop, construct, maintain, use, and operate the buildings and other facilities presently or hereafter situated on the Third Party's Property. Third Party reserves for itself and its heirs, successors, and assigns the right to continue to use and enjoy the surface of the Third Party's Property other than the Staging Licensed Premises in accordance with applicable laws, ordinances, and rules, and Owner's use of the Staging License shall not interfere unreasonably with such enjoyment.

12. Insurance. Upon notice by Owner to Third Party of commencement of the Staging License, Owner at its expense throughout the term of such license shall obtain and maintain insurance in conformity with the requirements set forth in Exhibit E attached hereto. The coverage may be provided in the form of a rider and/or endorsement to a previously existing insurance policy. The insurance must cover all perils arising from the activities of Owner, its agents, contractors, and invitees, related to such license. In the event of any insurance claim, Owner agrees to pay all deductibles stated in the policy. The insurance specifically shall name each of the parties comprising Third Party as an additional insured, and a certificate of insurance evidencing coverage shall be provided by the insurance company to Third Party by not later than the date of commencement of the license. To the extent obtainable based on reasonable efforts, all insurance is to include a clause stating that in the event of cancellation or material change that reduces or restricts the insurance afforded by the insurance policy, the insurer agrees to mail prior written notice of cancellation or material change that reduces or restricts the insurance afforded to Third Party as additional insured at least 30 days in advance to Third Party.

13. Indemnification and Repair of Damage.

13.1. Indemnity. To the extent permitted by law, Owner hereby agrees fully to indemnify, save, and hold harmless Third Party, its heirs, executors, administrators employees, owners, officers, directors, managers, agents, lessees, licensees, lenders, and invitees (collectively called "Third Party Indemnitees") against any and all liability, damage, loss, claims, demands, and actions of any nature whatsoever, including reasonable attorneys' fees, on account of personal injury (including without limitation, workers' compensation and death claims) or property loss or damage of any kind whatsoever, which arises, or is claimed to arise, out of or is, or is claimed to be, in any manner connected with: (i) Owner's use of the Staging License; (ii) any act, omission, or negligence of Owner or its agents, contractors, or invitees; (iii) any activities of Owner or its agents, contractors, or invitees conducted on or about the Third Party's Property; or (iv) any breach or default of the terms of this License by Owner or its agents, contractors, and invitees. **TO THE EXTENT PERMITTED BY LAW, THE INDEMNITY IN THIS PARAGRAPH SHALL APPLY REGARDLESS OF WHETHER THE LOSS IN QUESTION ARISES OR IS ALLEGED TO ARISE IN PART FROM ANY NEGLIGENT ACT OR OMISSION OF THIRD PARTY OR THEIR AGENTS OR EMPLOYEES, FROM STRICT LIABILITY OF ANY SUCH PERSONS OR OTHERWISE; PROVIDED, HOWEVER, THAT SUCH INDEMNITY SHALL NOT INCLUDE ANY CLAIMS THAT ARISE FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THIRD PARTY OR THEIR AGENTS OR EMPLOYEES.** Owner must, at its own expense, investigate all such claims and demands, attend to their settlement or other disposition, defend all actions based thereon, and pay all attorneys' fees and all other cost and expenses of any kind arising from any aforesaid liability, damage, loss, claims, demands or actions. This indemnification provision shall not permit Third Party to recover from Owner any damages, costs, losses, expenses or other amounts for which the Third Party Indemnitees have been compensated by insurance provided by Owner under Section 3 above. The foregoing indemnity shall survive after the later of the expiration or termination of the Staging License for the duration of all applicable statutes of limitation.

13.2. Repair of Damage. Owner, at its sole cost, shall repair or replace any damage to the Third Party's Property and any surrounding areas caused by the activities of Owner in the exercise of its rights under this License. If Owner fails to repair any damage for which it is responsible within fifteen days after receipt of written notice from Third Party (or, if such repair reasonably requires more than fifteen days to complete, fails to commence repair within such fifteen-day period and diligently pursue such repair to completion), then Third Party may elect to repair such damage. If Third Party makes repairs as provided in this Section 4.2, then Owner shall reimburse Third Party for the reasonable cost of such repairs within thirty days after receipt of an invoice for same. Notwithstanding the foregoing, if Third Party, in the exercise of its rights under this License, becomes aware of a condition which it reasonably believes (a) constitutes an imminent threat to the health, safety or welfare of any

persons or property, and (b) resulted from the activities of Owner, Third Party shall use reasonable efforts to notify the other party of such condition by telephone, electronic mail or other immediate means of communication. If Owner is not available or does not immediately begin to remedy such emergent and hazardous condition, then Third Party may remedy such condition and receive reimbursement from Owner as provided above.

14. Termination. The license granted herein shall terminate on the scheduled termination dates specified in Section 1.3 above.

15. Default. If either Owner or Third Party fails to comply with any of the terms and conditions herein, then the other party may give the defaulting party written notice of such default. The defaulting party will have 15 days from the date of such notice to take action to remedy the default. If the defaulting party does not satisfactorily remedy such default within such 15-day period the non-defaulting party may seek specific performance of this agreement by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. In addition to obtaining restraining orders and injunctions and the remedy of specific performance, the non-defaulting party shall be entitled to recover from the defaulting party all reasonable costs and expenses incurred in remedying the default or pursuing its remedies under this License. **EXCEPT FOR THE EXPENSE REIMBURSEMENT IN THE PREVIOUS SENTENCE, NO PARTY UNDER THIS LICENSE MAY PURSUE AN ACTION FOR ANY FORM OF MONETARY, DAMAGES, INCLUDING ACTUAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES.**

16. General Matters.

16.1. Compliance with Laws. Owner agrees and covenants that all activities related to its use of the license granted to it herein shall be done in compliance with all applicable city, county, state and/or federal laws, ordinances, regulations and policies now existing or later adopted.

16.2. Venue. Venue for all lawsuits concerning this License shall be in the state district courts of \_\_\_\_\_, \_\_\_\_\_ County, \_\_\_\_\_.

16.3. Waiver of Default. Either party may waive any default of the other party at any time, without affecting or impairing any right arising from any subsequent or other default. The failure at any time of either party to enforce any provision hereof, whether a violation is known or not, shall not constitute a waiver or estoppel of the right to do so.

16.4. Notice. Notice may be given by fax, hand delivery, or certified mail, postage prepaid, and is deemed received on the day faxed or hand delivered or on the third day after deposit if sent certified mail. Either party may change the addressee or address for notices, by notice to the other party as provided herein. Notice must be sent as follows:

If to Owner:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile Number: \_\_\_\_\_  
E-Mail Address: \_\_\_\_\_

With copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile Number: \_\_\_\_\_  
E-Mail Address: \_\_\_\_\_

If to Third Party:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile Number: \_\_\_\_\_  
E-Mail Address: \_\_\_\_\_

With copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Facsimile Number: \_\_\_\_\_  
E-Mail Address: \_\_\_\_\_

16.5. Interpretation. This License, in the event of any dispute over its meaning or application, shall be interpreted fairly and reasonably, and neither more strongly for nor against any party.

16.6. Application of Law. This License is governed by the laws of the State of \_\_\_\_\_. If the final judgment of a court of competent jurisdiction invalidates any part of this License, then the remaining parts must be enforced, to the extent possible, consistent with the intent of the parties as evidenced by this License.

16.7. Cooperation and Consents. Owner and Third Party each agrees to cooperate fully with and assist each other and execute such documents as may be necessary to further the express purposes of this License, which cooperation and assistance shall not be unreasonably withheld, conditioned or delayed.

16.8. Severability. If any provision of this License shall for any reason be held to be invalid, illegal or unenforceable by any court of competent jurisdiction, the validity of the other provisions of this License shall in no way be affected thereby. **To the extent that Code applies, then the indemnity and additional insured coverage is to be limited by the statute's limitations and the indemnity and additional insured coverage are to be enforced to the extent permitted.**

16.9. Counterparts; Signatures. This License may be executed in any number of identical counterparts by the handwritten signature of each party, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. This License may be executed by the handwritten signature of the parties and transmitted by facsimile or e-mail.

16.10. Attorneys' Fees. If any action shall be commenced to enforce the terms of this License or to declare the rights of the parties hereunder, the prevailing party shall be entitled to recover all of its costs and expenses (including, but not limited to, reasonable attorneys' fees) from the nonprevailing party. In addition to the foregoing award of attorneys' fees and other litigation costs to the prevailing party, the prevailing party in any lawsuit on this License shall be entitled to its reasonable attorneys' fees and other litigation costs incurred in any post-judgment proceedings to collect or enforce the judgment. This provision is separate and several and shall survive the merger of this License into any judgment on this License, and shall survive the termination of this License.

16.11. No Third Party Rights. Nothing in this License shall be construed to confer any rights, benefits or remedies upon any person or entity other than the parties hereto and their respective successors and assigns as owners of their respective Property.

16.12. Entire Agreement. This License and all documents referred to herein: (i) constitute and are intended as a final expression and a complete and exclusive statement of the understanding and the agreement between the parties hereto with respect to the subject matter hereof; (ii) supersede all prior or simultaneous understandings, correspondence, letters of intent, negotiations, or agreements, whether oral or in writing between the parties respecting the subject matter of this License; and (iii) may not be modified, amended or otherwise changed in any manner except by a writing specifically setting forth such modification, amendment or change and executed by the handwritten signature of each of the parties hereto. The parties further agree that neither shall claim that the



other waived any rights under this License, whether by inconsistent actions or otherwise, unless a written amendment is executed in accordance with this paragraph.

16.13. Liability of Third Party Parties Not Joint and Several. In the event that one or more of the parties comprising Third Party under this License breaches or defaults an obligation under this License with respect to only the portion of the Third Party's Property owned by such defaulting party, any liability of such defaulting party to Owner shall be personal to such defaulting party and shall not be joint and several with the other parties comprising Third Party. In such event, Owner's cause of action for breach or default shall be commenced against only such defaulting party and not all of the parties comprising Third Party.

16.14. No Recordation. Neither party may record this License in the Official Public Records of Travis County, Texas, or any other county in Texas or any other state.

16.15. List of Exhibits. The exhibits identified below and attached hereto are incorporated herein by this reference.

Exhibit A - Project Site  
Exhibit B - Third Party's Property  
Exhibit C - Construction Concept Plan  
Exhibit D - Terms and Conditions  
Exhibit E - Insurance Requirements

Executed to be effective \_\_\_\_\_ (the "Effective Date").

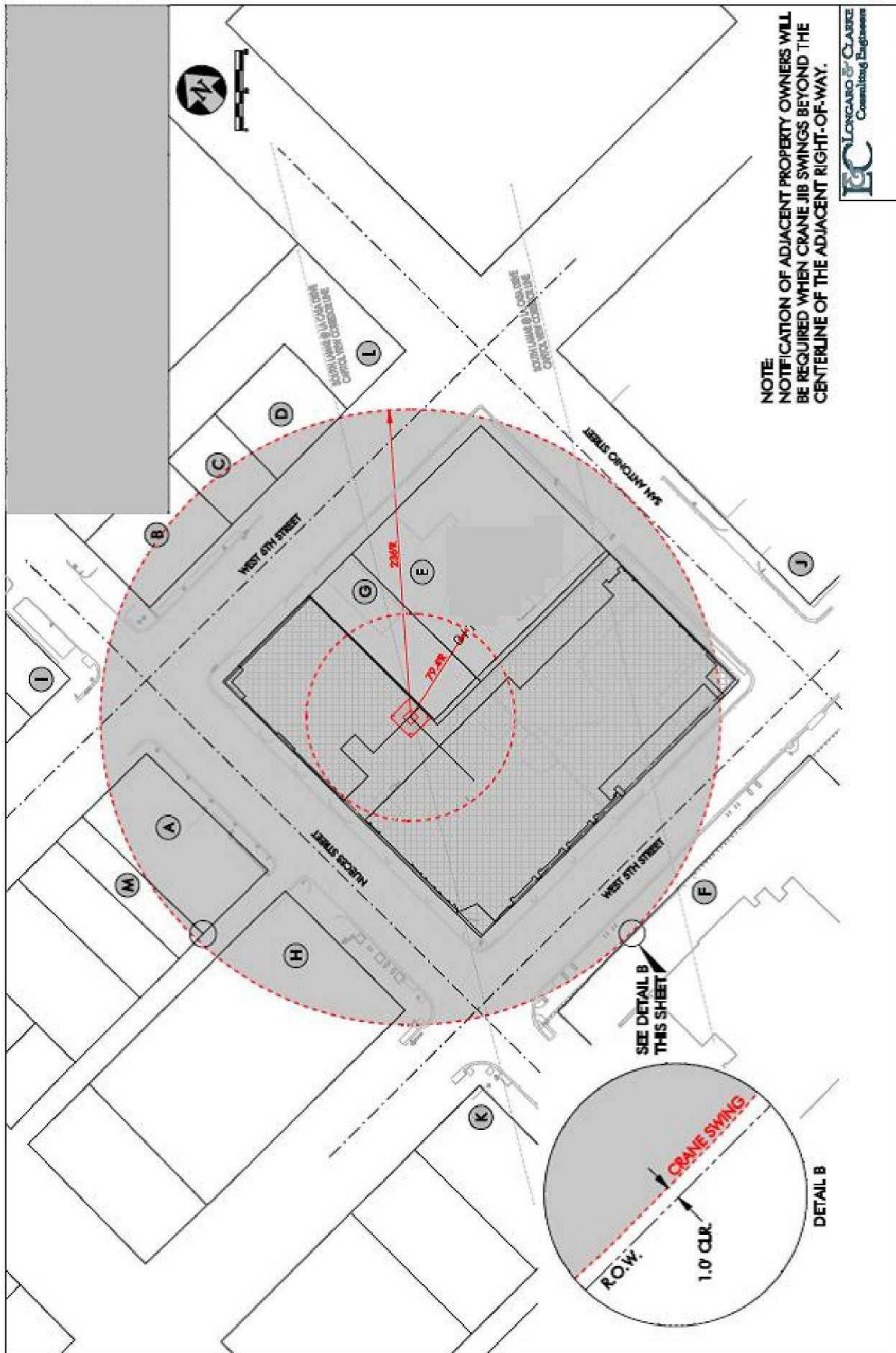
[Signature page follows.]

