ITEM 35
RESIDENT'S SERVICE REQUEST

Resident's Name: Lauren 314/212-
Address: 5220 Temer Way Apt. No. 2134
Request: Water leaking into living room

Day Phone: __________________ Evening Phone: __________________

You are ☑ are not ☑ authorized to enter if no one is home.
Signed: DV Date: 1-2-06 Time: __________
(Resident)

Received by: ______________ Date: __________ Time: __________

1-2-06 12:40 P.M. noon

FOR OFFICE USE ONLY

Serviced by: 314 Date: __________

Result: ____________

Request not completed because: ____________

This request will be completed by (date): ____________

Comment: ____________

Follow up call completed by: ____________ Date: ____________

HAPPY TO SERVE YOU!
ITEM 36
### WESTERN NATIONAL CONSTRUCTION

**OWNER/ARCHITECT/CONTRACTOR (O.A.C.) MEETING NOTES**

**One Pearl Place**

**Meeting Location**
**Project Jobsite**

**Meeting Date & Time**
Wednesday February 4, 2004  9:00 AM

**Job Number**
05-570

These notes will be relied upon as the approved record of matters discussed and conclusions reached during the meeting, unless you send the author a written notice to the contrary within seven days following the date of the notes, or the discrepancies are reviewed during the next meeting.

TOTAL PAGES Including Cover: 11

Please distribute to:

<table>
<thead>
<tr>
<th>Name</th>
<th>Company</th>
<th>Phone</th>
<th>Fax</th>
<th>Cell Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill Cilker, Sr. (WHC)</td>
<td>Cilker Orchards (CO)</td>
<td>408-264-2534</td>
<td>408-264-2534</td>
<td>408-653-2516</td>
<td><a href="mailto:whcilker@pacbell.net">whcilker@pacbell.net</a></td>
</tr>
<tr>
<td>Carl Cilker (CC)</td>
<td>Cilker Orchards (CO)</td>
<td>408-264-2534</td>
<td>408-264-2534</td>
<td>408-499-7195</td>
<td><a href="mailto:ccilker@pacbell.net">ccilker@pacbell.net</a></td>
</tr>
<tr>
<td>Elizabeth Cilker Smith (ES)</td>
<td>Cilker Orchards (CO)</td>
<td>408-264-2534</td>
<td>408-264-2537</td>
<td>n/a</td>
<td><a href="mailto:ecilker@pacbell.net">ecilker@pacbell.net</a></td>
</tr>
<tr>
<td>William Cilker, Jr. (WC)</td>
<td>Cilker Orchards (CO)</td>
<td>408-264-2534</td>
<td>408-264-2537</td>
<td>n/a</td>
<td><a href="mailto:cclkerwjr@aol.com">cclkerwjr@aol.com</a></td>
</tr>
<tr>
<td>Jibu Mehta (JM)</td>
<td>Group M Engineers (GME)</td>
<td>818-313-8680</td>
<td>818-313-8561</td>
<td>818-723-8813</td>
<td><a href="mailto:groupenginers@aol.com">groupenginers@aol.com</a></td>
</tr>
<tr>
<td>Gary Penman (GP)</td>
<td>MVP &amp; Partners (MVP)</td>
<td>(949) 809-3300</td>
<td>(949) 809-3399</td>
<td>n/a</td>
<td><a href="mailto:gpenman@mvearchitects.com">gpenman@mvearchitects.com</a></td>
</tr>
<tr>
<td>John Atherton (JA)</td>
<td>Western National Construction (WNC)</td>
<td>949-862-6234</td>
<td>949-862-6252</td>
<td>n/a</td>
<td><a href="mailto:jatherton@wnc.com">jatherton@wnc.com</a></td>
</tr>
<tr>
<td>Keyston Smith (KS)</td>
<td>Western National Construction (WNC)</td>
<td>408-266-1372</td>
<td>408-266-1374</td>
<td>n/a</td>
<td><a href="mailto:ksmith@wnc.com">ksmith@wnc.com</a></td>
</tr>
<tr>
<td>Dennis Starkovich (DS)</td>
<td>PERT/CPM Management (PCM)</td>
<td>650-851-4800</td>
<td>650-851-4876</td>
<td>n/a</td>
<td><a href="mailto:pertcpm@aol.com">pertcpm@aol.com</a></td>
</tr>
<tr>
<td>James Nichols (JN)</td>
<td>City National Bank (CNB)</td>
<td>925-274-2766</td>
<td>925-274-2758</td>
<td>n/a</td>
<td><a href="mailto:jim.nichols@cnb.com">jim.nichols@cnb.com</a></td>
</tr>
<tr>
<td>Don White (DW)</td>
<td>White Residential, Inc.</td>
<td>425-576-4185</td>
<td>425-576-4186</td>
<td>206-715-6170</td>
<td><a href="mailto:dwhite@whiteresidential.com">dwhite@whiteresidential.com</a></td>
</tr>
<tr>
<td>Gary Love (GL)</td>
<td>White Residential, Inc.</td>
<td>408-266-1372</td>
<td>408-266-1374</td>
<td>503-807-8825</td>
<td><a href="mailto:wrglove@whiteresidential.com">wrglove@whiteresidential.com</a></td>
</tr>
<tr>
<td>Mark Peerboom (MP)</td>
<td>White Residential, Inc.</td>
<td></td>
<td></td>
<td></td>
<td><a href="mailto:mpeerboom@whiteresidential.com">mpeerboom@whiteresidential.com</a></td>
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5210 Terner Way, San Jose, CA 95136  (408) 266-1372  FAX (408) 266-1374

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EXHIBIT

![EXHIBIT](506.png)

**WNC 029299**

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<table>
<thead>
<tr>
<th>No.</th>
<th>Notes</th>
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<th>Action</th>
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<td>.10</td>
<td>IT System</td>
<td></td>
<td></td>
</tr>
<tr>
<td>.11</td>
<td><strong>3rd Party Inspections</strong>&lt;br&gt;04-24.02: ADA Consultant: An ADA Consultant will be selected to review the project. Don White offered to contact Mark Haddix of Marx/Okubo for a quote.&lt;br&gt;05-22: Pending. Don White to follow up.&lt;br&gt;05-28: Don will talk to Mark Haddix and have him provide a price for their services.&lt;br&gt;06-12: Don has provided Clikker Orchards with pricing from Mark Haddix. Pending a review from Clikker Orchards.&lt;br&gt;06-26: Pending.&lt;br&gt;07-10: Clikker Orchards has been presented with a proposal from Mark Haddix but the scope of work hasn't been determined. Don to speak with Mark to finalize a scope of work and price.&lt;br&gt;07-24: Carl Clikker has ADA proposals from Haddix and Wood Associates. Wood Associates bid is cheaper. Carl to check references of Wood Associates. The scope includes inside and outside of all buildings.&lt;br&gt;08-07: A report will be issued from Wood Assoc. Gary Penman at MVP to be issued a copy.&lt;br&gt;08-21: A preliminary report has been issued by Wood Associates. Gary Love has responded to its remarks. Pending the final report from Wood Assoc.&lt;br&gt;09-10: Wood Associates has not issued a final report to Clikker Orchards.&lt;br&gt;09-25: Pending.&lt;br&gt;10-09: Pending.&lt;br&gt;10-23: Wood Associates has issued a complete ADA report. Gary Love to review the report and respond.&lt;br&gt;11-06: Pending Gary Love.&lt;br&gt;11-20: Pending.&lt;br&gt;12-04: Pending.&lt;br&gt;12-18: Pending.&lt;br&gt;1-08: Pending.&lt;br&gt;2-04: Pending. =&gt; Due to review compliance of some items and to confirm with Carl.</td>
<td>04-24-03</td>
<td>DW</td>
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<td></td>
<td></td>
<td>05-22-03</td>
<td>DW</td>
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<td>05-28-03</td>
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<td>2-04-04</td>
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<td></td>
<td><strong>Waterproofing</strong></td>
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<td></td>
<td>1-22.03: Moisture has appeared to seep through the concrete block in a couple locations in the garage. The exterior of the block may need to be re-waterproofed in those locations.</td>
<td>1-22-04</td>
<td>GL</td>
</tr>
<tr>
<td>.12</td>
<td><strong>Recreation Building Outstanding Items</strong></td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>1-05: Light in Tower: Cliker Orchards would like a light to be installed in the tower at the Rec. Bldg. The inside of the tower needs to be painted as well. 2-04: Bath to supply lamp.</td>
<td>1-22-04</td>
<td>GL</td>
</tr>
<tr>
<td></td>
<td>Pending</td>
<td>2-04-04</td>
<td>GL</td>
</tr>
<tr>
<td></td>
<td>1-22.08: Keystone to have Aztec tile repair holes in the marble floor at the Rec. Bldg. 2-04: Pending.</td>
<td>1-22-04</td>
<td>KS</td>
</tr>
<tr>
<td></td>
<td>Pending</td>
<td>2-04-04</td>
<td>KS</td>
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</table>

_Causing today. Should be complete._
### One Pearl Place
#### Meeting Notes
February 4, 2004

<table>
<thead>
<tr>
<th>No.</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>.13</td>
<td><strong>Miscellaneous</strong></td>
</tr>
<tr>
<td></td>
<td><strong>04-03.01:</strong> Building B Parking Lot: Beth e-mailed Ron Eddow from The City of San Jose about dividing the parking for the back lot. She determined that it would be okay however, Mark Peerboom is to follow up.</td>
</tr>
<tr>
<td>04-03</td>
<td>Pending</td>
</tr>
<tr>
<td>04-24</td>
<td>Pending</td>
</tr>
<tr>
<td>05-08</td>
<td>Clilker Orchards has decided they would like to proceed with the mid parking lot gate and garage gate for Bldg. &quot;B.&quot; Mark will talk to Ron Eddow and submit drawings for the proposed Bldg &quot;B&quot; auto entry gates for the Planning Departments Preliminary Review on Monday (5-19-03) or Tuesday (5-20-03).</td>
</tr>
<tr>
<td>05-22</td>
<td>Pending Mark Peerboom.</td>
</tr>
<tr>
<td>05-28</td>
<td>Pending the City of San Jose.</td>
</tr>
<tr>
<td>06-12</td>
<td>Pending the City of San Jose plan review.</td>
</tr>
<tr>
<td>06-26</td>
<td>Pending.</td>
</tr>
<tr>
<td>07-10</td>
<td>Pending.</td>
</tr>
<tr>
<td>07-24</td>
<td>The city of San Jose has reported that their review should be complete by Monday 7-28-03. Pending. Ron for direction.</td>
</tr>
<tr>
<td>08-07</td>
<td>The City of San Jose has reported that the permit was filed as an adjustment but because it is not a location change it is an addition, it should have been filed as an amendment. Ron Eddow originally directed Mark Peerboom to file the application as an adjustment. Mark to contact.</td>
</tr>
<tr>
<td>08-21</td>
<td>Don to have Mark e-mail Ron Eddow.</td>
</tr>
<tr>
<td>09-10</td>
<td>Pending Mark.</td>
</tr>
<tr>
<td>09-25</td>
<td>Keystone to contact Mike Enderby at the City of San Jose to file for a Comprehensive Permit Adjustment form.</td>
</tr>
<tr>
<td>10-09</td>
<td>Pending.</td>
</tr>
<tr>
<td>10-23</td>
<td>The City of San Jose has decided that the current submittal is sufficient. Clilker Orchards to provide a check for the difference in filing fees and Keystone to follow up on the status.</td>
</tr>
<tr>
<td>11-06</td>
<td>Keystone to follow up with Dippa Chundar at the city to determine if the current submittal is accurate and a possible review completion date.</td>
</tr>
</tbody>
</table>
### Meeting Notes
February 4, 2004

<table>
<thead>
<tr>
<th>No.</th>
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<th>Dates</th>
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</tr>
</thead>
<tbody>
<tr>
<td>11-20:</td>
<td>Dippa Chundar at the City has not completed her review of the plans but anticipates completion by 11-24-03. Keystone to follow up.</td>
<td>11-20-03</td>
<td>KS</td>
</tr>
<tr>
<td>12-04:</td>
<td>Pending.</td>
<td>12-04-03</td>
<td>KS</td>
</tr>
<tr>
<td>12-18:</td>
<td>Dippa Chundar is out of town and approval is still pending the City of San Jose.</td>
<td>12-18-03</td>
<td>KS</td>
</tr>
<tr>
<td>1-08:</td>
<td>The Permit Adjustment has been delivered to the Fire Department by Dippa for their review. She is currently waiting to hear back from them. She anticipates a response by the end of the week.</td>
<td>1-08-04</td>
<td>KS</td>
</tr>
<tr>
<td>1-22:</td>
<td>Pending the San Jose Fire Department review.</td>
<td>1-22-04</td>
<td>KS</td>
</tr>
<tr>
<td>2-04:</td>
<td>The City of San Jose, has approved the plan. Keystone to provide them with copies to stamp and to schedule A &amp; D Automatic Gate to begin work.</td>
<td>2-04-04</td>
<td>KS</td>
</tr>
</tbody>
</table>

#### 04-03.03: Site Fencing:
- WNC to find out costs for decretive spears on every other picket, for a 6½' perimeter fence, and a 10' VTA side fence with 2" slant.
- Pending pricing from Larco.
- Pricing Pending from Larco. Discussion was held regarding the perimeter fence at the VTA right-of-way. It was suggested that it be 8' high, black, chain-link with an angled, security over-hand. WNC to secure pricing and specifications.
- Pricing is pending Landscape Pros.
- Cilker Orchards requests that WNC contract a fence company, instead of Landscape Pros., to install the cyclone fence along the VTA.
- Pending a decision from Cilker Orchards and Woodmont regarding a concrete block wall. Keystone to research pricing from Albanese.
- Don White to contact EJ Masonry for a quote on the wall behind Bldg. "B." Keystone to contact Bill Knox for the name of another subcontractor located in Morgan Hill.
- Pending a quote from EJ Masonry.
- A meeting has been scheduled with WNC and Earl Stenfeld from Superior Concrete Products on July 31, 2003 at 10:30am.
- Pending.
- Keystone to contract with Superior Concrete Product.
- Keystone has sent preliminary contract information to Superior Concrete Product.
<table>
<thead>
<tr>
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<tbody>
<tr>
<td></td>
<td>Products. They are currently reviewing their bid and will contact WNC once complete.</td>
</tr>
<tr>
<td>09-10</td>
<td>Cilker Orchards have received pricing for a 6' high wall. Bill to approve the pricing to WNC. Pending.</td>
</tr>
<tr>
<td>09-25</td>
<td>Owner has approved the pricing for the 6' high wall. Keystone to contract and proceed.</td>
</tr>
<tr>
<td>10-09</td>
<td>Superior Concrete has submitted the cobblestone pattern and color. Cilker Orchards would like a color chart and a 3x3 sample. Keystone to order.</td>
</tr>
<tr>
<td>10-23</td>
<td>Cilker Orchards does not approve of the original color selected (Taupe). Superior Concrete to send a color chart and larger sample.</td>
</tr>
<tr>
<td>11-06</td>
<td>An alternate color of Pueblo has been selected and approved by Cilker Orchards. Keystone to follow up with Group M to confirm the status of the submittal for the wall. Bill is currently working with the VTA on an application for an easement on to their property so that the concrete wall can be installed as close to the property line as possible.</td>
</tr>
<tr>
<td>11-20</td>
<td>Group M approval is not needed on the wall. We are currently pending VTA approval of an easement.</td>
</tr>
<tr>
<td>12-04</td>
<td>Pending approval of an easement from VTA.</td>
</tr>
<tr>
<td>12-18</td>
<td>Pending.</td>
</tr>
<tr>
<td>1-08</td>
<td>We should be able to receive a permit for the concrete wall over the counter. We will need engineering calcs., pictures, and shop drawings. Keystone to organize and take down to the city for review.</td>
</tr>
<tr>
<td>1-22</td>
<td>The City of San Jose has rejected our request to build the concrete wall. They have requested us put in a rot iron fence similar to what is installed on the adjoining properties. Bill Cilker to provide the City with pictures of his designs for the rot iron fence.</td>
</tr>
<tr>
<td>2-04</td>
<td><strong>The City has approved the installation of a 7'-0&quot; rot iron fence (Larco) to be installed at the back of the property, tying the adjacent properties together. The fence will have squashed spears pickets at 4&quot; spacing and mesh. There will also be a relief around lampposts.</strong></td>
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<td>10-09-03</td>
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<td><strong>NEW BUSINESS</strong></td>
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<tr>
<td></td>
<td>- Construction Superintendent list</td>
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<td></td>
<td>- Pavers around the fountain have several pavers that are collecting standing water. Some of the pavers are also settling.</td>
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<td>- Pines are also missing from the tops of pavers in some areas.</td>
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<td></td>
<td>- Rec. Bldg. Front door to close properly.</td>
</tr>
</tbody>
</table>

Spreadsheet for MDE change order breakdown.
Project Schedule

10-09-01: PCM/WNC Project Schedule
04-03: WNC and White Residential will keep Clker Orchards posted on schedule status. Gary Love will report on the current schedule updates.

2-04: Yesterday we began walking mechanical 3rd/fl. sec. #5 with Ferdie. Bob Clark to walk cosmetic. We are currently on schedule. Marlon is re-cleaning between mechanical walk and cosmetic walk. Sec. #5 to be turned over March 1st and the Owner to accept Feb. 27th. All appliances are being installed so we can get meter releases.

Critical Items: 
- Joe has completed 100% of his current punch list of exterior items.
- Joe and Dawne to review units 106,107, 207 Bldg. "A" so those units can be turned back to management.
- Bldg. "A" stair to be reviewed because it is leaking worse than before. The concrete will be removed, the problem fixed.
- The F-units in Bldg. "B" have no way to drain rainwater accumulating at the floor doors. MVP has just provided a new detail to release the water in this area.
- Do's units must be blown out and down in the areas where floor units are not.
- Caps for planters to be put on ASAP. They will be delivered March 15th. Reminding on 26th.

Weekly

- Mark in sect. #7. Mechanical walk complete. Currently cleaning for final walk. Turn over should be Monday or Tues.
- Elec. units to be completed today for sect. #8.
- Complete today sect. #8.
- Try to finish upper lot by the end of next week.
- Striping parking lot next week.
- LA/Snow staff to be left for management. Management to determine what they want.