**Exhibit A**

Project Site

[legal description], and identified as the cross-hatched area in Exhibit A-1 attached hereto.

Exhibit A-1

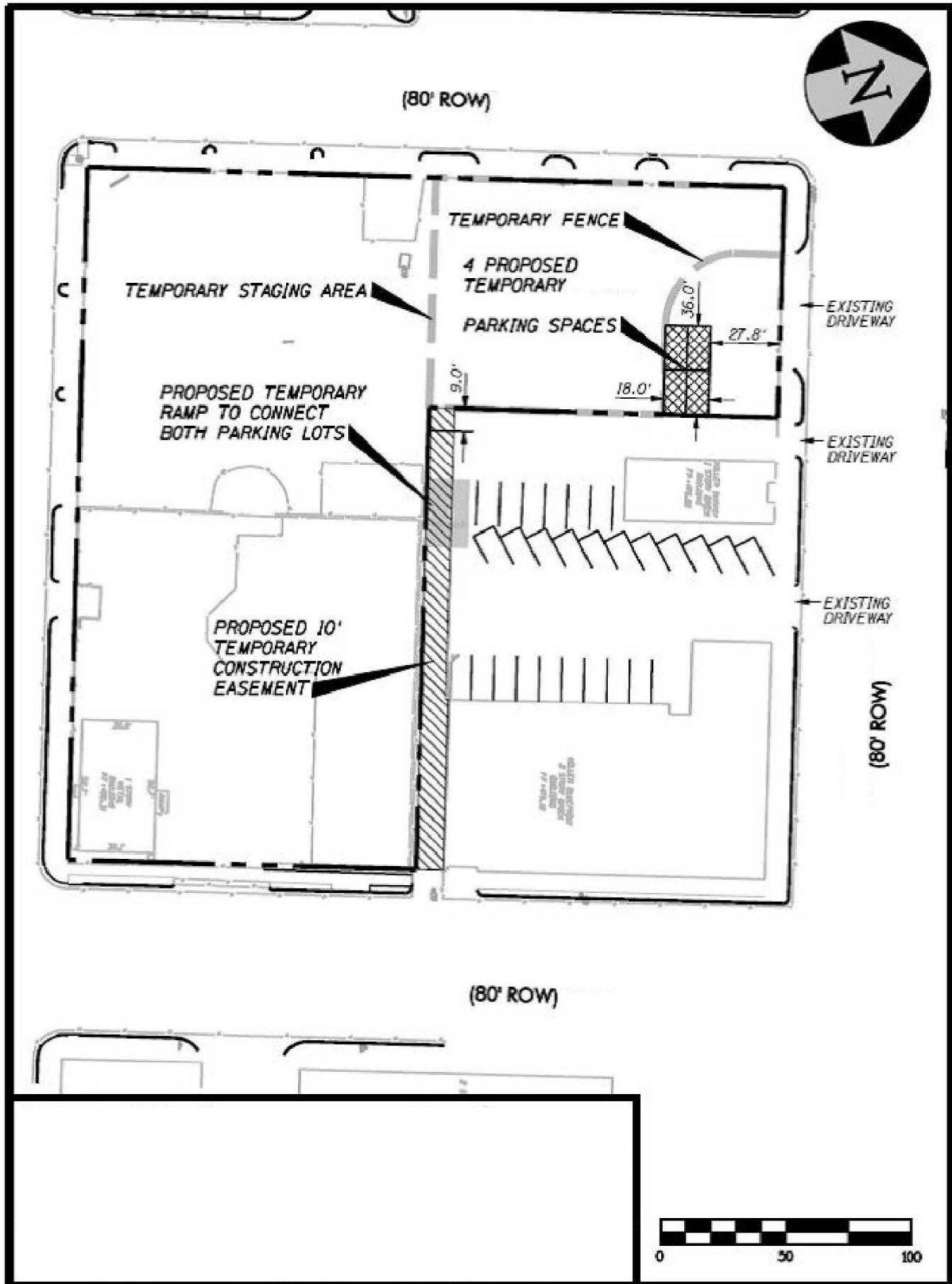


**Exhibit B**

Third Party's Property

[legal description], and identified as the cross-hatched area in Exhibit B-1 attached hereto.

Exhibit B-1



**Exhibit C**

**Construction Concept Plan**

## **Exhibit D**

### **Use of License**

Owner's use of the Staging License shall be subject to the following terms and conditions:

1. Owner may only use the Staging Licensed Premises during the following periods: (i) 21 days beginning on the date identified in Owner's notice delivered under Section 1.2 of this License as Owner's commencement date and (ii) 21 days beginning on a date to be identified by Owner at least 30 days prior to the commencement of this second 21-day period at the end of which the Staging License shall terminate. In any event, the Staging License shall terminate on the date identified in Section 1.3 of this License, and the second 21-day period described in this paragraph shall automatically commence 21 days prior to the termination of the Staging License even if no notice is delivered by Owner.
2. During the two 21-day periods that Owner will use the Staging License, Owner must provide alternative access for Third Party to any blocked public roadway in the manner depicted on the sketch attached to this License as Exhibit C-1 (or in such other mutually agreeable manner). The alternate access route must allow for unobstructed, continuous use by Third Party and all third parties desiring to access the Third Party's Property during the two 21-day periods described in paragraph 1 above. Notwithstanding anything in this License, Owner shall at all times provide a means of egress and ingress to and from the Third Party's Property.
3. The Staging License shall terminate on the last day of the second 21-day period described in paragraph 1 above. Owner shall restore the Staging Licensed Premises to its prior condition (or better), at its sole cost and expense, before the end of such second 21-day period. If Owner fails to restore the Staging Licensed Premises in the manner required by this paragraph, Third Party, without need for written notice to Owner, may complete such restoration. If Third Party incurs restoration expenses under this paragraph, then Owner shall reimburse Third Party for such expenses within thirty days after receipt of an invoice for same. If such amount remains unpaid thirty days after delivery of an invoice, it will accrue interest at the maximum rate allowed by law on a daily basis.

## Exhibit E to Staging License

### Insurance Specifications

Below are specifications for the insurance to be maintained pursuant to the Staging License (the “License”) by Owner under § 3, as the insuring party (“Insuring Party”) as to the premises (the “Licensed Premises”) owned by the persons designated below as the “Property Owner” and licensed to the Insuring Party for its use for the limited purposes set out in the License. Both the Insuring Party and contractors (“Contractor”) hired by the Insuring Party that are performing work or operations on or above the Licensed Premises are to obtain and maintain insurance meeting these Insurance Specifications. In the event of any conflict between these Insurance Specifications and other provisions of this License, the other provisions of the License controls. The term “Additional Insured” as used below refers to the persons designated below as additional insureds on the insurance to be maintained or caused to be obtained and maintained pursuant to the License by the person designated below as Insuring Party:

Insuring Party:	Additional Insured or Property Owner:
<div style="border-bottom: 1px solid black; margin-bottom: 5px;">_____ (“<u>Owner</u>”)</div>	<div style="border-bottom: 1px solid black; margin-bottom: 5px;">_____ (“<u>Third Party</u>”) c/o _____</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">_____</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">Facsimile Number: _____</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">E-Mail Address: _____</div>

The following are specifications for insurance to be maintained both by the Insuring Party and its Contractor (\*specifications of “minimum limits” or “no less than” means that the insurance is to have limits of no less than the limit specified, but that if the Insuring Party or Contractor, as the case may be, has greater limits, then the greater limits are specified and apply hereunder):

#	Specification	Additional Details
<b>1.</b>	<b>Commercial General Liability Insurance (“CGL”)</b>	
1.1	Occurrence Basis	The CGL is to be issued on an occurrence basis.
1.2	Minimum Limits*	
		\$ 5,000,000 per occurrence*
		\$ 5,000,000 products/completed operations*
		\$ 5,000,000 personal and advertising injury*
1.3	General Aggregate	If the CGL insurance contains a general aggregate limit, it shall apply separately to this project, and shall be no less than \$5,000,000.*
1.4	Form	CGL is to be on an ISO form CG 00 01, or a substitute providing equivalent coverage, and shall cover liability arising from premises, operations, and contractor’s liability arising out of the hire of contractors (independent contractors coverage). If available at no extra cost, CGL shall cover sudden and accidental pollution.
1.5	Term	The policy effective date/expiration date shall cover the entire term of construction contractor’s operations at the project’s location, and for a period of no less than 2 years after completion of contractor’s operations.
1.6	Insured Contracts	Coverage shall include but not be limited to insurable assumed contract liability to the Additional Insureds, and their officers, directors and employees.
1.7	Primary	This insurance shall be endorsed to provide primary and non-contributing coverage (other insurance of the Additional Insured is not required to contribute or share the with CGL’s



		limits).
1.8	Waiver of Subrogation	CGL shall be endorsed with an ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by the insurer as to claims against the persons designated herein to be Additional Insureds, and their officers, directors and employees.
1.9	Prohibited Endorsements	The following exclusions/limitations (or their equivalents) are not permitted without the prior consent of the Additional Insured; if the Insuring Party's insurer refuses to delete any of the endorsements below, the Additional Insured agrees to consult with and cooperate with Insuring Party to reach a commercially reasonable resolution:
		a. Contractual Liability Limitation, CG 21 39.
		b. Amendment Of Insured Contract Definition, CG 24 26.
		c. Any endorsement modifying or deleting the exception to the Employer's Liability exclusion.
		d. Any "Insured vs. Insured" exclusion.
		e. Any type of punitive, exemplary or multiplied damages exclusion.
		f. An exclusion for the type of operations contemplated by the License to be undertaken by the Insuring Party's contractor.
1.10	Additional Insured	
	(1) Insuring Party's CGL:	Additional insured coverage is to be provided to the Additional Insured for the term of the Insuring Party's obligations under the License and for at least 2 years thereafter, and shall be written:
		a. with respect to liability arising out of the ownership, maintenance or use of that part of the licensed premises licensed to the Insuring Party and shown in the Schedule on an ISO CG 20 11 modified to change the reference "premises leased to you" to "premises licensed to you" listing the Additional Insured as additional insureds.
		b. as to "ongoing operations" on an ISO CG 20 26 Additional Insured – Designated Person or Organization modified to change the reference "premises rented to you" to "premises licensed to you" listing the Additional Insured as additional insureds.
		c. as to "completed operations" coverage of hazards within the "products-completed operations hazard" for work performed by or for the Insuring Party at or around the licensed premises under the License, listing the Additional Insured as additional insureds listing the Additional Insured as additional insureds.
1.10	(2) Insuring Party Contractor's CGL:	Additional insured coverage is to be provided for the term of the Contractor's obligations under the construction contract with the Insuring Party and for at least 2 years thereafter, and shall be written:
		a. with respect to liability arising in whole or in part out of the Contractor's acts or omissions on an ISO CG 20 10 04 13 listing the Additional Insured as additional insureds.
		b. as to "completed operations" on an ISO CG 20 37 04 13 listing the Additional Insured as additional insureds.
1.11	Notice	The policy and additional insured endorsement shall provide for 30 days' prior written notice by the insurance carrier to the

		Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
1.12	Excess/Umbrella	CGL limits may be covered under a combination of primary and excess/umbrella policies. Excess/umbrella policy is to be written on an occurrence basis. Such insurance shall be excess over and be no less broad than all coverages described above for the base policy. The policy limits for the primary and excess/umbrella policy may be allocated between the primary and excess/umbrella as selected by the named insured. The policy shall list the Additional Insured as additional insureds. This insurance shall be endorsed to provide primary and non-contributing liability coverage as to any other insurance of the Additional Insured. It is the specific intent of the parties to this License that all insurance held by the Insuring Party shall be excess, secondary and not contribute to the insurance provided by the Insuring Party. Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits of the base policy. This policy shall include a duty to defend any insured. The policy shall include a waiver of subrogation by insurer against the additional insureds. The policy shall contain a provision for 30 days' prior written notice by insurance carrier to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
<b>2.</b>	<b>Workers' Compensation ("WL") and Employer's Liability ("EL")</b>	
2.1	Limits	WC – statutory limits. EL – \$1,000,000 each accident and disease.
2.2	Territory	State where work is to be performed must be listed under Item 3.A. on the Information Page.
2.3	Scope	Such insurance shall cover liability arising out of the Insuring Party's employment of workers and anyone for whom the Party may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance shall be permitted.
2.4	Leased Employees	Where a Professional Employer Organization or "leased employees" are utilized, Named Insured shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement.
2.5	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Property Owner of cancellation or material change that reduces or restricts the insurance.
2.6	Waiver of Subrogation	Include a waiver of subrogation by insurer as to the Property Owner, its officers, directors and employees.
<b>3.</b>	<b>Business Auto Liability ("BAL")</b>	
3.1	Minimum Limit*	\$5,000,000 per accident.*
3.2	Form	The BAL is to be written on a Current ISO edition of CA 00 01, or equivalent.
3.3	Scope	The BAL is to cover liability arising out of any auto (including owned, hired and nonowned).