GL

- Marlin in sect. #7. Mechanical walk. Complete. Currently clearing for final walk. Turn over should be Monday or Tues.
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<tr>
<td>.02</td>
<td><strong>Architectural/Structural Issues</strong>&lt;br&gt;1-08: Rain Water Drainage: The scuppers on the decks are dripping water on the paint and staining the walls. The run off from these scuppers should be reviewed.&lt;br&gt;2-04: Ponding -&lt;br&gt;2-04: Owners to meet with Dimetrios Painting to get a cost and scope for the new paint in this section.</td>
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<td>Dates</td>
</tr>
<tr>
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**Landscape Punch List:** Jim Chadwick to punch the landscaping around the Rec. Bldg, Bill Sr. to sign off after punch of Rec. Bldg, and the units.

- **9:25:** Pending
- **10-09:** Bill is concerned about the location of the fencing at the Rec. Bldg. The sprinklers are spraying the fence and water is running everywhere and the grass is receiving too much water. Gary Love to fix.
- **10-23:** Pending Gary Love
- **11-06:** Rec. Bldg. fence/ sprinkler repair pending Gary Love. Cilker Orchards to provide all landscape maintenance service for One Pearl Place.
- **11-20:** Gary to have Landscape Pros repair the location of the sprinklers vs. the location of the blue stone deck. This is currently not installed per plan. Bill Cilker Sr. is currently working on punching the landscaping around Bldg. "A" and the Rec. Bldg. He believes that the grass located at the pool area from the decorative gate to the fountain is too high. He is concerned that in a hard rain the water could flow into the pool.

**Landscape Changes:** Cilker Orchards will resubmit to the City of San Jose for the landscaping changes that have been made. They plan to add more evergreen plants to the current Cotton & Taniguchi plans.

- **1-22:** Pending.

**2-04:** Pending.

- **Bill:** We are making quite a bit of changes around the Rec. Bldg. and the landscaping of the entire property in general.
- **Eastern landscape** is doing quite a bit of work around the Rec. Bldg. near the new exit.
- Possibly with hold some changes from Martin's final plans.
ITEM 37
FIELD OBSERVATION NOTES NO. 2

Date: March 11, 2004
Job No.: 97-229

Project:
One Pearl Place
San Jose, California

Attendees:
Cilker Orchards (CO)
Bill Cilker
Carl Cilker
Elisabeth Smith

Owner:
Cilker Family Trust
1631 Willow Street, Suite 225
San Jose, California 95125

White Residential (WR)
Don White
Gary Love

McLarand, Vasquez & Partners, Inc. (MV&P)
Ernie Vasquez
Gary Fenman

OBSERVATIONS:

2.1 At Unit 117 in Building B, it appears that the deck edge flashing at the private deck is partially embedded in the exterior cement plaster. This needs to be corrected so that moisture can weep out from behind the edge flashing and not be restricted by the plaster.

2.2 It has been observed that the utility room closets on the Third Floor private decks are subject to a lot of rainwater in locations where there is no roof over the deck. It is recommended that those doors receive full weather stripping at all jambs, heads, sills and paired door jambs. It is further recommended that a waterproof door sill be added at those doors to keep water flowing on the deck surface out of the closets.

2.3 There was much discussion during the job walk regarding decks and catwalks that are not protected by a roof. These surfaces can develop a rain water flow that exceeds the capacity of the sheet flow scupper and gutter. MV&P noted that the small gutter and scupper were designed to allow the rain water to sheet flow over the edge in heavy rain. However, it was apparent that the water that exited out of the scupper dropped on the scupper below, causing splashing and staining of the adjacent surfaces. To mitigate this issue, MV&P suggested connecting the small gutters to adjacent, existing downsputs. If there was no existing downspout adjacent to the small gutter, MV&P did not recommend adding a new one.

2.4 It was observed that a catwalk scupper was placed directly above a foam trim piece that protrudes from the arch adjacent to Unit 314 of Building B. This caused
splashing and staining. MV&P recommended removing the foam trim and patch and paint the exterior cement plaster exposed when the trim is removed.

2.5 At the Third Floor carwaks of Building B, it was observed that the “Hardrock” concrete deck topping had pulled away slightly from the carwalk curb during curing. Carl Cilker, Gary Love, and Gary Penman discussed the merits of filling that gap with a flexible non-drying caulk or sealant. The moisture that got into the gap would travel to the waterproof decking below the concrete and eventually wort out of the deck at the snoppers. However, the moisture could move at a slow speed and may sit for awhile under the concrete deck. Carl, Gary Love, and Gary Penman agreed that filling the gap would make a good water proofing system better. Carl authorized Gary Love to have the gaps thoroughly cleaned and caulked. Carl also requested that the caulk be added at the gaps between the dwelling unit exterior wall and the “Hardrock” deck topping.

2.6 It was observed that the exterior cement plaster was showing a lot of “spider web” cracking. According to Gary Love, a lot of the cracks were very recent, and some he had not seen before. Gary Love was going to pursue this issue with the contractor and subcontractor. MV&P reviewed the paint specification for exterior cement plaster to see if elastomeric paint was called for. The specs called for 100% acrylic paint (see attachment).

2.7 Gary Love pointed out to Gary Penman that the two trash enclosure rooms in Building B were constructed with an opening to the exterior stair leading down into the garage lobby. Gary Penman explained that this configuration was not intended. It was agreed that the opening would be closed using steel studs, finished on the outside with exterior cement plaster to match adjacent walls and finished on the inside with two layers of 5/8” thick Type “X” gypsum board. The new wall should extend from the underside of the concrete podium deck to the underside of the concrete stairway, completely enclosing the trash enclosure room.

2.8 Ernie Vasquez offered to have MV&P participate in a follow-up “punch list” walk that would more thoroughly review the buildings prior to final completion. Bill Cilker told Ernie that he would let him know if that would be necessary. No time or date was established.

Distribution:
Attendees
ITEM 38
April 21, 2004  C.Cilker Building B walk-through, 4/20/04.
Gary Love, Joe Marler, Bob Clark, ECS, CAC

Notes with Photographs

This is a listing of the last 4 digits of the picture number and then a short description of the subject of the photograph.

✓ 1734 the vertical of paint edge of the dark brown is at an angle. This needs to be squared off.
✓ 1735 the soil to the right of the downspout has receded. Is this a sign of a water leak or excess water.
✓ 1736 rotate this picture 90 degrees to the right. It shows the gap between the concrete stairs and the stucco siding to the left. This void needs to be caulked.
✓ 1737 the papers on the technique to be cleaned up of all the stucco and paint
✓ 1738 stairs facing Pearl Avenue have stucco, paint residue, and other foreign material that needs to be cleaned off.
✓ 1739 similar stair problem on Pearl Avenue side of the building.
✓ 1740 stucco repair and paint needed under the eaves.
✓ 1741 the paver walkway is not centered to the stairs. Elizabeth remembers talking to Keystone about the paver installation crew addressing this problem. She believes Keystone was addressing this problem at one time.
✓ 1743 stucco material on stairs needs to be removed
✓ 1744 pavers need to be cleaned up and foreign material on stairs.
✓ 1745 stairs need be cleaned.
✓ 1746 HVAC refrigerant lines should be concealed and protected.
✓ 1748 the concrete post needs to be finished where meets the brick pavers.
✓ 1749 same as 1748.
✓ 1750 the paint at the gate mounting needs to be touched up.
✓ 1751 foreign material on stairs these to be cleaned up.
✓ 1752 properly finished a concrete post where it meets the stairs.
✓ 1753 same as 1752.
✓ 1754 clean-up foreign material on the face of the stairs.
✓ 1755 this walkway is properly aligned with the concrete stairs. This one was installed correctly.
✓ 1756 fill and finish the concrete below the storm water trapped where this area meets the top stair.
✓ 1757 clean-up foreign material on stairs.
✓ 1758 clean up foreign material on stairs.
✓ 1759 properly finished the stucco trim were at meets the papers at the bottom of the entry door.
April 21, 2004 C.Cilker Building B walk-through, 4/20/04.
Gary Love, Joe Marler, Bob Clark, ECS, CAC

1760 same as 1759.
1761 stucco on stairs.
1762 repair concrete curb so it matches other planters. Some of the planters along Pearl Avenue have been curbing next to the sidewalk and some do not. Shouldn’t all of them be the same?
1767 dark paint should be a straight line where it meets the lighter color paint at the second-floor landing.
1768 Utility room till doors aren’t square. Correct bent louvers on the wall above the utility closet.
1769 there was considerable debris on the pavers in the interior of sections 4 and 5 of the B building. There is also considerable debris on the second and third for catwalks of Section 4 and 5 of the B building. They will clean up.
1770 there was excess water between the planter and the stucco wall on the right hand side of this photograph. The openings in the downspout that are supposed to drain this area were plugged.
1771 The walls floors and trash chute openings in each of the B building trash rooms are unfinished. Gary explains that this is per the contract. Regardless, these rooms need the cleaned up, painted, and put in a more presentable condition. There should be trim at the bottom of the sheetrock where it meets the concrete and the room should look as though it’s not been forgotten.
1776 the keyhole openings in the lower side wall of the third floor catwalks are very ragged. The edges should be cleaned up, squared off, painted and finished so that they look appropriate for the building. At the moment they look for very poor.
1777 and 1778 we need to make a decision about the correction of the scuppers over the archway trim in B-4.
1782 there’s a need for repair of the concrete slab where it meets the wall below the iron railing at unit 231.
1786 the pavers need to be cleaned up to get rid of the dust from the stucco, paint, dirt, etc..
1787 the foam trim is missing at the top edge of the utility room doors.
1791 this detail shows the sloppy finish work at the drain openings for the third floor catwalk.
1792 the flashing for the roof should be reshaped so they lay flat against the roof.
1793, 1794, 1799 all show the rough edges and finish work around the drains from the third floor cat walk.
1775 we should correct the handrail on the B building stairs that lead from the podium level down to the garage. The design of the handrail changed because originally the wall behind the screen been portion was open to the trash room. Since the wall was closed there’s no further need to have the vertical members of the handrail.
1773 we need to identify all exposed and unconnected irrigation risers and drains and protect them so they’re not a tripping hazard.
Other Notes from the Walk.

1. On the North East corner of B, check the paint to be sure that all of the edges or straight and, where possible, that paint separations occur at architectural elements.

2. There's some settlement of next to a downspout at the Pearl Avenue side of the NE corner of B which may indicate either settlement of the soil or a leak of the storm drain.

3. On the stairways that lead the from the street, check the edges of the concrete stairs where they meet the adjacent siding where the stucco was applied to be sure that the joint between the stairs and the siding is adequately finished. In some instances there needs to be caulking applied to fill the gap between the stairs and the siding.

4. On all of the staircase is that face Pearl Avenue, and staircases elsewhere in the project, there is excess stucco and of a white residue may be left from paint. We need to make a good effort to remove this and to get the concrete stairs back in the condition where they are presentable. If you look at the stairs inside the stairwells were they were enclosed and not exposed to the stucco, the color and the condition of the concrete is much better and the aggregate stripes that appear at the edge of the stairs are much sharper and clearer looking. This doesn't exist on the concrete stairs that are on the outside of the structure.

5. On the Pearl Avenue side, the paver walkways that lead to the stairways at the street are misaligned with the stairway. Elizabeth believes there was some discussion with Key about this and getting the paver contractor to correct this problem.

6. To the right of the main archway entrance on the Pearl Avenue side of the B building there is a wire protruding from the third floor stucco. This should be removed.

7. Check the flashing at the bottom of the concrete wall where it meets the landscape. Many of these flashings can slide and out of position.

8. The sheet metal that allows the weeping from the paver decks doesn't extend far from the stucco wall beneath it so the dripping water hits the wall and not the ground. Question, is this the proper design or should the water discharge be extended away from the wall so it doesn't stain?

9. The overhead lights in the dark corridors, especially for first floor of B-4, should remain lighted during the day so that it doesn't appear so dark.

10. Trim out the bituthane on the Pearl Avenue side of the entrance archway.

11. Put closers on the iron gates. Also, check the doorstops for the iron gates. They appear to be inadequate.
12. Clean all of the gutters on the 2nd and 3rd floor cat walks. There's a considerable amount of construction debris in the gutters.

13. There's a water leak in the ceiling in front of the second floor elevator.

14. Finish out the stucco where it meets the doorjamb for the trash room on the second floor.

15. The second floor concrete slab to the right of the elevator door needs to be finished.

16. The iron railings need to be cleaned and some of them need to be repainted because the stucco guys used them for scaffolding support. The railings got dinged up in the process.

17. Unit 231. The concrete at the right hand edge next to the utility closet needs to be repaired.

18. All weep holes need to be cleaned and we need to be sure they operate properly.

19. There's still water dripping off the foam trim applied in the archways of B4.

20. All of the walkways need to be cleaned.

21. Finished out the bottom of the utility closet door jamb on Unit 236.

22. Check the cleanup of the windows in the stairwells.

23. Some of the outdoor lights are on during the day of the third floor level which shouldn't be.

24. The 3rd floor exit sign is inadequately mounted so that its back and ankle in these to be squared up and firmly attached. Gary thought this was hit by a tenant moving in. That may be true but it still needs to be fixed.

25. The low electrical lights attached to the planter walls need to be mounted so they're secure. There are only two screws that mount the lamp to the concrete at the top of a the planter wall. A spacer and another screw at the bottom of the electrical box are needed so a more solid connection is formed.

26. Check the air-conditioning condensers and the interior courtyard units a to be sure the metal flashing is caulked properly to the stucco wall.

27. Confirm the we're agreed on putting an awning in front of the elevator door on the third floor and also check to be sure that the elevator buttons have been replaced with a weatherproof type.

28. Check the bituthane on the third floor to make sure that the corner trim has been carried out properly.
29. On the south side of the B building at the loft windows on the exterior side there are some nails or pins or something that is attached to the outside of the building just above the windows. This may have been where the "For Lease" sign was attached. If these connection points aren't going to be used should be removed.

X

30. On the south side where the decks are protected with the glass windows, the glass needs to be cleaned up.

X

31. Check the concrete top of the planter walls for staining.

32. Unused water supply and drain risers originally intended for landscape may be a tripping hazard. These should be mapped and any that we don't intend to use should be cut off, concealed or otherwise protected.
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CONSTRUCTION CONTRACT

THIS CONSTRUCTION CONTRACT (the “Contract”) is made as of the 1st. day of July 2000, by and between CILKER APARTMENTS, LLC., a California corporation (the “Owner”) and WESTERN NATIONAL CONSTRUCTION a California corporation (the “Contractor”), with respect to the project commonly known as the ONE PEARL PLACE APARTMENTS (the “Project”) located on that certain real property in the County of Santa Clara legally described on Exhibit A attached hereto and by this reference made a part hereof.

RECITALS:

Owner is the owner of the Project (as hereinafter defined). Owner desires to engage Contractor to be the general contractor for the construction of the improvements (as hereinafter defined) of the Project including, without limitation, engaging Contractor to construct all onsite buildings and common areas, and certain street improvements, sewer system, water system, storm drains and other offsite improvements as required by the Plans and Specifications (as hereinafter defined).

NOW, THEREFORE, in consideration of the foregoing Recitals and the mutual promises and covenants contained herein, Owner and Contractor agree as follows:

I. DEFINITIONS

For the purposes of this Contract, the following terms shall have the meanings set forth below:

“Accepted Bid” shall mean the meaning given such term in subsection III.7.1.

“Application for Payment” shall mean the Application for Payment attached hereto as Exhibit D.

“Architect” shall mean McLARAND VASQUEZ & PARTNERS, INC. and any other architect for the Project designated by Owner.

“Budget” shall have the meaning given such term in Section III.6 hereof.

“Business Day” means Monday through Friday of each week except that a holiday on which businesses in Santa Clara or Orange Counties, California are generally closed for business or a legal holiday recognized as such by the Government of the United States shall not be regarded as a Business Day.

“Change Order” shall mean any change in the Plans and Specifications, the cost of the Work, the Progress Schedule or any portion of the Contract Documents relating to the construction of the Project, all as more fully set forth in Article VI.

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"Complete" or "Completion" shall be deemed to have occurred on the date on which the conditions set forth in subsection VII.1.1 hereof have been met and Contractor has received, or is entitled to receive, under the terms of this Contract, the last disbursement of Retainage applicable to the Construction Service Fee; provided, however, that if Contractor's right to proceed under this Contract has been terminated during the Construction Period pursuant to Section IX.3 or IX.4, "Completion" shall be deemed to have occurred on the date on which, in Owner's reasonable judgment, all of the conditions set forth in subsection VII.1.1 have been met and all Punch List Work has been fully performed.

"Completion Date" shall mean the date on which the work is Complete.

"Construction Period" shall mean the period commencing with the start of site grading and ending on the Completion Date.

"Construction Reports" shall mean reports in form and substance reasonably satisfactory to Owner to be submitted by Contractor to Owner pursuant to subsection III.8.3.

"Construction Services Fee" shall have the meaning shown on Exhibit B attached hereto.

"Consultants" shall mean such architects, engineers, consultants or designers for the Project (if any), as designated by Owner.

"Contract" shall mean this Construction Contract, as the same may be amended, modified or supplemented from time to time.

"Contract Documents" shall mean, collectively, this Contract, all Change Orders, all Exhibits attached or to be attached hereto, the Plans and Specifications and the Drawings, as the same may be amended, modified or supplemented from time to time.

"Contract Modification" shall mean a written amendment to this Contract signed by both parties hereto.

"Contractor" shall mean the person or entity who has a direct contract agreement with the Owner to perform any of the Project Work and all of his or its employees. The term "Contractor" is referred to throughout the Contract and Contract Documents as if singular in number and masculine in gender and means a Contractor or his authorized representative. By executing this Contract, the Contractor attests that he is thoroughly knowledgeable of the Work and related work by other trades and contractors and, as such, certifies that he has carefully examined the Contract Documents, Project Site, Governmental Requirements and is aware of and understands the availability of manpower, materials, tools, utilities and equipment required for the Work. Contractor represents to Owner that prior to executing this Contract, the Contractor has resolved to his satisfaction, all known errors, omissions, deficiencies in codes, ordinances and regulations, impractical details and/or conflicts between the Contract Documents, his Work and the work of other trades being a part of or otherwise affecting his Work.

"Contractor's Breach" shall mean any acts or omissions of contractor constituting a breach of Contractor, its officers or employees of any of Contractor's duties or obligations hereunder, including, without limitation, Contractor's negligence or willful misconduct in

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connection with the performance of the Work, Contractor's negligent supervision of the portion of the Work performed by Subcontractors, any default by Contractor pursuant to Contractor's failure to perform its obligations under any Subcontract.