3.4	Additional Insured	The Additional Insured is to be designated as an additional insured on the BAL. Additional insured coverage is to be provided by the Insuring Party for the term of the Insuring Party's obligations under the License and for at least 2 years thereafter; and by the Contractor for the entire term of construction operations at the project's location, and for a period of no less than 2 years after completion of construction operations.
3.5	Primary	This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this License that all other insurance held by an Additional Insured shall be excess and secondary to the coverage provided by the BAL to the Additional Insured.
3.6	Notice	Contain a provision for 30 days' prior written notice by insurance carrier to the Additional Insured of cancellation or material change that reduces or restricts the insurance afforded the Additional Insured.
3.7	Waiver of Subrogation.	Include a waiver of subrogation by insurer as to the Additional Insured, and its officers, directors and employees.
<b>4.</b>	<b>Certificate of Insurance ("COI")</b>	
2.1	Form	The Insuring Party is to provide the Additional Insured with evidence of insurance by a completed ACORD™ Form 25 (2010/05) <i>Certificates of Liability Insurance</i> prior to the Insuring Party's, or its contractors, commencing operations on the Insuring Party's property, and shall refresh the COI by delivering an updated COI prior to the expiration date of the CGL set out in the previously provided COI.
2.2	Certificate holder	The COI is to be addressed to the Additional Insured at its above address as Certificate Holder.
2.3	Information	The COI shall be fully completed and shall state that the Additional Insured is an additional insured on the named insured's policy; the named insured's coverage, including the additional insured coverage, is primary and does not provide for contribution by the additional insured's other insurance.
2.4	Endorsements	Accompanying the COI shall be a copy of the following endorsements: the additional insured endorsement, the waiver of subrogation endorsement, and the endorsement to give the Additional Insured advance notice of cancellation or material modification of the policy.
2.5	Declaration Page	Accompanying the COI shall be a copy of the policy's Declaration Page and any supplemental page listing endorsements to the policy.
<b>5.</b>	<b>General Specifications</b>	
5.1	Policies	The Additional Insured shall be entitled to communicate directly with the insurance agents of the Insuring Party, its contractors and subcontractors to verify amounts, coverages, deductibles, and other terms of insurance carried by the Insuring Party, its contractors, and their subcontractors. Failure of the Additional Insured to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Additional Insured to identify a deficiency from evidence that is provided shall not be

		<p>construed as a waiver of the Insuring Party's obligation to maintain such insurance. The limits of liability may be provided by a single policy of insurance or by a combination of primary and excess policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein. The Limits set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If the Insuring Party or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to the Additional Insured. If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, the Additional Insured will have the right to require other equivalent forms. Any policy or endorsement forms other than a form specified in this exhibit must be approved in advance by the Additional Insured. If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to this License, shall be reformed to provide the maximum amount of protection to the Additional Insured as allowed under the law. <b>To the extent that _____ Code applies, then the additional insured coverage is to be limited by the statute's limitations.</b></p>
5.2	Insurer Qualifications	<p>All insurance required to be maintained by the Insuring Party must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard &amp; Poor Insurance Solvency Review A-, or better, and authorized to engage in the business of insurance in Texas.</p>
5.3	ISO	<p>These insurance specifications are stated in terms of coverage provided by the specified Insurance Service Office ("ISO") forms. Terms used herein have the meaning specified at the following webpage for the International Risk Management Institute, Inc.:</p> <p><a href="http://www.irmi.com/forms/online/insurance-glossary/terms.aspx">http://www.irmi.com/forms/online/insurance-glossary/terms.aspx</a></p>

## Endnotes

<sup>1</sup> **Additional Resources.** Palley, Delahunt, Sandberg and Wielinski, CONSTRUCTION INSURANCE A Guide for Attorneys and Other Professionals (ABA 2011) (the “ABA Construction Insurance Guide”); 4 Brunner and O’Connor, BRUNNER AND O’CONNOR ON CONSTRUCTION LAW Ch. 11 Insurance (2013); Locke and Comiskey, *A Dozen Things You Wish You Had Known About Commercial Project Insurance*, ACREL PAPERS (Vancouver, 2013); Arthur E. Pape, *The Insurance Provisions of AIA Form Contracts*, ACREL PAPERS (Tucson, 2005) and articles and materials posted on the Insurance Committee’s webpage [www.acrel.org](http://www.acrel.org).

<sup>2</sup> **CIP.** A controlled-insurance program (“CIP”), sometimes called a “wrap-up” insurance program, is used to provide liability insurance coverage for on-site construction participants from a single insurer. Construction participants must agree to be “enrolled” (“enrolled parties”) in the consolidated program and agree to substitute the CIP coverage in lieu of the party’s own insurance coverage. The CIP is “sponsored” (administered) either by the Owner (“OCIP”) or the general contractor (a “CCIP”). The sponsor is responsible for the program’s insurance premium cost, which is reflected one way or another in the Contract Sum (e.g., in the case study, the liability program is a CCIP and the premium cost is passed through to the Owner pursuant to the “cost plus” feature of the A133. In order to implement a CIP, the sponsor must be assured that the all liability risk inducing parties are to the maximum extent possible enrolled parties (subcontractors of all tiers) and that they will comply with the program (e.g., the safety program, loss controls, payroll reporting, claims reporting), and that program cost funding is secure to assure payment of deductible losses and premiums. CIPs may be project-specific programs, multiple project programs or rolling programs. (The case study program is a rolling CCIP). The case study CCIP has a CIP Manual setting out a “coordinated master insurance, safety and claim management program for the Contractor and all Enrolled Subcontractors working on the Project.” The CIP Manual addressed the following: (1) coverages provided; (2) obligations of an enrolled party; (3) identification of types of subcontractors that are not program participants (“non-enrolled subcontractors or non-enrolled project parties”); (4) obligations of non-enrolled subcontractors or non-enrolled project parties, including insurance specifications for insurance to be maintained; (5) details as to the project safety program; (6) if workers comp coverage is to be offered, insurance calculation worksheets facilitating calculation of the subcontractor’s estimated insurance premium using its estimated payroll and payroll reporting forms, and experience rating data; (6) provisions, including insurance specifications, to be included by an enrolled subcontractor in lower tier subcontracts; (7) claims reporting procedures; (8) bid procedures to assure the sponsor that the enrolled subcontractor has deducted from its bid the cost of insurance for coverages within the CIP; and (9) insurance specifications for insurance to be carried by the enrolled subcontractor for risks not covered by the CIP.

<sup>3</sup> **Advantages.** The following are the usual advantages to be achieved in a CIP: (1) cost savings through bulk purchase and reduction in enrolled parties’ contract prices by substitution of the CIP for the enrolled parties’ insurance program (to the extent of the CIP’s coverages; (2) coordinated coverage for the project through the use of a single project-specific insurance policy; (3) elimination of overlapping insurance coverages of the same risk or party to be protected (e.g., additional insureds); (4) enhanced loss control and safety; (5) higher limits; (6) completed operations coverage dedicated to the project through project-specific policies; and (7) reduced risk of nonrenewal or cancellation.

<sup>4</sup> **Implementation Considerations.** The following program implementation considerations are noted in the ABA Construction Insurance Guide at pp. 333:

There are other considerations to bear in mind, of course: (1) CIP programs typically entail high deductibles that, though usually capped at a fixed percentage of payroll, can result in program costs that exceed contractor credits; (2) CIP policies often have premiums that can go up (or down) depending on loss frequency and audited payroll, presenting a potential financial risk to the sponsor; (3) significant collateral can be required; (4) particularly for larger projects, the CIP model requires experienced administration for successful implementation, and this has a cost impact as well; (5) project –specific coverage is usually at least as robust as individual policies but there are exceptions, and it can be less favorable than some larger contractors’ own practice policies, which may not be available if a CIP is used; and (6) realizing cost savings requires that participants fully disclose their insurance costs and that they have sophisticated understanding of that cost.

<sup>5</sup> **Owner’s Pollution Liability Policy.** Additional features: on-site clean-up of pre-existing conditions; on-site clean-up new conditions; third-party claims for off-site clean-up resulting from pre-existing conditions; third-party claims for off-site clean up resulting from new conditions; third-party claims for bodily injury and property damage; third-party claims for non-owned locations; third—party claims for covered operations; third-party claims resulting from the transportation of cargo; business interruption expenses coverage; no construction or site development related exclusions; mold coverage upon COO, illicit abandonment coverage, crisis response and management coverage, diminution in value coverage for coverage B (on-site clean-up of new conditions); \$250,000 in defense costs outside the limit; removal of any condition that the Owner’s mold plan must be followed in order for mold coverage to be provided; contingent business interruption coverage; extend reporting period of 90 months; coverage for lead and asbestos in surface and ground water; and Legionella.

<sup>6</sup> **Scope of Indemnity.** Limited form of indemnity as covers CM’s negligence but not Owner Parties’ contributory or sole negligence. Written indemnity agreement as to CM’s negligence over comes the “Workers comp” bar.

<sup>7</sup> **Parties to Policy: “First Named Insured”; “Named Insured”; “An Insured”; “An Additional Insured”.** Different “insured” terminology is used to define the insured in liability policies and property policies.

**Commercial General Liability Policies.** The following is terminology used in CGL Policies and their endorsements to describe various types of insured parties, each with varying rights and obligations under the CGL Policy:

**Named Insureds.** The Declarations Page of a liability policy names the person or organization who is the insured and such person or organization is the named insured. If more than one person or organization is named in the Declarations Page as an insured, the first person or organization named is the first named insured.

**Automatic Insureds.** Additionally, the liability policy may identify other persons or organizations who qualify as insureds on the basis of their relationship to the named insured. For example, a liability policy on which an organization is the named insured, may provide that the organization's employees are automatically covered and are automatic insureds. The standard CGL policy designates the following persons as automatic insureds: the spouse of an individual named insured; partners and joint venturers in a named insured partnership or joint venture; members and managers of a named insured limited liability company; officers, directors, and stockholders of a named insured corporation or other named insured organization; trustees of a named insured trust; employees and volunteer workers of the named insured business; the named insured's real estate manager; any person having proper temporary custody of a deceased named insured's property; the deceased named insured's legal representative; and newly acquired or formed organizations.

**Additional Insureds.** An "additional insured" is a person other than the named insured who is protected under the terms of the contract. Usually, additional insureds are added by endorsement or referred to in the wording of the definition of "insured" in the policy itself. The reason for including another person might be to protect the other person because of the named insured's close relationship with that person or to comply with a contractual obligation that requires the named insured to do so (e.g., owners of property leased by the named insured -landlords). Under a CGL policy many types of persons or organizations may be added by endorsement as an additional insured, upon approval of the insurer. Many liability insurers issue blanket endorsements specifying certain parties that are "automatic additional insureds" under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. Persons or organizations are routinely added to a CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy. A common error in insurance specifications is to specify that a party is to be added to the named insured's policy as an additional named insured.

**Property Policies.** The following is terminology used in Property Policies and their endorsements to describe various types of insured parties, each with varying rights and obligations under the Property Policy:

**Insured.** In a property policy, the insured is the party identified on the Declarations Page as having an *insurable interest* in the covered property and to whom loss payments will be paid if the property is damaged or destroyed.

**Additional Insured.** Third parties may be designated by endorsement to the property policy as an *additional insured* to protect their *additional interests*.

**Mortgageholder.** Similarly, the standard commercial property policy contains the standard mortgage clause providing that loss payments will be made to the insured and the *mortgageholder* as their interests may appear.

<sup>8</sup> **Commercial General Liability Insurance (CGL).** CGL insurance is termed "third party coverage" insurance as it covers liabilities incurred by the named insured to third parties and excludes injuries and damage to the insured (e.g., it excludes coverage for damage to property "owned, occupied or controlled by the named insured." Covered liabilities or damages arise from an "occurrence" during the policy period which is not excluded by the Exclusions of the policy.

CGL Insurance provides protection to the insured for amounts the insured is legally obligated to pay that are caused by physical injury, personal injury (libel or slander), advertising injury and property damage as a result of the insured's products, premises, or operations, and can be offered as a package policy with other coverages. CGL policies also provide coverage for the cost to defend and settle claims. Commercial general liability policies typically and the ISO general liability policy form, which is the industry standard, is divided into Sections, Coverages, Exclusions, Definitions and Endorsements. The ISO CG policy is set up in the following parts:

- Declarations.
- Section I - Coverages
  - Coverage A. Bodily Injury and Property Damage Liability. (Note "Bodily Injury" and "Personal Injury" are different terms)
    - 1. Insuring Agreement
    - 2. Exclusions
  - Coverage B. Personal and Advertising Injury Liability
    - 1. Insuring Agreement
    - 2. Exclusions
  - Coverage C. Medical Payments
    - 1. Insuring Agreement
    - 2. Exclusions
  - Supplementary Payments - Coverages A and B
- Section II - Who Is An Insured
- Section III - Limits of Insurance
- Section IV - Commercial General Liability Conditions
- Section V - Definitions
- Endorsements

The ISO commercial general liability policy categorizes liabilities into three categories: Coverage A for "Bodily Injury" and "Property Damage", Coverage B for "Personal and Advertising Injury Liability" and Coverage C for "Medical Payments." ISO defines each of these terms in the policy as follows: "Bodily Injury" is "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any

time.” “**Property Damage**” is “physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured.” “**Personal and Advertising Injury**” is injury, including consequential bodily injury, arising out of one or more of the following offenses: false arrest, detention or imprisonment; malicious prosecution; wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services; oral or written publication, in any manner, of material that violates a person’s right of privacy; the use of another’s advertising idea in the insured’s advertisement; infringing upon another’s copyright, trade dress or slogan in the insured’s advertisement. “**Medical Payments**” is coverage for medical expenses for bodily injury caused by an accident (a) on the premises owned or rented by the insured, (b) on the ways next to the owned or rented premises, or (c) because of the insured’s operations.