"Day" shall mean a calendar day.

"Drawings" shall mean the drawings identified in Exhibit H attached hereto.

"Governing Agencies" or "Governing Agency" shall mean any governmental or quasi governmental agency or agencies having jurisdiction over the Work or any portion thereof.

"Governmental Requirements" shall mean all codes, statutes, ordinances, laws, permits, orders, and any rules and regulations promulgated thereunder of all Governing Agencies.

"Improvements" shall mean the improvements to be constructed on the Property as set forth in the Plans and Specifications, as the same may be amended, modified or supplemented from time to time pursuant to the terms hereof.

"Installment Amount" shall mean, as the context may require, the monthly installment of the Construction Services Fee to be paid to Contractor, as set forth in Exhibit B.

"Knowledge" and the terms "recognize" and "discover" and their respective derivatives, and similar terms in the Contract Documents, as used in reference to the Contractor, shall mean that which the Contractor knows (or should know) recognizes (or should recognize) and discovers (or should discover) in exercising the care, skill and diligence required by the Contract Documents. Analogously, the expression "reasonably inferable" and similar terms used in the Contract Documents shall be interpreted to mean reasonably inferable by a Contractor familiar with the Project and exercising the degree of care, skill, and diligence required of the Contractor by the Contract Documents.

"Lender" shall mean anyone providing financing to Owner to defray in whole or in part the costs of the cost of or construction of the Project, or any portion thereof.

"Line Items" shall mean the cost accounting categories set forth in the Budget for each of the construction trades applicable to the construction of the Improvements. In no event shall the term "Line Item" or "Line Items" include the contingency category in the Budget.

"Mechanics" shall mean anyone involved with the Work at the instance or request of Contractor including without limitation all Subcontractors of Contractor AND ALL SUBCONTRACTORS OF ANY SUCH Subcontractor as well as all workmen engaged by Contractor or Subcontractor in connection with the Work, and all of their respective Mechanics.

"Milestone" shall mean a date established in the Construction Schedule as a specific point in time at which the advance of the Work can be measured.

"Notice of Completion" shall have the meaning given such term in California Civil Code Section 3093.

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“Notice of Termination” shall mean a notice of termination of this Contract delivered by Owner to Contractor pursuant to Article IX.

“Owner” shall mean the entity identified in the Contract, or its successors and assigns. The term “Owner” shall mean the Owner or its designated representative (the terms “designated representative” and “authorized representative” are used interchangeably in this Contract and have the same meanings). Contractor shall look solely to the property of Owner for the payment of any claims against Owner and for performance of any obligations of Owner for the payment of any claims against Owner and for performance of any obligations of Owner hereunder. The shareholders, members, agents, employees or partners of Owner, and any person or entity holding any interest in the Owner, as the same may from time to time appear, jointly and severally, do not have any personal liability for obligations entered on behalf of Owner. For purposes of this Contract, anytime the approval of Owner is required, Contractor shall submit all requests through the Reviewing Representatives. From time to time, however, the Owner may elect to sell, lease, mortgage, or otherwise transfer any of the Owner's interest in any portion of the Project site, not including any part of the Project site covered by the buildings (“Site Conveyance”). In connection with any Site Conveyance, the Contractor shall execute and deliver to the Owner and shall cause any Subcontractors to execute and deliver to the Owner such documents for the benefit of the Owner, any purchaser, and any title insurance company issuing title insurance a full and complete release of all mechanic's and material suppliers' liens and rights with respect to the property as a title company may require to induce it to issue its policy of title insurance with respect to the Site Conveyance without requiring the Owner's indemnity against mechanic's and material suppliers' liens.

“Plans and Specifications” shall mean the plans and specifications identified on Exhibit H attached hereto.

“Product Data” shall mean, collectively, illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by Contractor to illustrate a material, product or system for some portion of the Work.

“Progress Payment” shall mean a payment made by Owner, other than the disbursements of Retainage, pursuant to an Application for Payment approved by Owner, representing the payment of all costs properly incurred by Contractor in connection with a completed portion of the Work, including, without limitation, all amounts then properly due Subcontractors, plus the applicable Installment Amount in each case subject to the Retainage which is to be paid in accordance with Section X.3.4.

“Progress Schedule” shall mean the schedule to be prepared by Contractor for approval by Owner in the form of Exhibit G-1 attached hereto, showing the principal categories of the Work, the order in which the Work is to be carried out, the dates of commencement and completion of each principal category of the Work, together with all amendments thereto made in accordance with the terms hereof.

“Project” shall mean the Property and the Improvements.

“Project Work” shall mean all Work for the total construction of the Project, required by all contractors.

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“Property” shall mean the real property described on Exhibit A attached hereto.

“Punch List Work” shall mean minor items of the Work that need to be corrected or completed pursuant to Article VII prior to Completion.

“Retainage” shall, unless otherwise approved in writing by Owner, mean a holdback of ten percent (10%) of the Construction Services Fee and all other amounts due Contractor under the terms hereof. Contractor shall require a similar “Retainage” in all Subcontract Contracts.

“Reviewing Representatives” shall mean Owner as well as any agent or representative of Owner designated by Owner to Contractor, and Owner’s Construction Manager, if any.

“Samples” shall mean physical examples requested by owner to illustrate materials, equipment or workmanship.

“Spending Limit” shall, for each individual Line Item in the Budget, as originally approved by Owner, excluding any contingency Line Item and the accounting categories set forth in Section XI.2. mean the amount of such line item.

“Stipulated Interest Rate” shall mean the greater of (a) five percent (5%) per annum plus the discount rate charged by the Federal Reserve Bank of San Francisco as of the twenty-fifth (25th) day of the calendar month immediately preceding the demand, or (b) ten percent (10%) per annum.

“Subcontract” shall mean a contract between Contractor and any Subcontractor and, as used herein, unless the context otherwise requires, includes a contract between a Subcontractor and a Sub subcontractor.

“Subcontractor” shall mean a person, firm or corporation and all of his or its employees who has or have a direct or indirect contract or engagement with Contractor to perform any of the Work or supply materials, equipment or any other item related thereto as well as anyone involved with the Work at the instance or request of Subcontractor. By executing this Contract, Contractor represents that Contractor is the agent for each Subcontractor who shall be bound by this Contract, notwithstanding that no such Subcontractor is a signatory hereto.

“Sub subcontractor” shall mean a person or organization who has a direct contract with Contractor to perform any of the Work or to provide any materials, equipment or supplies for the Project.

“Submittals” include shop drawings, product data, samples and similar materials. Shop drawings are drawings, diagrams, schedules and other information specially prepared for the Work.

“Substantial Completion” shall mean such time as all Work has been fully performed, other than Punch List Work, and a valid Notice of Completion covering the Project has been recorded in the Official Records of, California.

“Suspension” shall mean a suspension, delay or interruption of all or any portion of the Work ordered by Owner in writing.

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“Work” shall mean the entire completed construction of the Improvements, or the various separately identifiable parts thereof (including all labor and materials), required to be furnished under the Contract Documents, more specifically described on Exhibit H attached hereto.

II. ENGAGEMENT; STANDARDS OF PERFORMANCE

II.1. Engagement.

Owner hereby engages Contractor, subject to the terms and conditions set forth in this Contract, to perform the duties and obligations set forth herein and Contractor agrees to perform such duties and obligations in accordance with the terms and conditions of this Contract.

II.2. Standards of Performance.

Contractor accepts the relationship of trust and confidence established between Contractor and Owner by this Contract. Contractor covenants with Owner to furnish its best skill and judgment and to cooperate with Owner, Subcontractors, the Architect and Consultants performing work on the Project or providing services relating to the Project. Contractor agrees to use its reasonable best efforts to perform its duties and obligations under this contract in an efficient, expeditious and economical manner, consistent with the best interests of Owner, and in such a manner so as to effect Completion of the Improvements to the reasonable satisfaction of Owner within the time periods set forth herein or in the Progress Schedule (subject, however, to the provisions of Section VII.2).

II.3. Contractor's Personnel.

Contractor shall provide adequate and experienced personnel to perform the duties and obligations of Contractor as described in this Contract. Contractor shall be responsible for hiring, supervising and training all of Contractor's employees and staff members performing services relating to the Project. Contractor shall comply with all applicable laws, rules and regulations relating to the duties and obligations of Contractor under this Contract. Contractor shall employ a competent Project superintendent and necessary assistants who shall be in attendance at the Project during the progress of the Work. All employees of Contractor performing a portion of the Work and all Subcontractors shall be reasonably satisfactory to Owner. Those persons listed on Exhibit M attached hereto shall represent Contractor as its agents and all communications given to or by those representatives shall be deemed given to or by Contractor. Such designated representatives may be changed from time to time by Contractor by delivery of written notice thereof to Owner. Contractor shall at all times exercise all reasonable care and diligence in the supervision of its employees and reasonable care and diligence in the supervision of all Subcontractors with regard to performance of their respective obligations under any Subcontract. Any employee of Contractor or any Subcontractor working on the Project who, in the opinion of the Owner, does not perform his work in a skillful manner or appears to be incompetent or to act in a disorderly or intemperate manner shall, at the written request of Owner, be removed from the Project immediately.