<sup>9</sup> **Occurrence Policy vs. Claims Made Policy.** An “**Occurrence Policy**” provides liability coverage only for injury or damage that occurs during the policy term, regardless of when a claim is actually made. A claim made in the current policy year could be charged against a prior policy period, or may not be covered, if it arises from an Occurrence prior to the effective date of the policy. A policy written on a “**Claims Made**” basis covers claims made while the policy is in effect, rather than at the time the event causing the injury or damage occurred. Thus, once a policy period has passed without a claim, if the policy is not renewed or a new policy is not issued, the insured will have no coverage for a claim filed after the policy period even if it arose prior to the end of the policy period unless “**tail**” coverage is purchased to cover claims made after the policy expires and within a specified number of years after the policy expires.

<sup>10</sup> **Products-Completed Operations.** “**Products-Completed Operations**” coverage is a major general liability sub-line which provides coverage for an Insured against claims arising out of products sold, manufactured, handled or distributed, or operations which are complete. Claims are covered only after a product has been sold and possession relinquished, or operations have been completed or abandoned by the Named Insured. The coverage applies only to claims for bodily injury and/or property damage and not for the Insured’s failure to complete a job or operation on time. The following is an endorsement to a contractor controlled insurance program on a recently completed office tower that provided post-completion coverage to the contractor:

<p>This endorsement, effective 12:01 A.M. 03/31/2012 Forms a part of Policy GL ____ Issued to (____) By AMERICAN HOME ASSURANCE COMPANY</p> <p style="text-align: center;"><b>COMPLETED OPERATIONS EXTENSION CONTROLLED INSURANCE PROGRAM (MULTIPLE PROJECTS)</b> <i>This Endorsement modifies insurance provided under the following:</i> <b>COMMERCIAL GENERAL LIABILITY COVERAGE PART</b></p> <p>SCHEDULE: All (____) Projects with construction values \$15,000,000 and above.</p> <p>Coverage of the “products-completed operations hazard” is extended for the Projects described in the above Schedule for a period of TEN (10) years or the Statute of Repose, whichever is less (“Extended Completed Operations Period”). The Extended Completed Operations Period will commence when that portion of the project is put to its intended use, or a temporary or permanent certificate of occupancy is issued. The Extended Completed Operations limit of insurance is \$4,000,000 per project and in the aggregate for all projects listed above, which includes the term of the Extended Completed Operations Period.</p> <p>All terms and conditions remain unchanged.</p>
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<sup>11</sup> **Self-Insurance.** “**Self-insurance**” is a system whereby a firm sets aside an amount of its monies to provide for any losses that occur - losses that could ordinarily be covered under an insurance program. The monies that would normally be used for premium payments are added to this special fund for payment of losses incurred. Self-insurance is a means of capturing the cash flow benefits of unpaid loss reserves and also offers the possibility of reducing expenses typically incorporated within a traditional insurance program. It involves a formal decision to retain risk rather than insure it and is distinguished from noninsurance, or retention of risks through deductibles, by a formalized plan or system to pay losses as they occur.

“**Self-Insured Retention (‘SIR’)**” is defined as a dollar amount specified in an insurance policy (usually a liability insurance policy) that the insured elects to self-insure prior to the attachment of the limits of a liability insurance policy. An SIR is generally considerably larger than a deductible and may be utilized to moderate the costs of the purchase of insurance. SIRs generally create no obligation on the Insurer to respond to loss on the Insured’s behalf until the SIR level has been paid. SIRs typically apply to both the amount of the loss and related costs (*e.g.*, defense costs), but some apply only to amounts payable in damages (*e.g.*, settlements, awards, and judgments). An SIR differs from a true deductible in at least two important ways. Most importantly, a liability policy’s limit stacks on top of an SIR while the amount of a liability insurance deductible is subtracted from the policy’s limit. As contrasted with its responsibility under a deductible, the insurer is not obligated to pay the SIR amount and then seek reimbursement from the insured; the insured pays the SIR directly to the claimant. While these are the theoretical differences between SIRs and deductibles, they are not well understood, and the actual policy provisions should be reviewed to ascertain the actual operation of specific provisions.

<sup>12</sup> **General Aggregate Per Premises or Project.** See the ISO CG 25 04 05 09 Designated Location(s) General Aggregate Limit (this form in an annotated format is posted on [ACREL Website](#) – Insurance Committee webpage).

<sup>13</sup> **Post-Completion Coverage.** Contractor should be required to maintain the required CGL policy in effect for up to the maximum time limit as to which a cause of action could be maintained against contractor and the landlord parties for risks covered by the required form of CGL policy. "Completed operations" coverage only covers occurrences during the policy term. Thus on an occurrence policy, for "completed operations" coverage to continue, the Contractor must obtain a "completed operations extension endorsement" purchasing continuation of completed operations coverage after the original policy term. The insurer may be unwilling to issue a completed operations extension endorsement on the original policy after its term without there being also issued a current term CGL policy for the periods covered by the completed operations extension endorsement. The length of time the contractor should be required to maintain Post-Completion Coverage can be, depending on the risk tolerance of the landlord, between two years (a typical state's tort statute of limitations) and ten years (a typical state's statute of repose).

<sup>14</sup> **Sole Negligence.** The ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations is the 04 2013 edition (this form in an annotated format are posted on [ACREL Website](#) – Insurance Committee webpage). It bodily injury and property damage "caused, in whole or in part, by 'your work'" and likely does not cover injuries and damages caused by the sole negligence of the additional insureds as does an earlier edition of this endorsement.

<sup>15</sup> **"Or Equivalent".** If requiring a specific ISO form, specification drafters sometimes provide "or equivalent". What does that mean? What it does not mean is "identical." Make the insurance provider declare what in fact they do have. Get a copy and read it. Make sure it complies with your requirements.

<sup>16</sup> **Owner's and Contractor's Protective Liability Policy ("OCP Policy").** An OCP Policy covers bodily injury and property damage liability arising out of an independent contractor's operations for another party. Although the contractor purchases the policy, the Named Insured is the party for whom it is performing operations. The OCP Policy also responds to liability arising out of the acts or omissions of the insured in connection with the general supervision of the contractor's operations.

<sup>17</sup> **Incidental Design Liability.** The list of prohibited endorsements includes the ISO CG 22 34 04 13 Exclusion – Construction Management Errors and Omissions and the ISO CG 22 79 04 13 Exclusion – Contractors – Professional Liability (these forms in an annotated format are posted on [ACREL Website](#) – Insurance Committee webpage). These endorsements have been posted to the ACREL Website. These endorsements are designed to deflect from the CGL policy liabilities perhaps more properly covered by a professional liability policy. However, a contractor's service likely includes an element of professional services, including incidental design services. Before accepting the additions of these exclusions, consideration should be given to requiring the contractor to carry professional liability insurance or tailoring the exclusions to exclude known professional liability services being provided by the contractor in its scope of its work. The ISO CG 22 79 states that scope of "professional services" excluded by the endorsement "do not include services within construction means, methods, techniques, sequences and procedures employed by (the contractor) in connection with (its) operations in (its) capacity as a construction contractor." Even though the ISO endorsement sets out this understanding of what is and is not excluded by the endorsement, the bounds of the exception are not bright lines. The limits of a CGL policy are generally greater than a professional liability policy and the time to submit claims is longer because CGL policies are generally occurrence-based, unlike professional liability policies.

<sup>18</sup> **Contractual Liability Coverage - An Exception To An Exclusion From Coverage.** See ISO CG 00 01 04 13 Commercial General Liability Coverage Form, Section I – Coverages, Coverage A, Par. 2 Exclusions, Par. 2.b Contractual Liability (this form in an annotated format is posted on [ACREL Website](#) – Insurance Committee webpage). "Contractual Liability Coverage" (referred to by this author as "indemnity insurance") is contained in the CGL policy as an exception to an exclusion from coverage. The exclusion provides:

This insurance does not apply to:

- b. Contractual Liability  
"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This **exclusion does not apply** to liability for damages:
  - (1) That the insured would have in the absence of the contract or agreement; or
  - (2) Assumed in a contract or agreement that is an "**Insured Contract**", provided the "Bodily Injury" or "property Damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
    - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
    - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

An "**Insured Contract**" is defined in the standard CGL policy as:



Paragraph 9 of the Definitions Section is replaced by the following:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an “insured contract”;
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

See ISO CG 24 26 04 13 Amendment of Insured Contract Definition, which when added to the standard CGL policy amends definition “F” to add the following qualifier at the end of the first clause:

, provided the “bodily injury” or “property damage” is **caused, in whole or in part, by** you or by those acting on your behalf.

(This form in an annotated format is posted on [ACREL Website – Insurance Committee webpage](#)). Also see ISO CG 21 39 Contractual Liability Limitation (this form in an annotated format is posted on [ACREL Website – Insurance Committee webpage](#)), which when added to the standard CGL policy by endorsement deletes “F” altogether from the definition of an insured contract; and discussion at Item 9 *Exclusions May Be Invisible* in the article by Bill Locke and Charles Comiskey titled *A Dozen Things You Wish You Had Known About Commercial Project Insurance* posted on the [ACREL Website – Insurance Committee webpage](#).

Coverage For Named Insured As Indemnifying Party. Contractual liability coverage does not make the indemnified person an insured under the policy. *Alex Robertson Co. v. Imperial Casualty & Indemnity Co.*, 8 Cal. App. 4th 338, 10 Cal. Rptr. 2d 165 (1992); *Jefferson v. Sinclair Ref.g Co.*, 10 N.Y.2d 422, 223 N.Y.S.2d 863, 179 N.E.2d 706 (1961); *Davis Constructors & Engineers, Inc. v. Hartford Accident & Indemnity Co.*, 308 F. Supp. 792 (M.D. Ala. 1968); and *Hartford Ins. Group v. Royal - Globe Co.*, 21 Ariz. App. 224, 517 P.2d 1117 (1974). Instead it expands coverage for the named insured. See e.g., *Gibson & Associates, Inc. v. Home Ins. Co.*, 966 F.Supp. 468, 475-77 (N. D. Tex. 1997).

Named Insured Not Insured For All Contractually Assumed Liabilities. CGL policies place conditions precedent that must be satisfied by an indemnified person prior to providing it defense under the indemnifying person’s CGL policy. For example, the ISO CGL (form posted on [ACREL Website](#)) standard policy form provides

If we defend an insured against a “suit” and an indemnitee of the insured is also named as a party to the “suit”, we will defend that indemnitee if all of the following conditions are met:

- a. The “suit” against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an “insured contract”;
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same “insured contract”.

The insured contract provisions of ISO’s CG 00 01 requires as a condition to providing the indemnified person a defense under the contractually assumed liability coverage that the indemnified person and the named insured - indemnifying person are parties to the same suit. An example of a common suit in which this is not the case is suit by an injured employee of the indemnifying party against the indemnified party.

Under the 1996 and later editions of the standard ISO form CGL policy, the cost to defend an indemnified person under the indemnifying person’s CGL policy will be provided within the limit of the proceeds available under the policy as opposed to being on top of the limits as a supplementary payment, unless the indemnified person complies with a lengthy list of conditions precedent.

Named Insured Not Insured For All Contractually Assumed Liabilities. Indemnity insurance does not expand the scope of the liability policy beyond the coverage provided, nor does it extend the limits of liability. Coverage is limited by the policy’s other exclusions (e.g., pollution

liability, insured's breach of contract, and breach of product warranty). Indemnity insurance does not insure the performance of the business aspects of the contract. *Musgrove v. Southland Corp.*, 898 F.2d 1041 (5th Cir. 1990). The court held

Contractual liability has a definite meaning. It is coverage of the insured's contractual assumption of the liability of another party. It typically is in the form of an indemnity agreement.... The assumption by contract of the liability of another is distinct conceptually from the breach of one's contract with another.... Liability on the part of the insured for the former is triggered by contractual performance; for the latter liability is triggered by contractual breach.... CITGO (the owner) concedes that LCE (the contractor) made no indemnification agreement applicable to the loss herein; rather, it complains of LCE's breach of contract. LCE's contractual liability insurance is thus not applicable. LCE did not insure its commitment to secure insurance coverage for CITGO. *Id.* at 1044.

Contractually assumed liability coverage under the standard policy covers "bodily injury" and "property damage" but does not cover "personal injury or advertising injury" liability, unless such coverage is endorsed as additional coverage on to the insured's CGL policy. "Personal and Advertising Injury" is defined in Coverage B to standard CGL policies as "injury, including consequential bodily injury, arising out of one or more of the following offenses:

(i) false arrest, detention or imprisonment; (ii) malicious prosecution; (iii) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (iv) oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; (v) oral or written publication of material that violates a person's right of privacy; (vi) the use of another's advertising idea in your "advertisement"; or (vii) infringing upon another's copyright, trade dress or slogan in your "advertisement."

For example, guard service contracts typically contain a provision requiring the owner to indemnify the guard service from liability for the types of liabilities that are embraced by the term "*Personal Injury*" (libel, slander, defamation of character, false arrest, wrongful eviction, and invasion of privacy). In such case unless the owner has its CGL policy endorsed to cover this indemnity, the owner is uninsured for this contractually assumed liability. Alternatively, the owner could require that it be listed as an additional insured on the guard service's CGL policy.

**No Coverage for Indemnified Person's Sole Negligence.** Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractually assumption of liability for the indemnified person's sole negligence. ISO issued in 2004 an endorsement, CG 24 26 06 04 (form attached to this Article), which modifies the definition of "insured contract" to eliminate coverage for the sole negligence of an indemnified person. Thus, an indemnifying person should review its CGL policy to determine whether it will extend to protect it should it decide to indemnify the other party to its contract for the other party's sole negligence.