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III. SUBCONTRACTS; BUDGET AND PRELIMINARY DOCUMENTS


III.1.1 Document Review

Contractor shall review all of the Contract Documents, including, without limitation, any working drawings and the Plans and Specifications, to identify procedures for prosecuting the Work in the most efficient manner possible and procedures for achieving the maximum amount of cost-savings. With Owner's prior written consent, the Contractor shall cause any procedures so identified to be incorporated into the Contract Documents and included in any bid package delivered to any Subcontractor.

III.1.2 Review of Contract Documents.

In addition to the performance of the obligations specified in Sections III.1.1 and XIV.21 hereof, Contractor shall, throughout the course of construction of the Improvements, periodically review all of the Contract Documents to identify ways in which the Work can be prosecuted more efficiently and ways in which cost savings can be achieved. If Owner's prior consent is not required under the terms of this Contract, Contractor shall immediately implement any procedures which Contractor has identified as improving the efficiency of the prosecution of the Work or as achieving cost-savings. If Owner's prior consent is required pursuant to the terms hereof, Contractor shall immediately seek such consent. Contractor shall provide Owner with a report detailing the steps Contractor has taken to comply with this Section III.1.2. Such report may be made at any appropriate progress meeting held pursuant to Section III.8.1.

III.1.3 Contractor's Review of the Contract Documents

Contractor hereby represents and warrants to Owner that Contractor has carefully studied the Contract Documents and has reported to Owner any error, inconsistency or omission it has discovered. Any discrepancies or omissions hereafter found in the Contract Documents by Contractor shall be reported immediately in writing to Owner. In the event that there is any discrepancy within the Plans and Specifications or among the Plans and Specifications, the other Contract Documents and applicable governmental requirements, unless otherwise directed by Owner, Contractor shall resolve such discrepancy in favor of the most stringent or detailed alternative.

III.1.4 Conflicts and Clarification.

The intent of the Contract Documents is to contain all items necessary for the proper execution and completion of the Project Work as well as those items which may be reasonably inferable therefrom as being necessary to produce the intended results. If the Drawings, Plans and Specifications or Contract Documents, or any of them are in conflict

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with the other or require clarification of any inadequacy, inconsistency or omission or are in conflict with the Submittals or any of them, Contractor shall immediately request clarification in writing from the Architect in the form of a Request for Information ("RFI") and notify the Owner that clarification has been requested. If the Architect fails to clarify such discrepancy within a reasonable time under the circumstances, the Contractor shall proceed with the Work and give precedence to the Contract Documents, in the following order of priority: (i) modifications issued after execution of this Contract; (ii) the Contract Between Owner and Contractor; (iii) Addenda issued prior to the execution of the Contract Between Owner and Contractor with the Addenda bearing the latest date taking precedence; (iv) the supplementary conditions, if any; (v) the general conditions of the Contract; (vi) the Final Drawings and Specifications; (vii) the Schedule of Contractor's Qualifications, Clarifications and Assumptions; (viii) the Preliminary Drawings and Specifications. Specifically, Drawings shall govern over specifications when the conflict relates to quality or location, specifications shall govern Drawings when the conflict relates to quality or performance and figured dimensions shall govern scaled dimensions; and large scale Drawings shall govern small Drawings. Contractor's failure to request clarification of any known, suspected or reasonably inerrible inadequacy, inconsistency, omission or conflict shall not relieve Contractor of his obligation to perform in accordance with the Contract Documents and the clarification provided to Contractor, or, if not so provided, according to the hierarchy set forth above. Contractor shall not be entitled to any additional compensation for performing the Work pursuant to this Contract and the clarification provided to Contractor, or, if not so provided, according to the hierarchy set forth above. Furthermore, if a discrepancy exists between the Contract Documents and the Governmental Requirements imposed after the date of this Contract, which necessitates a correction or change in the Work, said change or correction will be immediately brought to the attention of the Owner in the form of a Change Order Request. In all other instances, the Contractor shall be responsible for corrections or changes required as a result of compliance with Governmental Requirements. If Contractor claims he is entitled to an increase in the Budget or corresponding time extension for completion of the Work, or both, due to changes occasioned by subsequently imposed Governmental Requirements, Contractor must, except in an emergency endangering life or property, submit the proposed change in writing to Owner in accordance with the provisions of Section VI.4.4 (and must receive Owner's written approval therefor) before proceeding to execute any Work involved. Failure of Owner to notify the Contractor of its approval or disapproval of such claim within fifteen (15) days shall be conclusively deemed to constitute Owner's disapproval of such claim.

In the event of inconsistencies within or between parts of the Contract Documents, or between the Contract Documents and applicable standards, codes, and ordinances, the Contractor shall (i) provide the better quality or greater quantity of Work; or (ii) comply with the more stringent requirements.

III.1.5 No Adjustment For Governmental Compliance.

Contractor shall not be entitled to an increase of the Budget or extension of time due to Governmental Requirements whether or not Contractor was aware of Governmental

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Requirements in effect as of the date of the Contract so long as such Governmental Requirements set forth a clear and objective requirement.

III.1.6 Work Agreements.

Instructions and other information furnished in the specifications, including, without limitation, items in connection with prefabricated or pre-finished items, are not intended to supersede work agreements between employers and employees. If the specifications conflict with such work agreements, the work agreements shall be followed, provided such items are provided and finished as specified. If necessary, such work shall be performed on the Project Site, instead of at the shop, by appropriate labor in accordance with the requirements of the Drawings and Specifications.

III.1.7 Work Not in Accordance with Contract Documents

If Owner determines that the Work is not in accordance with the Contract Documents in any material respect, then Owner may order all Work affected by the condition of nonconformance immediately stopped until the condition of nonconformance is corrected to Owner's reasonable satisfaction. After the issuance of such an order, Contractor shall not allow any construction work at the affected area, other than corrective work, to be performed until Owner notifies Contractor in writing of Owner's determination that the condition of nonconformance has been corrected. Except in the case of corrective work necessitated by Contractor's Breach, the cost of such corrective work shall be borne by Owner and the Progress Schedule shall be adjusted to account for any delay in the Work arising out of such nonconformance.

III.3. Subcontractual Relations.

III.3.1 Subcontracts

Any portion of the Work performed by a Subcontractor shall be pursuant to a Subcontract between Contractor and such Subcontractor (and, where appropriate, between a Subcontractor and Sub-subcontractor), which is in the form and substance required under the terms hereof and which, unless otherwise approved in writing by Owner, contains provisions that:

III.3.1.1 Subcontracts Shall Conform to Prime Contract

require that the portion of the Work covered by the applicable Subcontract be performed in accordance with the requirements of the Contract Documents;

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III.3.1.2 Applications for Payment

require submission to Contractor of applications for payment and clearly defined invoices and billings supporting all such applications under each Subcontract to which Contractor is a party;

III.3.1.3 Lien Waivers and Releases

require, as a condition to the disbursement of the Progress Payment next due and owing, submission of labor and material lien releases and waivers by the Subcontractor for the portion of the Work completed by the Subcontractor and by such Subcontractor's Sub-subcontractors for which payment has previously been made;

III.3.1.4 Timely Submission of Information

obligate each Subcontractor to furnish to Contractor in a timely fashion all information necessary for the preparation and submission of the reports required herein;

III.3.1.5 Subcontractor's Obligations Upon Termination of Contract

obligate each Subcontractor to continue to perform under its Subcontract in the event this Contract is terminated and Owner elects to accept an assignment of said Subcontract and request Subcontractor to continue such performance; or, if Owner does not elect to accept an assignment, require that the applicable Subcontract be terminated;

III.3.1.6 Subcontractor's Insurance Obligations.

require each Subcontractor to obtain the insurance coverage required to be obtained by each Subcontractor pursuant to Exhibit J-1. Each Subcontractor shall file certificates of the foregoing insurance coverage with Contractor together with copies of the additional insured endorsement naming Owner and contractor as additional insureds. Notwithstanding the foregoing provisions of this subsection III.3, and irrespective of whether any Subcontractor obtains or fails to obtain the herein above-described insurance coverage, Contractor shall be obligated to indemnify, defend (with attorneys approved by Owner in its sole discretion) and hold harmless Owner from and against any and all damages, losses and expenses to the extent provided in Section V.12.

A Subcontract in the form of Exhibit J, without material modification, shall be deemed approved by Owner.


Contractor shall obtain for Owner a minimum of three (3) separate bids from three (3) different qualified Subcontractors identified pursuant to subsection 111.2 for each trade (or Line Item)

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where such trade or Line Item exceeds Five Thousand Dollars ($5,000.00) unless such requirement is waived by Owner in writing.

III.5. Bids Consistent with Plans and Specifications.

Contractor shall be responsible for ensuring that all bids obtained are based upon and consistent with the Plans and Specifications and the other Contract Documents as approved and directed by Owner, that all bids are sufficiently detailed to conform, and all work and material included in the bids conform to, standard industry practices in Santa Clara County, California and are in compliance with all laws and governmental requirements applicable to the Project.


The Contract Sum is $21,215,667, (TWENTY-ONE MILLION, TWO HUNDRED AND FIFTEEN THOUSAND, SIX HUNDRED AND SIXTY-SEVEN DOLLARS & 00/100) which amount constitutes a guaranteed not to exceed price for the Work (the “Guaranteed Maximum Price”). The projected Cost of the Work encompassed within the approved Guaranteed Maximum Price as set forth in the Budget and as may be adjusted by Change Order after the date hereof, is sometimes herein referred to as the “Approved Cost of the Work”. The line item breakdown of the Approved Cost of the Work and other components of the Guaranteed Maximum Price is set forth in the Exhibit entitled “C”. The aforementioned sum excludes the General Contractor’s fee referred to under Section X.1 and set forth in the Exhibit entitled “B”.