<sup>19</sup> **Additional Insureds on Contractor's CGL Policy.** Care should be taken in reviewing the additional insured coverage proffered on behalf of the tenant's contractor. Agents may insist that the additional insured coverage requirement is met by the blanket automatic additional insured provisions in a blanket additional insured endorsement to the contractor's policy. The standard contractor's CGL policy endorsed with an ISO CG 20 33 04 13 Additional Insured – Owners, Lessees Or Contractors - Automatic Status When Required In Construction Agreement provides

<div><div><div><b>Commercial General Liability</b> CG 20 33 04 13</div><div><b>Additional Insured – Owners, Lessees Or Contractors -Automatic Status When Required In Construction Agreement With You</b></div><div><b>A. Section II - Who is An Insured</b> is amended to include as an additional insured any person or organization for whom you are performing operations when <i>you and such person or organization have agreed</i> in a written contract that such person or organization be added as an additional insured on your policy.</div><div>(Bold italics emphasis added.)</div></div></div>
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Since the landlord does not have a contract with the contractor, this language does not extend additional insured coverage to the landlord. In *Westfield Insurance Co. v. FCL Builders, Inc.*, 948 N.E.2d 115, 350 Ill. Dec. 46 (Ill. App. Ct. – First Dist., 2<sup>nd</sup> Div. 2011) an Illinois appellate court faced an analogous situation. A second tier subcontractor's commercial general liability (CGL) insurer brought a declaratory judgment action that it was not obligated to defend or indemnify a general contractor (FCL Builders, Inc.), in a tort action brought by an injured employee of a second tier subcontractor (JAK). FCL contracted with Suburban Ironworks, Inc., which in turn subcontracted with JAK. JAK erected steel on the job site. Unfortunately, about a month into the job, JAK's employee was severely injured when he fell off of a steel beam. The employee filed a tort suit against FCL and Suburban, alleging the breach of various duties of care regarding job site safety that they allegedly owed to the employee. FCL had been furnished with a certificate of insurance issued by JAK's insurance agent that listed FCL as an additional insured under JAK's policy with Westfield. The appellate court held that the general contractor was not an additional insured under the CGL policy purchased by the second tier subcontractor. The Westfield CGL additional insured policy contained an endorsement that amended the definition of "insured" under the CGL policy to include as additional insureds "any person or organization for whom you are performing operations when you and such a person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy". The court held

Even assuming, without deciding, that JAK was "performing operations" for FCL within the meaning of the policy, there is no evidence in the record that JAK had agreed in writing with FCL for FCL to be an additional insured. The policy explicitly and unambiguously requires a direct, written agreement to that effect in order to cover anyone other than JAK under the policy. Because no such written agreement ever existed between FCL and JAK, FCL cannot be an additional insured under the policy and Westfield is not obligated to furnish FCL with a defense or indemnification .... The plain and

ordinary meaning of the term “such person or organization” in this provision is that it refers back to the same person or organization for whom JAK is performing operations, which was mentioned earlier in the same provision, and it does not encompass any other entity. . . . Notably, the provision does not refer to *any* person or organization. By repeatedly using the term “such” instead of “any,” the provision necessarily requires that, in order to qualify as an additional insured, an entity must enter into a direct written agreement with JAK listing them as an additional insured.

*Id.* at 118-119. *But cf. Ryan Companies US, Inc. v. Secura Insurance Co.*, 2011 WL 2940985 which declined to follow the *FCL* case, concluding that there was an agreement other than the policy showing that the parties intended by some implication that the general contractor in *Ryan* be an additional insured.

**20 Additional Insureds – ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.**

The July 2004 version of this CGL endorsement, ISO CG 20 10 07 04, which is the revision immediately preceding the most recent version of April 2013, “includes as an additional insured the person or organization shown in the Schedule, but only with respect to liability *caused in whole or in part by [the Named Insured’s] acts or omissions*; or the acts or omission of those acting on [the Named Insured’s] behalf in the performance of *on-going operations*.” The July 2004 endorsement revision (1) carries forward the major change introduced by the October 2001 revision to this endorsement, the CG 20 10 01, that eliminated from the scope of additional insured coverage liabilities arising out of *completed operations*; and (2) changes from the previously used language “*arising out of the [Named Insured’s ongoing operations]*” to the “*caused in whole or in part by [the named insured’s acts or omissions acts or omissions]*”, thus eliminating coverage for the additional insured’s sole negligence.

**21 Additional Insureds – ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.**

See ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person Or Organization (this form in an annotated format is posted on [ACREL Website](#) – Insurance Committee webpage). This, the most recent revision to the CG 20 10 Additional Insured endorsement, introduces as additional limitation of coverage the following: “the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.” and “the most we will pay on behalf of the additional insured is the amount of insurance: 1. Required by the contract or agreement; or 2. Available under the applicable Limits of Insurance shown in the Declarations.” Thus, in order to avoid the minimum limit becoming the maximum limit of coverage, the insurance specifications will need to clearly specify that the specification of the minimum limit does not result in capping the limit but that any additional limits provided by the policy will be fully available to respond to protect the additional insured.

Also, note that the “04 13” edition limits coverage to injuries and damage “caused, in whole or in part, by: Your acts or omissions; or The acts or omissions of those acting on your behalf.” and does not extend coverage to the additional insured for injuries or damage caused by its sole negligence (see discussion at the annotated form).

**22 Primary and Noncontributing.** See the following: (1) Section IV, Paragraph 4.a Other Insurance – Primary Insurance and 4.b – Excess Insurance to the ISO CG 00 01 04 13 Commercial General Liability Coverage Form (this form in an annotated format is posted on [ACREL Website](#) – Insurance Committee webpage) for provisions in the standard CGL policy establishing that coverage to the Named Insured under the CGL is provided on a primary basis and co-contributing with other insurance available to the Named Insured but is excess under specified circumstances, including if the Named Insured’s other insurance is an additional insured provided on a primary basis; and (2) ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition (this form in an annotated format is posted on [ACREL Website](#) – Insurance Committee webpage).

The use of additional insured status as a risk transfer device is aimed at procuring insurance protection under someone else’s policy rather than having to rely upon on one’s own policy. Additional insured indemnified persons must verify that any “other insurance” coverage to which they have access will not interfere with payment by the indemnifying person’s policy on a primary and noncontributing basis. This is the interplay of the indemnifying person’s CGL policy with the additional insured’s own CGL policy. Assuming both the indemnifying person’s CGL policy and the additional insured indemnified person’s policies are standard form policies, both will declare themselves to be primary insurance unless some modification is effected to eliminate this dual coverage. *Texas Employers Ins. v. Underwriting Members*, 836 F.Supp. 398, 404 (S. D. Tex. 1993). Note that endorsing the indemnifying person’s policy to provide that it is primary does not solve the problem. In fact, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. The standard ISO form policy also provides for *proration* when other insurance is available to the additional insured. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969). Without more, in such cases the additional insured’s desire to have the named insured’s policy respond prior to the additional insured’s own policy is thwarted.

Whether the limits of the Named Insured’s umbrella or excess policy contribute prior to calling upon the additional insured’s “other insurance”, is a question addressed by case law in each jurisdiction. The so-called “Horizontal Exhaustion” rule applies in some jurisdictions and declares a party’s excess coverage to be excess over all “primary” coverages. See *e.g., Kajima Constr. Servs. V. St. Paul Fire & Marine Ins. Co.*, 856 N.E.2d 452 (Ill. App. 2006) – court held that Illinois’ horizontal exhaustion rule required the additional insured’s (general contractor) CGL policy pay prior to the subcontractor’s umbrella policy. Also, the courts of some jurisdictions (Alaska, Arizona, Delaware, Idaho, Indiana, Louisiana, Maine, Michigan, Missouri, Nevada, Oregon, Tennessee, Rhode Island and West Virginia) follow the so-called *Lamb-Weston* rule (named after the first case in which the rule was applied) and hold that all “other insurance” clauses are repugnant to each other. When more than one policy is triggered by a loss, all policies automatically share the loss on a pro rata basis.

The following are common means employed to avoid the protected party’s own policy contributing to the loss covered to the extent of the additional insurance coverage afforded on the protecting party’s policy:

(1) Endorse the protecting party's policy to be primary. The above stated approach of endorsing the protecting party's CGL policy to state that it is primary with respect to other insurance maintained by the additional insured (as noted above most standard CGL policies state they are primary).

(2) Endorse the protecting party's policy to be primary and noncontributory. In addition to requiring that the protecting party's insurance be endorsed to state that it is primary, also requiring that the protecting party's policy be endorsed to state that it is "noncontributory" (an example of this approach is to endorse the protecting party's policy with an endorsement reading "Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the insured named above.") The meaning of the word "noncontributory" in this insurance context is not intuitive. "Noncontributory" does not mean that the coverage afforded by protecting party's CGL policy will not contribute to cover the additional insured's liability, but it means that the protecting party's CGL carrier will not seek contribution from any other "applicable" insurance (e.g., the additional insured's own CGL policy). What is being said is that the protecting party's CGL coverage is primary but contributory—it will respond on a primary basis to pay a covered claim, but will seek contribution from any other insurance structured to respond on a similar primary basis. Unfortunately, the phrase "primary and noncontributory" does not have an established legal meaning in many jurisdictions. Reliance on this approach opens the protected party to litigation with the protecting party's carrier as to what was meant by this endorsement. A protecting party's carrier may balk at endorsing its named insured's policy to be "primary and noncontributory" due to concerns not that it is waiving contribution from the protected party's CGL policy but that it might inadvertently be eliminating contribution by other carriers that have issued additional insurance coverage to additional insured on the protecting party's policy (for example, a general contractor with additional insured status under multiple subcontractors' policies or a building owner that is an additional insured under each of its tenants' policies).

ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition has been introduced in 2013 by ISO to address this approach of endorsing the protecting parties policy to reiterate that it provides "primary" coverage and "will not seek contribution from any other insurance available to an additional insured"; but Provision (2) of this endorsement requires that the written agreement of the Additional Insured (the protected party) and the Named Insured (the protecting party) must provide that the Named Insured's insurance is primary and will not seek contribution from the additional insured's other insurance. Requiring in the written agreement between the Named Insured and the Additional Insured that ISO CG 20 01 endorsement be added to the Named Insured's policy may not achieve the Additional Insured's objective if the written agreement itself does not specify that the additional insured coverage on the Named Insured's policy is "primary and noncontributory" plus contain language defining what is meant by primary and noncontributory.

(3) Endorse the protected party's policy to be excess. The third approach is for the protected party (the additional insured) to have its own carrier endorse the protected party's CGL policy to state that coverage under the protected party's policy is excess to coverage available to the protected party as an additional insured on another person's policy. This works unless the additional insured endorsement has also been issued on a excess liability basis. Because of this possibility, option (3) is not recommended.

In April 1997 ISO revised its "other insurance" clause in its standard CGL policy form to do just that. ISO added in Paragraph 4.b(2) an exception to the declared primary coverage in Paragraph 4.a for additional insurance coverage of the named insured. Thus, ISO revised its standard policy to provide that in a case where the protected party has both its own CGL policy and is an additional insured on the protecting party's CGL policy, then the protected party's CGL insurance states that its coverage is excess to the coverage available through being covered under the additional insured endorsement on the protecting party's insurance.

#### 4. Other Insurance

##### b. Excess Insurance

This insurance is excess over: ...

(2) Any other *primary* insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured *by attachment of an endorsement*.

Note, however, the 1997 language does not apply where additional insured status is not obtained by an endorsement to the protecting party's CGL policy. This provision is not triggered if the additional insured is automatically an additional insured on another insured's CGL policy. In 2013 the "by attachment of an endorsement" language was deleted. The 2013 revision thus ends concern under the standard CGL policy as to whether an additional insured's own CGL policy would be primary and co-contributing with automatic additional insured coverages. Note that the protected party's policy may not contain the 1997 language. If this is the case then the protected party's policy should be endorsed to make it excess over all other coverage available to the protected party in order to achieve the elimination of overlapping coverage and contribution. The following are traps to be avoided by the party seeking protection:

(1) Do not assume that the protecting party's insurance contains standard wording. It might not contain the standard wording that the policy affords primary coverage over other insurance available to the additional insured. In such case reliance on the 1997 ISO language or other endorsement to the additional insured's own policy to state that it is excess over other coverage available to the additional insured may be misplaced. A policy maintained by a protecting party may provide that its coverage of the additional insured is not primary but on an excess basis. In such case, endorsing the protected party's policy to provide that it is excess coverage creates a case where both policies declare them to be excess.

Also, if the protected party's own insurance does not provide (e.g., the pre-1997 ISO policies) for an exception to its contributing with all other policies available to the protected party, nonstandard language in the protecting party's to the effect that it provides excess coverage to an additional insured in cases where the additional insured has available insurance will result in the protected party's insurance being primary and

the protecting party's coverage of the protected party as an additional insured being excess. If this is the situation, then the protecting party should insist on the protecting party's policy being endorsed to provide that it affords primary and noncontributory coverage with respect to the additional insured's own policy coverage.

(2) Do not assume that the protecting party's additional insured endorsement does not have a provision in it stating that the additional insured's coverage is on excess or contributory basis. Even though the protecting party's policy may have standard language to the effect that coverage for insureds is primary and noncontributory for other insurance coverage available to the insured, the additional insured endorsement may have overriding language. The protected party should require in the contract with the protected party that the additional insured coverage to be provided to the protected party will be on a primary, noncontributory basis. Failure of the protecting party to provide such coverage will be a breach of this insurance covenant. Note, some CGL policies provide that they automatically provide primary coverage when required by the contract between the parties (a "primary-when-required" provision). For example the following is a "primary-when-required" provision contained in some CGL policies:

The insurance provided to the additional insured is excess over any other insurance naming the additional insured as an insured, whether primary, excess, contingent, or on any other basis; unless you have agreed in a written contract that such coverage will apply on a primary basis.