III.7. Award of Subcontracts and Other Contracts.

III.7.1 Selection of Subcontractors

Owner and Contractor shall jointly identify and accept the remaining Subcontractors (other than those Subcontractors already bound by a signed Subcontract with Owner for their portion of the Work on the Project) to whom Subcontracts shall be awarded on the basis, in each case, of the lowest qualified bidder, unless Owner otherwise directs. If Owner directs that a bid be accepted which was not the bid used in arriving at the Budget, the Budget shall be appropriately revised to reflect the accepted bid. The bid made or negotiated by any Subcontractor to whom a Subcontract is awarded shall be referred to herein as an “Accepted Bid.” Upon Owner’s written direction, Contractor shall let all of the remaining Subcontracts, utilizing the Plans and Specifications as the basis for the scope of each Subcontractor’s work. Contractor shall use its reasonable best efforts and skill to negotiate the final cost of all Subcontracts. Contractor shall have the authority only to enter into Subcontracts which are with the accepted Subcontractors, which are substantially in the form attached hereto as Exhibit J and which have a contract price equal to or less than the applicable Accepted Bid. Contractor shall obtain the written approval of Owner prior to entering into any Subcontract with a contract price in excess of the applicable Accepted Bid. If Contractor enters into a Subcontract without obtaining such written approval, Contractor shall be liable for all amounts payable under any such

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Subcontract in excess of the applicable Accepted Bid. Contractor shall not, under any circumstances, be required to enter into a Subcontract with a contract price in excess of the applicable Accepted Bid unless Owner give its prior written approval thereof. If for any reason a Subcontract cannot be entered into at the applicable Accepted Bid, Owner agrees that it will either promptly (i) accept another bid from a Subcontractor on the list of qualified Subcontractors, (ii) accept another bid from a Subcontractor presented by Contractor or (iii) accept a bid from a Subcontractor selected by Owner and reasonably satisfactory to Contractor. In the event that any Subcontractor whose bid used in establishing the Budget fails to enter into a Subcontract or terminates its Subcontract or fails to perform in accordance with its Subcontract and (a) such termination or failure to perform is not the result of Contractor's Breach and (b) a replacement Subcontractor is selected as above provided, the Budget shall be appropriately adjusted to reflect the replacement Subcontract price. Provided that replacement is not required because of Contractor's Breach, Owner shall not unreasonably withhold its consent to the replacement. Similarly, if, for reasons other than Contractor's Breach, the cost of materials or other components increase, the Budget shall be appropriately adjusted. Contractor is not a guarantor of the Budget, but is responsible for exercising its best efforts and all due diligence to complete the Work in accordance with the Budget as provided in Section V.1 hereafter.

III.7.2 Contractor's Right to Substitute Subcontractors

Contractor shall not make any substitution for any Subcontractor or person or organization who has been accepted by Owner, unless (a) the substitution is approved in advance in writing by Owner (which approval shall not be unreasonably withheld) or (b) Subcontractor is guilty of a material breach of its Subcontract, in which event any substitute Subcontractor shall be approved by Owner prior to Contractor's execution of the applicable Subcontract. Owner shall approve or disapprove, in writing, any such substitution within three (3) Business Days following receipt of written notification thereof. Any approval by Owner of such substitution shall in no event be deemed a waiver by Owner of any rights Owner may have against Contractor or the terminated Subcontractor.

III.7.3 List of Subcontractors employed in the Work

Contractor shall furnish to Owner, from time to time during the term of this Contract, within five (5) Days of Owner's request, a current list of all of its Subcontractors employed in connection with the Work. Each list shall contain the following information:

III.7.3.1 Subcontractor information

the name, address and telephone number of each Subcontractor, including each materials-only Subcontractor under contract with Contractor;

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III.7.3.2 **Subcontract value**

the dollar amount of each Subcontract, including each materials-only Subcontract, entered into by Contractor; and

III.7.3.3 **Subcontractor payments**

the amount paid to each Subcontractor, including each Materials-only Subcontractor, through the date of each list.

Contractor shall sign each such list and shall certify the accuracy of the information set forth in each list. Owner may make direct contact with each such Subcontractor, including each materials-only Subcontractor, to verify the facts disclosed by such list or for any other purpose.

III.8. **Progress Meetings, Books, Records and Accounts.**

III.8.1 **Progress Meetings**

Contractor shall schedule and attend weekly meetings (or otherwise periodically as Owner shall reasonably require) with Owner to discuss the progress of the development and construction of the Project and to assess Contractor's compliance with the requirements of this contract. At such meetings Contractor shall provide Owner with the updated Progress Schedule described in Section VI.3.2 and with any Change Orders which have been initiated by Contractor and which have not been previously delivered to Owner. At such meetings, Contractor shall provide Owner with a construction cost breakdown and variance report in the form of Exhibit G-2 attached hereto.

III.8.2 **Books and Records.**

There shall be kept at the principal office of Contractor full, true, correct and complete books of account and business records in which all transactions of the Project shall be entered. Such accounts and records shall be kept by Contractor on a cash basis and in all other respects in a manner consistent with accepted accounting principles and practices, as adopted by Owner from time to time, consistently applied. All Project costs must be charged to the proper account, as set forth in the Budget, and no expense may be classified or reclassified for the purpose of avoiding an excess in the budgeted amount for any accounting category. Contractor shall preserve all such records for a period of four (4) years, or for such longer period as may be required by law, after the Final Payment. Such books shall be opened at all reasonable times and upon reasonable advance notice for inspection or copying by Owner, its authorized representative, Lender or any governmental agency. The books shall be audited as directed by Owner. If such audit is conducted by a third party, the cost of such audit shall be borne by Owner; provided, however, that if any audit reveals error or discrepancies, Contractor shall correct the same at its sole expense.

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III.8.3 Reports.

Contractor shall supply Owner with the Construction Reports by the third (3rd) Wednesday of each month, in the form and with such content as Owner shall reasonably require. Contractor shall also submit to Owner, within sixty (60) days after Owner's request thereof and in the form specified by Owner, a job-end costs report. In addition, Contractor shall promptly advise Owner if at any time it appears that construction of the Project is not proceeding in accordance with the Progress Schedule, or if it appears that any Line Item will be exceeded by more than the Spending Limit.


In addition to the specific duties described in this Contract, Contractor shall perform, at Owner's expense, such other reasonable services as Owner may request from time to time in connection with the construction of the Project or as Owner may deem necessary to complete the construction of the project in accordance with the Plans and Specifications. In the event that the services Contractor is requested to perform by Owner result in or derive from a single change in the scope of the Work that causes a "line item" in the Budget to be increased by more than five percent (5%) and does not arise as a result of a Contractor's Breach, the Construction Services Fee shall be increased to an amount mutually agreed upon by Owner and Contractor. In such event, Contractor shall be under no duty to undertake such additional services until Contract has been reached on the increase in the Construction Services Fee. If providing such other services will delay the estimated Completion Date, or other date set forth in the Progress Schedule, the parties will reasonably consider a revision to the Progress Schedule.

IV. ADMINISTRATION OF THE CONTRACT

IV.1. Administration by Owner.

IV.1.1 Owner's Administration of the Contract

Owner will provide general administration of this Contract, including performance of the functions hereinafter described. In addition to the foregoing, Owner shall obtain all discretionary permits and other discretionary approvals required for the Project such as subdivision map approval, conditional use permits, zoning variances, final tract map and any necessary amendments to the applicable general plan. Those persons listed on Exhibit L attached hereto shall represent Owner as its agents and all written communications given to or by those representatives shall be deemed given to or by Owner. Such designated representatives may be changed from time to time by Owner by delivery of written notice thereof to Contractor.

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IV.1.2 Owner's Access to the Work

Owner and, at Owner's request, Owner's Consultants and Lender, as well as their agents and employees, shall at all times have access to the Work wherever it is in preparation or progress. Contractor shall provide facilities for such access in order to enable Owner and its authorized agents to perform their functions under the Contract Documents.

IV.1.3 Owner's Right to verify Progress of the Work

Owner will make periodic visits to the Project site to familiarize itself generally with the progress and quality of the Work and to determine if the Work is proceeding in accordance with the Contract Documents. Based on such observations and the Application for Payment submitted by Contractor, Owner will verify and approve, at Owner's reasonable discretion, the amount of the Progress Payment then owing to Contractor.

V. CONTRACTOR'S OBLIGATIONS

V.1. Supervision and Construction Procedures.

Contractor shall use reasonable care in the supervision of all Subcontractors and, subject to the revisions to the Budget as herein provided, shall use its reasonable best efforts to cause the completion of the Work in such a manner that the actual cost of performing the Work does not exceed the total amount of the Budget. Contractor acknowledges that Owner will not be responsible for, and will not have control or charge over, construction means, methods, techniques, sequences, procedures, safety precautions and programs employed in connection with the Work, Contractor's failure to carry out the Work in accordance with the Contract Documents and applicable laws, rules and regulations, or the acts or omissions of Contractor, Subcontractors, any of their agents or employees or any other person performing any of the Work.

V.2. Prosecution of Work.