(3) Do not forget that umbrella insurance is not primary insurance and that to avoid the protected party's insurance becoming contributing with umbrella coverage or becoming primary to the umbrella policy some additional action is required. In order to ensure that the protected party's own CGL policy is excess and noncontributory to the protecting party's umbrella policy, the protected party should consider (a) having its own CGL policy endorsed to provide that it is not only excess to other primary coverage available to it as an additional insured but also excess over umbrella insurance provided by the protecting party (excess over any insurance available to it as an additional insured, whether primary, excess, contingent, or on any other basis) or (b) striking from the "other insurance" provision in the protected party's CGL policy the word "primary" from the 4.b(2) exception to primary coverage of the protected party's own policy, or (c) having the protecting party's umbrella insurance endorsed to state that it affords primary and noncontributory coverage to the additional insured.

<sup>23</sup> **Contractual Waivers of Claims; Contractual Waivers of Insurer's Subrogation Rights.** "Waiver of claims" is the landlord or tenant waiving its rights or recovery for the acts of the other. "Waiver of subrogation" is the landlord or tenant or both waiving the right of its insurer to be subrogated to the landlord's or tenant's claim. While a waiver of recovery also is a waiver of subrogation (because the insurer has no rights left to which to be subrogated), a waiver of subrogation alone is not a waiver of recovery. Leases may provide that the party whose property is damaged waives claims against the other negligent party and that the damaged party will look to the property insurance for recovery. Further the lease may provide that the right of subrogation of the insurer is waived or that the party obtaining the insurance will also obtain an endorsement to the property policy whereby the insurer waives its rights of subrogation to recovering its insurance proceeds against the negligent party.

<sup>24</sup> **Waiver of Subrogation Endorsement.** There generally is no premium charged by the insurer to issue this endorsement. The endorsement waives the insurer's right or reimbursement for its paid claims as to persons scheduled in the endorsement.

<sup>25</sup> **Amendment of Cancellation Provisions or Coverage Change.** Insurers are now resisting giving notice of cancellation or material modification to persons other than the first Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the first Named Insured. The very purpose of getting the insurer to give this notice to persons other than the first Named Insured is to avoid having to rely on notice from the first Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

<sup>26</sup> **Contractual Liability Limitation.** See ISO CG 21 39 Contractual Liability Limitation, which when added to the standard CGL policy by endorsement deletes paragraph "f" (assumption of tort liability of another) altogether from the definition of an insured contract. (This form in an annotated format is posted on [ACREL Website](#) – Insurance Committee webpage.)

<sup>27</sup> **Amendment of Insured Contract Definition.** See [Endnote 12](#) for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy. See the ISO CG 24 26 Amendment of Insured Contract Definition (this form in an annotated format is posted on [ACREL Website](#) – Insurance Committee webpage) amending the definition of "insured contract" in the CGL Policy to limit Contractual Liability Coverage to tort liability assumed by the Named Insured to bodily injury and property damage caused in whole or in part by the Named Insured.

<sup>28</sup> **ACORD Certificates - Not Reasonable To Rely Upon.** An ACORD Certificate of Insurance and ACORD Evidence of Insurance should not be relied on as being accurate or as properly defining coverages, exclusions, and deductibles. W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* PROBATE & PROPERTY 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, PROBATE & PROPERTY 54 (Jan./Feb. 1995).

Sample of Cases Finding Reliance Unreasonable. *Alabama. Alabama Elec. Co-Op Bailey*, 950 So.2d 280, 284 (Ala. 2006).

*Illinois. National Union Fire Ins. Co. v. Glenview Park Dist.*, 594 N.E.2d 1300 (1<sup>st</sup> Dist. 1992) and judgment aff'd in part, rev'd in part, 632 N.E.2d 1039 (1994) court held the fact that certificate of liability insurance did not contain notation that the additional insured endorsement did not cover the additional insured's negligence did not obligate the insurer to cover the additional insured's negligence; the certificate was issued "for information only"; *Lezak & Levy Wholesale Meats v. Illinois Employers Ins. Co.*, 460 N.E.2d 475 (Ill. 1984) the certificate's disclaimer notice protected the insurer from claims by a meat packing company falling within the exclusion in the cold storage company's liability policy for loss caused by failure of refrigeration equipment.

New York. In *Greater NY Mut. Ins. Co. v. White Kansas*, 776 N.Y.S.2d 257, 258 (N.Y. 2004) the court held that a broker was under no duty to an owner and contractor to provide them with additional insured coverage as was stated in the certificates of insurance, as disclaimers in the certificate made it unreasonable to rely on the certificate.

Washington. *Postlewait Construction, Inc. v. Great American Ins. Co.*, 106 Wash.2d 96, 720 P.2d 805 (1986) finding that an erroneous certificate of insurance listing lessor and certificate holder as an insured did not create a cause of action by lessor against insurer for breach of an insurance contract.

In *TIG Ins. Co v. Sedgwick James of Washington*, 276 F.3d 754 (5<sup>th</sup> Cir. 2002), *aff'g* 184 F.Supp. 2d 591 (S.D. Tex. 2001), the client (Safety Lights) of a delivery service (U. S. Delivery) and the client's insurer (TIG) sued an insurance broker (Sedgwick James of Washington), alleging that the broker had misrepresented on an insurance certificate that Safety Lights was an additional insured on U.S. Delivery's liability insurance policy issued by Lumbermens Mutual Casualty Co. The suit arose after Wright, an independent contractor hired by U. S. Delivery, was injured delivering a steel plate to Safety Light's facility. TIG, Safety Light's liability insurer, defended the claim by Wright and sought reimbursement for the settlement and the costs of defending the suit after Lumbermens denied that Safety Lights was an additional insured on its liability policy. The certificate of insurance certified that Safety Lights was an additional insured on the Lumbermens CGL policy. The Fifth Circuit found that Sedgwick did not have authority, either actual or apparent, to make Safety Lights an additional insured on Lumbermens CGL policy. The court found that the disclaimer on the certificate of insurance (the first ACORD disclaimer discussed above) effectively negated reliance by Safety Lights on the express statement of additional insured coverage in the certificate of insurance, absent the existence of proof of Sedgwick's apparent authority to alter the terms of Lumbermens CGL policy to add Safety Lights as an additional insured. The district court held as a matter of law that Safety Lights could not have reasonably relied on the insurance certificate. The court made the following statements:

An insured has a duty to read the insurance policy and is charged with knowledge of its provisions.... The Court concludes that (the party to be protected), claiming to be an additional "insured" under (the policy) should be held to the same obligation as a named insured to review a policy of insurance on which it seeks to rely, and its reliance solely on the agent's certificate of insurance is not reasonable under the circumstances presented by the admissible evidence. .... [T]here is no admissible evidence to suggest that (the party to be protected), had it made the request, would have been unable to obtain and read the insurance policy in issue.... Moreover, (the party to be protected), the holder of a certificate of insurance, was warned it was not entitled to rely on the certificate itself for coverage. The certificate stated to the holder that the certificate did not create coverage.... The certificate issued by (the insurance broker) prominently stated that it was "issued as a matter of information only" and did not "amend, extend or alter" coverage provided by the listed policies. Had Plaintiffs taken the reasonable step of obtaining a copy of (the policy) ... Plaintiffs would have learned that there was no additional insured coverage in the policy at all. Thus, the Court finds that the Plaintiffs' reliance upon (the insurance broker's) representation of (the party to be protected's) additional insured status was not reasonable. Accordingly, as a matter of law, Plaintiffs' claims for negligent and fraudulent misrepresentation fail.

184 F.Supp.2d at 603-04 (footnotes omitted).

**Benefits From Obtaining A Certificate.** Even though it may not be reasonable to rely upon a certificate of insurance which contains disclaimers, there are benefits to having a certificate and potential detriments from a failure to obtain a certificate. Some courts have held that the party to be protected has waived the protecting party's obligation to procure contractually specified insurance by failing to insist upon being furnished the contractually required certificate. There are benefits arising from the standard certificate, even though it contains disclaimers, which will not obtain in the absence of a certificate. Some of the benefits are the following: (1) the standard certificate sets out important information, which in the event of a claim, may provide a quick means of resolution (e.g., agent and insurer contact information, policy numbers); (2) under particular circumstances a court may be willing to disregard the certificate's disclaimers and find coverage for the party to be protected; (3) an erroneous certificate may provide a basis for recovery on the issuing agent's E & O policy or establish a contractual undertaking by the agent to provide the certificated coverage.

<sup>29</sup> **Business Auto Liability.** A "business auto policy" or "BAP" is a commercial auto policy that includes auto liability and auto physical damage coverages arising from "covered autos"; other coverages are available by endorsement. Except for auto-related businesses and motor carrier or trucking firms, the business auto policy (BAP) addresses the needs of most commercial entities as respects auto insurance. What autos are "covered autos" is identified by a designation on the BAP's Declaration page called a "symbol". There are the following 10 symbols:

Symbol 1	Any Auto
Symbol 2	Owned Autos Only
Symbol 3	Owned Private Passenger Autos Only
Symbol 4	Owned Autos Other Than Private Passenger Autos Only
Symbol 5	Owned Autos Subject to No Fault
Symbol 6	Owned Autos Subject to Compulsory UM Law
Symbol 7	Specifically Described Autos
Symbol 8	Hired Autos Only
Symbol 9	Nonowned Autos Only
Symbol 19	Mobile Equipment Subject to Motor Vehicle Insurance Law Only

<sup>30</sup> **"Any Auto".** If the insured does not own an auto, the insurer may not agree to cover liability from "any auto", but limit coverage to hired and nonowned autos.

<sup>31</sup> **Workers Compensation Limits Required by Law.** Leases and construction contracts frequently require that a party “maintain Workers Compensation and Employers Liability coverage *as required by law*.” Does this verbiage really require coverage? With few exceptions, Texas does not require an insured to carry Workers Compensation insurance. A statement that coverage shall be provided “as required by law” does not require that the coverage be provided.

<sup>32</sup> **Bodily Injury by Accident Limit (Workers Compensation).** The specified amount is the limit the insurer will pay under Part Two, Employers Liability, for all claims arising out of any one accident, regardless of how many employee claims or how many related claims (such as a loss of consortium suit brought by the injured worker’s spouse) arise out of the accident.

<sup>33</sup> **Bodily Injury by Disease.** “Bodily Injury by Disease, Each Employee” is a policy limit within Part Two, Employers Liability, establishing the most the insurer will pay for damages due to bodily injury by disease to any one employee. “Bodily Injury by Disease, Policy Limit” is an aggregate limit of Part Two, Employers Liability, stipulating the most the insurer will pay for employee bodily injury by disease claims during the policy period (normally a year) regardless of the number of employees who make such claims. In the event the policy is for a period longer than 1 year, the limit is reinstated for each subsequent 12-month period.

<sup>34</sup> **Umbrella and Excess Policies.** The following definitions are found in the on-line IRMI Glossary of Insurance and Management Terms <http://www.irmi.com/online/insurance-glossary/default.aspx>. “**Umbrella policy**”: “A policy designed to provide protection against catastrophic losses. It generally is written over various primary liability policies, such as the business auto policy (BAP), commercial general liability (CGL) policy, watercraft and aircraft liability policies, and employers liability coverage. The umbrella policy serves three purposes: it provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims; it drops down and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims; and it provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention (SIR).” “**Excess policy**”: “A policy issued to provide limits in excess of an underlying liability policy. The underlying liability policy can be, and often is, an umbrella liability policy. An excess liability policy is no broader than the underlying liability policy; its sole purpose is to provide additional limits of insurance.”

<sup>35</sup> **No Standard Builder’s Risk Policy.** There is no standard builder’s risk policy, like there is a commonly recognized standard ISO CGL policy. ISO has a builder’s risk policy, but builder’s risk policies are considered to be Inland Marine policies and there is a wide divergence in builder’s risk coverages insurer to insurer. “**Inland Marine**” policies are policies that are customized to the loss sought to be insured, and are designed to provide coverage for special exposures typically associated with the type property at which they are directed and the special valuation methods needed to address the exposure. Construction is recognized as a special exposure. A commonly used Inland Marine policy for builder’s risk coverage is the Commercial Inland Marine Conditions (Form CM 00 01 09 04).

#### Common Errors and Problems

**Early Occupancy.** Most projects have someone that occupies to some limited degree before substantial completion. Any degree of occupancy could invalidate the coverage if the policy isn’t properly worded or endorsed.

**Review of Policy Delayed Until After Construction Commencement.** Like the other insurance products discussed in this article, the actual builder’s risk insurance policy may not, and likely will not, be issued or available prior to commencement of construction! The actual policy in many cases is not issued and delivered for weeks or months after work has begun. As noted above in the discussion of the perils of reliance on an ACORD Certificate of Property Insurance, an ACORD Evidence of Insurance or even an ACORD Binder, the policy itself is the contract of insurance and contains extensive terms and conditions that should be reviewed and approved prior to commencement of work. A great level of “distress” can occur, if an assumed coverage in fact is not included in the policy, despite the best written insurance specifications, and a loss occurs before issuance of the policy. If construction will commence before issuance and delivery of the policy, one avenue may be to have the insurer deliver a specimen policy and specimen endorsements.

**Coverage Amount.** Failure of the policy amount to reflect the full loss exposure is a common error. The contractor’s contract sum is a guide in setting the coverage amount. In projects involving remodeling (especially if the structure is a historic structure) or improvement to an existing building, limiting the coverage amount to the contractor’s contract sum could lead to a significant uninsured loss. Builder’s risk policies will not insure the building envelope unless specifically added. When added, some builder’s risk policies insure the envelope only on an actual cash value, or depreciated, basis.

**Coverage for Architect’s Fees, Owner Supplied Materials, Debris Removal, Full Limit Coverage of Flood and Earthquakes, and Elimination of Ordinance or Law Exclusions.** Many commonly expected coverages are available only through policy endorsement and are not part of the issuer’s standard policy form, such as coverage for the owner’s additional architect’s fees arising out of an insured loss; coverage for owner supplied materials; amending the Ordinance or Law exclusion to cover costs of demolition of the intact portion of a building when a law, ordinance or regulation requires that the entire structure be torn down; endorsement to include full collapse coverage, including collapse resulting from design error; and verification that sublimits (*e.g.*, sublimits for flood and earthquake coverage) are adequate or eliminated.

**Delay Damages.** See BRUNER AND O’CONNOR ON CONSTRUCTION LAW §§ 11:116 Builder’s risk soft cost coverage; Delayed completion and force majeure insurance. Builder’s risk policies typically do not cover damages caused by delays arising out of a covered loss. These “soft costs” can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes. Another endorsement that may be available to insure against a financial distress risk is a delayed completion and force majeure endorsement. This endorsement supplements the risk of covered loss to cover

consequential damage losses due to completion delays and force majeure events not otherwise covered. This endorsement extends coverage for losses due to strikes and labor disputes, changes in law (e.g., building codes, emission standards), acts of God, adverse weather conditions and off-site physical damage to materials or equipment.

<sup>36</sup> **Replacement Cost.** Builder's risk can be provided on either an Actual Cash Value basis or a Replacement Cost basis. Normally, there is little to no difference between ACV and Replacement Cost on a newly constructed structure but the potential exists that an adjuster could allege physical depreciation, especially when covering long-term construction projects. Replacement Cost is the preferred valuation method.

<sup>37</sup> **Typical Exclusions.** An unendorsed builder's risk policy includes a long list of excluded causes of loss, potentially but not limited to:  
Exclusions Regarding Causes of Loss:

- Asbestos removal or other loss arising out of the presence of asbestos
- Changes required by ordinance or law
- Collapse
- Consequential loss, damage, or expenses of any kind
- Contaminants or pollutants
- Cost of making good any faulty or defective workmanship, supplies, or materials, or fault, defect, error, deficiency or omission in design, plan or specification
- Damage by rain, snow, sleet or ice to personal property in the open
- Delay, loss of use, loss of market, fines, penalties, and other consequential losses
- Demolition, increased cost of construction, repair, debris removal or loss of use necessitated by enforcement of law or ordinance regulating asbestos
- Earthquake, volcanic activity, and other earth movement
- Electrical or magnetic injury to or errors and omission in creating, processing or copying electronic records
- Erosion
- Flood, mudslide, sewer backup, and seepage of water
- Freezing
- Fungus, mold and bacteria
- Hostile or warlike actions in time of peace or war
- Infestation, disease, or damage caused by insects, vermin, rodents or animals
- Insurrection, rebellion, revolution, civil war, or commotion
- Loss or damage covered under any written or implied guarantee or warranty by any manufacturer or supplier
- Seizure or destruction of property by governmental authority
- Subsidence, shrinking, settling, cracking and expansion
- Terrorism
- Testing – both hot (introduction of feed stock, catalyst or similar media for processing and handling or commencement of supply to a system) and cold (hydrostatic, pneumatic, electrical, hydraulic or mechanical)
- Unexplained disappearance or shortage
- Wear and tear, gradual deterioration, inherent vice, latent defect, corrosion, rust, dampness or dryness of the atmosphere
- Weight of ice and snow
- 

Exclusions Regarding Types of Property:

- Accounts, bills, currency, money and securities
- Contractor's tools, machinery, plant and equipment
- Existing property
- Land
- Landscaping
- Maps, plans, blueprints, drawings
- Property away from the project site
- Property in transit
- Prototype, developmental, used machinery or equipment
- Radio or television antennas, including lead-in wiring, masts and towers
- Signs
- Transmission and distribution lines upon energization at the completion of testing
- Vehicles or equipment licensed for highway use, rolling stock, aircraft or watercraft
- Water, animals, standing timber and growing crops
- Waterborne property

<sup>38</sup> **Builder's Risk – Insureds.** The owner and all contractors and major subcontractors should be named as named insureds under a builder's risk policy. *Employers' Fire Ins. Co. v. Behunin*, 275 F.Supp. 399 (Colo. 1967); *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32 (Tex. 1974); *LeMaster Steel Erectors, Inc. v. Reliance Ins. Co.*, 546 N.E.2d 313 (Ind. 1989); and *Tri-State Ins. Co. v. Commercial Group W., LLC*, 698 N.W.2d 483 (N.D. 2005). Phrases like "as their interests may appear" should not be included either in contractual specifications, insurance certificates or the policy, as this qualification has been the source of subrogation claims by insurers against an insured under builder's risk policies in cases where there has not been an express waiver of subrogation. *Paul Tishman Co., Inc. v. Carney & Del Guidice, Inc.*, 320 N.Y.S.2d 396 (1971), aff'd 359 N.Y.S.2d 561 (N.Y. 1974); *Turner Constr. v. John B. Kelly Co.*, 442 F.Supp. 551 (Penn. 1976) subrogation against named insured subcontractor permitted even though policy contained a waiver of subrogation endorsement. *But see St. Paul*



*Fire & Marine Ins. Co. v. F. D. Sprinkler, Inc.*, No. 119 021/06, N.Y. Sup. Ct. (Aug. 2009) where the court rejected the insurer's argument that ATIMA language limited the insurable interest of the sprinkler subcontractor to its work as opposed to the consequential damages to 21 floors of the building which arose out of an accidental discharge from a sprinkler head located in a temporary bathroom on the 21<sup>st</sup> floor.

<sup>39</sup> **Insureds – Subcontractors.** While the authors believe that subcontractors should be named insureds on the builder's risk policy along with the owner and contractor, some owners or general contractors decline to do so in order to protect their construction insurance program from loss that could be passed back onto the subcontractor. This stance contradicts the fundamental purposes of builder's risk insurance, which is first-party coverage and therefore not fault based. Although the general rule is that an insurer cannot sue its insured, some courts have made an exception in builder's risk policies where the words "as their interest may appear" follow designation of one of multiple insureds. In *OPI Int'l, Inc. v. Gan Minster Ins. Co.*, 1996 U.S. Dist. LEXIS 22959, 20-21 (S.D. Tex. 1996), the court stated:

An insurer retains the right to subrogate against a subcontractor even where a subcontractor is an insured for a limited purpose, to the limited extent of his own property in the project or "as his interests may appear" in the project. The subcontractor is not protected from his negligence which causes loss to other property beyond his interest and covered by the policy.... The waiver of subrogation rights in the policy only applies to assureds "whose interests are covered by the policy," which was limited in the definition of "other assureds" to contractors and subcontractors with whom [Named Insureds] have entered into agreements or contracts "in connection with the subject matters of Insurance, as their interests may appear." This waiver does not protect [Plaintiff], as a subcontractor, for claims arising from its negligence in causing damage to property owned by the general contractor, unrelated to [Plaintiff's] contract work.

**Installation Floaters.** An "installation floater" usually covers only the work performed by a single contractor, providing protection on that contractor's work as it is being installed, in contrast to builder's risk which covers the project. It is most often utilized by subcontractors who are performing work where there is no builder's risk coverage in place. Even where builder's risk coverage is provided, however, an installation floater is recommended. Should a subcontractor be subrogated against by the builder's risk carrier, the subcontractor's liability insurance will not be responsive for the portion of the subrogated claim that arises out of the subcontractor's own work. Properly designed, an installation floater should be responsive to this exposure. Additionally, should the builder's risk have a large deductible, a well-designed installation floater will provide protection to the subcontractor for the difference between the builder's risk deductible and that of the installation floater.

<sup>40</sup> **Special Form.** Most builder's risk policies are provided on an "all risk" basis. Of course, no policy truly covers all risks of loss. Like other insurance policies, builder's risk policies are subject to a variety of conditions, limitations, exclusions, and deductibles. This form does, however, cover all causes of loss not excluded in the policy. This has the advantage of transferring to the insurance company the burden to prove that a cause of loss was specifically excluded by the policy in order for them to deny coverage.

<sup>41</sup> **Completed Value Basis.** Builder's risk is most commonly issued on a "completed value" as opposed to a "reporting" form. A completed value form policy is issued for a specific construction project with the coverage limits and premium based on the expected value of the project as completed. The insured under a completed value basis form does not run the risk of under or misreporting and the associated contractual penalties that are involved with a reporting form basis policy. A completed value basis policy limit is based on the anticipated completed value of the project. Its premium is roughly 50% of the normal builder's risk rate in recognition of the fact that the average value exposed to loss during the project is approximately one-half of the completed value of the project.

<sup>42</sup> **Non-Reporting Form.** A "reporting form" policy is a single policy covering multiple projects. It is generally less costly than the multiple completed value form policies. A reporting form allows a developer to administer one insurance form as opposed to multiple completed value forms. The insured adds projects to a reporting form as it undertakes new projects. Under a reporting form, the insured is required to file periodic reports of the value of the covered projects. A reporting form increases the insured amount as the value of construction increases. A report is filed with the insurance company, usually on a monthly basis, updating values. Coverage and limit issues can arise if the reports are inaccurate, late or nonexistent. See *American Dream Homes, Inc. v. Insurance Co. of America*, 693 A.2d 517 (N.J. Super. Ct. App. Div. 1997) - the court upheld the insurer's denial of coverage of a project as to which the contractor late filed its monthly report.

<sup>43</sup> **Prohibition of Protective Safeguard Warranty.** "Protective safeguard warranties" are conditions precedent to coverage sometimes built into a builder's risk policy to assure the insurance company of certain protections being provided at the job site. Their inclusion is justified by the insurer on grounds of reduced premium. However, a violation of a protective safeguard warranty voids coverage, potentially even if the loss is not tied to the violated protective safeguard warranty. Typical protective safeguard warranties address the following: emergency response protocols; fencing surrounding the project (e.g., site must be fenced with a cyclone fence at least 6 foot high which must be locked during non-working hours); project lighting during night hours; site surveillance must be maintained by a licensed and bonded watchperson during non-construction hours; and water for fire suppression must be stored on site, or a working fire hydrant must be within 1,000 feet of the structure being constructed. See David S. Gordon, *Insurance Redux: Reprise and Update on the Protective Safeguards Endorsement* ACREL NEWS Vol. 30, No. 1 pp. 10 – 12 (April 2012).

<sup>44</sup> **Minimum Sublimit.** The coverage of a builder's risk policy may be extended to cover various risks with each risk carrying a "sublimit" (limit less than the policy amount) or no sublimit. The insureds should consider eliminating as many sublimits as financially and practicably possible.

<sup>45</sup> **Collapse Additional Coverage Endorsement.** The list of the causes of loss covered by the builder's risk policy should be examined. Many causes of loss are not included and have to be added by endorsement, e.g., many policies exclude collapse and require a Collapses Additional Coverage Endorsement to extend coverage to this cause of loss. See the following cases for discussions of this cause of loss and coverage issues: *Malbco Holdings, LLC. v. Amco Ins. Co.*, 629 F.Supp. 2d 1195 (D. Or. 2009); *Hennessy v. Mutual of Enumclaw Ins. Co.*, 206 P.3d 1184 (Or. Ct. App. 2009) and *130 Slade Condominium Ass'n, Inc. v. Millers Capital Ins. Co.*, 2008 WL 2331048 (D. Md. 2008).

<sup>46</sup> **Debris Removal.** See the ISO CP 00 10 10 12 Building and Personal Property Coverage Form ¶A.4.a Coverage – Additional Coverages – Debris Removal (this form in an annotated format is posted on [ACREL Website](#) – Insurance Committee webpage). The ISO Commercial Property Policy provides coverage for debris removal as “additional coverage” and is limited to 25% of the sum of the paid loss plus the deductible. An additional limit of \$10,000 is made available for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (2) the cost of debris removal exceeds 25% of the paid loss plus deductible. Higher limits for debris removal is provided by using the ISO CP 04 15 10 12 Debris Removal Additional Limit of Insurance endorsement.

<sup>47</sup> **Flood.** Flood losses are commonly excluded from property insurance policies. Flood losses are losses caused by rising waters, back up of storm sewers and storm surges. The Flood Disaster Protection Act of 1973 mandated that federally regulated lending institutions could not “make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified ... as an area having special flood hazards and in which flood insurance has been made available under the national Flood Insurance Act of 1968 without flood insurance in an amount equal to the lesser of the loan amount or the available coverage. 42 U.S.C.A. § 4012a (b) (1). Regulations implementing the flood insurance program are found at 44 C.F.R. pts. 59-78 (2006). Coverage can be obtained for these losses through flood insurance, a difference in conditions policy, or as an endorsement to a property policy.

<sup>48</sup> **Occupancy pre-completion clause.** If the property will be occupied, or arguably occupied (*e.g.*, a tenant building out its premises), the builder’s risk policy should be reviewed to confirm that pre-completion occupancy is permitted and under what conditions. It may be necessary, to have the policy endorsed to permit pre-completion occupancy.

<sup>49</sup> **Ordinance or Law Coverage.** Ordinance or Law Coverage is available by endorsement to a standard property policy to insure against loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings. Many communities have building ordinances that require that a building that has been damaged to a specified extent (typically, 50 percent) be demolished and rebuilt in accordance with current building codes rather than simply repaired. Unendorsed, standard property insurance forms do not cover the loss of the undamaged portion of the building, the cost of demolishing that undamaged portion of the building, or the increased cost of rebuilding the entire structure in accordance with current building codes. Ordinance or law coverage may be purchased using ISO CP 04 05 (form posted on [ACREL Website](#)) to cover the cost above the limit available under the ISO property insurance for cost of construction incurred to comply with an ordinance or law. The base form ISO property insurance limits such coverage to the lesser of \$10,000 or 5% of the policy limits.

<sup>50</sup> **Soft Costs Coverage Added to Builder’s Risk Policy.** See [Endnote 29](#) - No Standard Builder’s Risk Policy for a discussion of delay damages and builder’s risk policy endorsements. Builder’s risk policies typically do not cover damages caused by delays arising out of a covered loss. These “soft costs” can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. These are time element exposures, similar in many respects to business interruption exposures on a completed project, in that the extent of the loss is impacted by the length of the delay. Soft cost coverage responds to additional expenses made necessary by the delay in completion. Coverage is widely variable and it is incumbent upon the insured to describe what is needed. A thorough understanding of the project, contract documents, financing terms, materials and supply agreements, leasing agreements and construction regulations is needed. Coverage is provided on an actual loss sustained basis (*i.e.*, the insured can recover only for the actual loss of income or the actual additional expenses incurred regardless of the limit of coverage purchased). The period of indemnity usually begins a specified number of days after the date when construction is actually completed. The maximum time period commonly ranges up to 12 months. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes. The following is a manuscripted soft cost endorsement to a builder’s risk policy:

#### **ADDITIONAL EXPENSE – SOFT COST COVERAGE**

This endorsement modifies insurance under the following:

#### **BUILDERS’ RISK COVERAGE FORM**

A. The following is added to Additional Coverages:

We cover your additional expenses as indicated below which result from a delay in the completion of the Project beyond the date it would have been completed had no loss occurred. The delay must be due to direct physical loss to Covered Property and be caused by or result from a Covered Cause of Loss. We will pay covered expenses when they are incurred.

## Coverage and Limits of Insurance

**Rents and Rental Value Coverage.** We will pay the actual “loss” of net rental income which results from delay beyond the projected completion date. But we will not pay more than the reduction in rental income less charges and expenses which do not necessarily continue.

**Additional Advertising and Promotional Expenses.** We will pay the necessary additional advertising and promotional expenses which you incur as a result of a delay in the completion date of the Project.

**Additional Insurance Expense.** We will pay the necessary additional insurance expense for extending or renewing coverage which you incur as a result of a delay in the completion date of the Project.

**Additional Interest Expense.** We will pay the cost of necessary additional interest on money you borrow to finance construction or repair which you incur as a result of a delay in the completion date of the Project. This expense may arise from obligations to the interim financier or from cancellation of the permanent financing arrangements, including loan closing costs and remarketing of bonds.

**Additional Leasing/Commission Expenses.** We will pay the necessary additional costs of renegotiating and pre-leasing of the Project, including costs of additional commissions incurred upon renegotiating leases that result from the renegotiation of leases which you incur as a result of a delay in the completion date of the Project.

**Additional Legal and Accounting Fees.** We will pay the necessary additional legal and accounting fees you incur as a result of a delay in the completion date of the Project.

**Additional License, Building Inspection and Permit Fees.** We will pay the necessary additional license, building inspection and permit fees which you incur as a result of a delay in the completion date of the Project.

**Additional Real Estate Taxes/Ground Rents or Other Assessments.** We will pay the necessary additional real estate taxes, ground rents or other assessments which you incur as a result of a delay in the completion date of the Project.

**Additional Professional Fees.** We will pay the necessary additional architectural, engineering, and other professional fees which you incur as a result of a delay in the completion date of the Project.

**Additional Project Administration Expense/General Overhead.** We will pay the necessary additional project administration expenses which you incur as a result of a delay in the completion date of the Project.

The most we will pay for “loss” for all coverages provided by this endorsement is \$ \_\_\_\_\_ in any one occurrence.

<sup>51</sup> **Waivers of Subrogation on a Builder’s Risk Policy.** Subrogation can impact coverage and frustrate the objective of avoiding liability disputes between contractors, subcontractors and the owner. In *St. Paul Fire and Marine Ins. Co. v. Universal Bldg. Supply*, 409 F.3d 73, 84 (2d Cir. 2005), the court said:

A waiver of subrogation is useful because it avoids disruption and disputes among the parties to the project. It thus eliminates the need for lawsuits and yet protects the contracting parties from loss by bringing all property damage under the all risks builder’s risk property insurance. ... These “waiver of subrogation” provisions are intended to cut down the amount of litigation that might otherwise arise due to the existence of an insured loss.

Builder’s risk policies include a provision entitled “Transfer of Rights of Recovery Against Others to Us” or similar wording. The most common language is:

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after the loss to impair them. At our request, the insured will bring “suit” or transfer those rights to us.

Note that in this example, the insured is prohibited from relinquishing its rights after a loss. Beware: some builder’s risk policies prohibit the insured from relinquishing its rights at any time. An endorsement to the builder’s risk policy may be necessary to delete a pre-loss prohibition on the waiver of subrogation in the construction contract.

<sup>52</sup> **When Does Coverage Begin and End?** Coverage should be purchased for more time than the construction is anticipated to take. It may be difficult and/or expensive to obtain an extension if coverage expires when the project is nearing completion. If, on the other hand, completion is accomplished prior to expiration, most builder’s risk policy permit a pro-rata cancellation. Most builder’s risk policies state that coverage ceases upon the first to occur of a variety of circumstances. A significant problem arises when one of those circumstances is occupancy. The typical builder’s risk policy does not include an occupancy loading. That said, no definition of “occupancy” is provided. Preferably, the provision governing when coverage ceases should not include a reference to occupancy or there should be a specific grant for occupancy.

<sup>53</sup> **Contractor’s Pollution Liability.** See the ISO CG 00 01 04 13 Commercial General Liability Coverage Form, Section I, Coverage A, Par. 2.f – Exclusions – Pollution. Par. 2.f is known as the “absolute pollution exclusion” and excludes environmental pollution claims from the CGL policy’s coverage. See *Porterfield v. Audubon Indem. Co.*, 856 So.2d 789, 793 (Ala. 2002) for a discussion of the history of CGL policy’s absolute pollution exclusion.

<sup>54</sup> **ISO.** “ISO” refers to Insurance Service Office, Inc., a public company that acts as a source of information about property/casualty insurance risk. ISO provides statistical, actuarial, underwriting, and claims information; policy language; information about specific locations; fraud-identification tools; and technical services for a broad spectrum of commercial and personal lines of insurance. The form policies and endorsements ISO produces are used in whole or in part by many insurers when preparing their form policies. ISO’s forms are considered the standard form for most insurance forms and its liability policy and property policy and the endorsements thereto are referred to herein as the

“**standard form**”. Number designations for ISO’s standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1986 *endorsement* forms for use in connection with its commercial general liability policy. **Endorsement** is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement’s promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction. Each ISO designation is composed of four elements. The following is an example for the additional insured endorsement form appearing in the Appendix as ISO Form CG 20 26 04 13 Additional Insured–Designated Person or Organization:

CG	20	26	04 13
The “CG” prefix in the endorsement’s designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as “GL” in connection with its <i>comprehensive</i> general liability forms.	The first set of numbers identifies the “group” to which the endorsement form belongs. ISO endorsements are grouped according to their function. In this case the number “20” refers to group 20 which are all of the ISO endorsements that confer additional insured status on particular persons or organizations.	The second set of numbers identifies this endorsement within its group—in this case it indicates which additional insured endorsement is being dealt with. Endorsement 26 within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this Endorsement is titled “Additional Insured–Designated Person or Organization.”	The final four numbers in the endorsement designation identify the endorsement’s edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is “04 13” or April 2013. November 1985 is the initial date of all ISO forms for the “CG” system. The <i>coverage</i> forms have been revised a number of times since then and currently bear an edition date of 04 13. Many of the <i>endorsement</i> forms were revised at the same time as the coverage forms and also bear a 04 13 edition date.

<sup>55</sup> **Insurer Ratings.** BEST’S KEY RATING GUIDE published by A.M. Best Company assigns to insurance companies one of three types of rating opinions, a “*Best’s Rating*,” a “*Financial Performance Rating*” or a “*Qualified Rating*.” In addition Best’s assigns all companies to “*Financial Size Categories*.” More information concerning Best’s and its ratings is available at Best’s website, <http://www.ambest.com>. Insurance specifications in real estate documents will typically specify both the minimum acceptable Best Rating and minimum Financial Size Category for the insurance issuer. For example, “the insurer will be at least a Best’s A: VIII.”

<sup>56</sup> **Admitted Insurer.** Many good insurer choices are “authorized” to do business but are not “admitted” in the state. Also, not every state requires an insurer to be licensed (aka admitted) in that state.

<sup>57</sup> **Status as a Certificate Holder Does Not Create Rights.** As noted below in the review of the disclaimers contained in the ACORD Certificate of Insurance, it “confers no rights upon the certificate holder” but is issued “as a matter of information only”. See for example the case, *Bender Square Partners v. Factory Mutual Insurance Co.*, 2012 WL 208347 (S. D. Tex. – Hou. Div.) holding that the landlord was not entitled to its tenant’s property insurance proceeds in a case where the lease did not provide that the landlord was an insured on the tenant’s policy and did not provide for the landlord to be a loss payee. Prior to Hurricane Ike destroying the premises, a Big Lots retail store, tenant had provided its landlord with a certificate of insurance showing that the tenant had property insurance. The landlord was the certificate holder on the certificate of insurance, but was neither shown on the certificate of insurance as an insured or loss payee. The court rejected the landlord’s argument that it was a either an intended or implied third-party beneficiary of the policy. The court noted that the property policy contained the following seemingly positive provision:

Additional insured interests are automatically added to this Policy as their interest may appear when named as additional named insured, lender, mortgagee, and/or loss payee in the Certificates of Insurance on a schedule on file with the Company. Such interests become effective on the date shown in the Certificate of Insurance and will not amend, extend, or alter the terms, conditions, provisions, and limits of this Policy.

However, neither the policy nor the certificate of insurance named the landlord as an insured. Further, the court determined that the following interlineations following the liability insurance specification in the lease did not also apply to the property insurance specification:

[s]uch policies of insurance shall be issued in the name of tenant and landlord and for the mutual and joint benefit and protection of said parties; and such policies of insurance or copies thereof, shall be delivered to the landlord.

<sup>58</sup> **Producer.** The “Producer” of a certificate of insurance typically is the broker for the named insured of the policies described in the certificate.

<sup>59</sup> **Signed By An “Authorized Representative”?** ACORD Certificates or Evidences of Insurance are issued by a “*Producer*” and are signed by an “*Authorized Representative*”. Neither of these terms is defined on the face of the standard ACORD form. Except for the multiple disclaimers

of authority and accuracy, the ACORD Certificate of Insurance and the Evidence of Insurance are silent on the authority of the Authorized Representative to bind the listed Insurers. The ACORD Certificate of Insurance and Evidence of Insurance do not identify whether the Producer is the agent for the Insured, the agent for the Insurer, or a dual agent for both the Insured and the Insurer. Some courts in determining whether an ACORD form may be relied on despite the disclaimers have drawn a distinction on whether the Authorized Representative is a “broker”; a “soliciting agent”; a “recording agent”; a “dual agent”; a “special agent”; or an “insurer’s agent”. Other courts have held that the insurer is estopped from denying the coverage stated in the certificate or evidence of insurance, if the insurer or a person with apparent authority from the issuer issued the certificate, especially if the certificate does not contain ACORD-type disclaimers. See discussion at 43 AM. JUR.2d Insurance §§ 128 Brokers – Generally; 129 Brokers – Status While and After Procuring Policy. 4 BRUNER AND O’CONNOR ON CONSTRUCTION LAW §11:171 Certificates of Insurance – Generally; COUCH ON INSURANCE §§ 27:20 Act of Soliciting Agent – Insufficient to Justify Reformation; 45:1 Brokers Versus Agents; Definitions and Distinctions; 48:61 Soliciting and Collecting Agents; 48:62 Recording Agents.

Certificate Issued by “Soliciting Agent”. In *TIG Ins. Co v. Sedgwick James of Washington*, 276 F.3d 754 (5<sup>th</sup> Cir. 2002) the Fifth Circuit agreed with the district court’s determination that the issuing agent (Sedgwick) was a “soliciting agent” as opposed to a “recording agent”, and thus did not have actual authority to amend the policy to add Safety Lights as an additional insured. The court noted that the agency agreement between Sedgwick and Lumbermens authorized Sedgwick to solicit insurance on behalf of Lumbermens but permitted Sedgwick to bind Lumbermens only “to the extent specific authority (was) granted in the schedule(s) attached”. Sedgwick had the authority to issue certificates of insurance and binders but lacked the authority to modify the policy itself. Also see for example, *Benjamin Shapiro Realty Co., LLC v. Kemper Nat’l Ins. Cos.*, 303 A.D.2d 245 (N.Y. – 1<sup>st</sup> Dept. 2003) where the court held that a tenant’s insurance broker, which issued certificate of insurance to a landlord which erroneously stated that the tenant’s insurance policy, naming landlord as an additional insured, contained rental coverage insurance for landlord’s benefit, had no liability to landlord on ground that the broker and the landlord had no contractual relationship, privity, requisite to the imposition of liability for negligent misrepresentation.

Certificate Issued by “Recording Agent”. The court in *United States Fidelity and Guaranty Co. v. Travis Eckert Agency, Inc.*, 824 S.W.2d 628 (Tex. App. – Austin 1991, writ denied) held that USF&G was bound by an additional insured endorsement issued by its recording agent even though the endorsement form was not an authorized form.

Certificate Issued by Insurer. Another court, *Horn v. Transcon Lines, Inc.*, 7 F.3d 1305 (7<sup>th</sup> Cir. 1993), faced with an insurer-issued certificate certifying to a certificate holder that the insured had business auto liability insurance, held that the certificate bound the insurer to cover an injury that occurred before the policy was issued, where the list of covered trucking companies did not include the certificate holder. The court concluded that as of the date of the accident, the certificate was the policy and the insurer could not rely on the policy’s disclaimer that “the insurance afforded by the listed policy(ies) is subject to all their terms, exclusions, conditions” as there was no policy at the time of the certificate’s issuance.