V.2.1 Commencement of the Work

Contractor shall commence the work called for in this Contract within five (5) days of the receipt of a written "Notice to Proceed" from Owner, unless Owner and Contractor shall otherwise agree in writing. Contractor shall proceed diligently with the completion of the Work in accordance with the Plans and Specifications and Drawings and performance of the other portions of the Work at all times in accordance with the Contract Documents and the Progress Schedule (or other time period specified herein) and shall continue performance of the Work, pending resolution of any claim, appeal or other legal or equitable action related to this Contract (except to the extent that it is impossible to

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adhere to the Progress Schedule or such other specified time period), provided that Contractor is paid for performance of undisputed Work in accordance with Article X.

V.2.2 Right to Reject Work

Owner shall at all times have the right to reject and/or stop the performance of any Work which does not conform to the Contract Documents, or which is not satisfactory to any Governing Agency. Contractor shall, upon receipt of any such notice from the Owner, immediately stop performance of and correct any nonconforming Work and shall bear the entire cost of doing so, including the cost, if any, incurred by Owner as a result of any disturbance of the Project Work in progress. If Contractor fails to promptly commence corrective procedures and to prosecute the same diligently to completion, Owner shall have the right to stop the Work immediately upon written notice to Contractor, and Owner shall have the remedies available under this Contract, including without limitation, the remedies set forth in Article XIII.3.

V.2.3 Emergency Repairs

In an emergency affecting (or believed by Contractor, in good faith, to affect) the safety of persons or property, Contractor, without special instructions or authorization from the Owner, shall act at his own discretion to prevent such threatened loss or injury and shall have the authority to close down his operations until any unsafe condition has been corrected. Contractor shall notify Owner immediately of the action taken and the status of the emergency. Any additional compensation or extension of time claimed by Contractor on account of the emergency, when such emergency is not caused by the negligence or default of Contractor or any of his Subcontractors, shall be determined as provided in Article VI.4.3.

V.2.4 Materials Furnished by Others

If the Work includes installation of materials or equipment furnished by anyone other than by or through Contractor, Contractor shall carefully examine, inspect, unload, inventory and accept in writing the items so provided and thereupon reload as necessary, handle, store and install the items with skill and care so as to ensure their satisfactory installation and operation. Upon Owner's written acceptance of materials and equipment furnished by others for the Work, such materials and equipment shall become the sole property of Owner and any loss and/or damage to materials or equipment furnished by others due to negligence and/or willful misconduct of the Contractor shall be charged to Contractor and deducted from monies due Contractor under this Contract. When Contractor makes his inventory of materials and equipment furnished by others, and prior to commencing any installation, Contractor shall provide Owner with a written inventory of all missing and/or damaged materials and/or equipment furnished by others in connection with the Work.

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V.2.5 Prior Ordered Material

The Contractor accepts assignment of, and liability for, all purchase orders and other Contracts for procurement of materials and equipment that are identified as part of the Contract Documents. The Contractor shall be responsible for such pre-purchased items, if any, as if the Contractor were the original purchaser. The Budget includes, without limitation, all costs in connection with delivery, storage, insurance, installation and testing of items covered in any assigned purchase orders or Contracts. All correction and warranty of the Work obligations under the Contract Documents shall also apply to any pre-purchased items, unless the Contract Documents specifically provide otherwise.


With the exception of any Subcontract which is subsequently assigned to Owner pursuant to subsection 111.3.1.5, nothing contained in the Contract Documents is intended to, nor shall it, create or be construed to create any contractual relation between Owner and any Subcontractor.

V.3.1 Contractor’s Responsibilities.

In addition to all other duties specified herein, Contractor shall be responsible to Owner for the following:

V.3.1.1 Supervision of Employees.

the exercise of reasonable care in the supervision of its own employees and of Subcontractors of all tiers and their employees and the coordination of its Work and the work of all Subcontractors, including, but not limited to, all suppliers and materialmen, in order to complete the Work: (a) in accordance with the Plans and Specifications and the other Contract Documents, (b) in compliance with all applicable laws and other governmental requirements, (c) in accordance with customs and trades prevailing in Santa Clara County, and (d) in accordance with the Progress Schedule and the Budget;

V.3.1.2 Use of Current Plans and Specifications

using reasonable care to cause all Subcontractors to utilize the current updated version of the Plans and Specifications at all times in performing the Work covered by their Subcontracts, including, without limitation, all Change Orders issued subsequent to the execution of such Subcontracts. A copy of the current version of the Plans and Specifications shall be maintained on the Project site at all times;

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V.3.1.3 Sound Practices and Quality Control

the establishment and direction of sound construction practices and a systematic program of quality control in connection with the Project;

V.3.1.4 Scheduling of Construction Activity

the scheduling and direction of construction field operations, including, but not limited to, the scheduling and direction of offsite functions such as rough and fine grading, street improvements and the installation of sewer, water, storm drain and utility systems;

V.3.1.5 Avoidance of Delays

the coordination of onsite and offsite work to prevent interference with and resulting delays in the overall course of construction of the Project; and

V.3.1.6 Scheduling of the Work

the scheduling, direction and coordination of all concrete, framing, electrical, heating, plumbing and roofing work, the finish trades such as drywall, finish carpentry, and similar work and the installation of all landscaping, all in accordance with the Progress Schedule.

V.4. Safety.

V.4.1 Safety Precautions.

Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work, including safety of all persons and property during performance of the Work. This requirement will apply continuously and not be limited to working hours.

V.4.1.1 Safety of Persons and Property

Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection and follow any directions of Owner (which Owner shall not be obligated to make) to prevent damage, injury or loss to:

V.4.1.1.1 All employees on the Work and all other persons who may be affected thereby;

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V.4.1.1.2. Owner’s property and all the Work and all materials and equipment to be incorporated therein, whether in storage on or off the Project site, under the case, custody or control of Contractor; and

V.4.1.1.3. Other property at the Project site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

V.4.1.2 Contractor shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss, including, without limitation, the standards and regulations set forth in the Federal Occupational Safety and Health Act ("OSHA") and those imposed by the California Division of Industrial Safety.

V.4.1.3 Contractor shall promptly remedy at its expense all damage or loss caused in whole or in party by Contractor or any Subcontractor.

V.4.1.4 Contractor shall designate a responsible member of its organization at the Project site whose duty shall be the prevention of accidents and the enforcement of applicable safety codes. This person shall be Contractor's superintendent unless otherwise designated in writing by Contractor to Owner.

V.4.1.5 Contractor shall maintain at the Project site all articles necessary for giving first aid to the injured and shall establish the procedure for the immediate removal to a hospital or a doctor's care of persons (including employees) who may be injured on the Project site.

V.4.1.6 Contractor shall promptly report in writing to Owner all accidents whatsoever arising out of, or in connection with, the performance of the Work, whether on, or adjacent to, the Project site, giving full details and statements of witnesses, if any. In addition, if death or serious injury, or serious damage is caused, the accident shall be reported immediately by telephone or messenger to Owner and any government authority required by law.

V.4.1.7 Contractor shall erect and maintain, as required by existing conditions and the progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations, notifying owners and users of adjacent facilities and providing all necessary construction fencing surrounding the portions of the Project under
construction from time to time and such other safeguards as may be reasonable and prudent.

V.4.1.8 When the use or storage of explosives or other hazardous materials or equipment is necessary for the execution of the Work, Contractor shall exercise the utmost care, shall carry on such activities under the supervision of properly qualified personnel and shall comply with all applicable federal and state requirements (including, but not limited to, the OSHA "Right To Know" publication and the requirements contained in Division 5 of the California Labor Code) relating to employer disclosure of hazardous substances at the workplace.

V.4.1.9 Contractor shall post at a conspicuous location at the Project site Contractor's construction safety manual which is in compliance with recognized city, county, OSHA, state and federal safety laws, rules, ordinances, and regulations. Contractor shall be responsible for the implementation of the safety guidelines contained therein.

V.4.2 Removal of Debris, Etc.

During the course of the Work Contractor shall remove waste materials and debris resulting from his Work on a daily basis and at such additional times as is necessary, in the Contractor's opinion, to maintain the Project Site in a continuously clean, orderly and safe and production ready condition. Contractor shall store all materials, supplies, equipment and goods involved in the performance of the Work in appropriate containers or enclosures that are secure from access by persons not associated with the performance of the Work in locations acceptable to Owner. At the Completion of the Work, and after the testing of all systems by Contractor, it shall remove all its waste materials and rubbish from and about the Project as well as all its tools, construction equipment, machinery and surplus materials.

V.4.3 Failure to Maintain Site

If Contractor fails to commence cleaning up the Project as specified in subsection V.4.3 within two (2) Business Days after Contractor's receipt of written notice to do so from Owner, or at any time when clean-up is required to remove a danger to the health, safety and welfare of the public, or thereafter fails to prosecute the same diligently to completion, Owner may do so and the cost thereof shall be charged to Contractor.

V.4.4 Stored Materials

If any materials, equipment or goods involved in the performance of the Work ("Stored Materials") are to be stored offsite, such Stored Materials must be stored at a bonded...

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warehouse facility located within the near vicinity of the Project and as otherwise approved by Owner (an "Off-Site Warehouse"). Any decision to purchase materials that will require offsite storage will be made by mutual agreement between Owner and Contractor.

All Stored Materials placed in an Off-Site Warehouse shall be (i) segregated and clearly identified as being owned by Owner for incorporation into the Project and being subject to Owner's liens and security interests, and (ii) covered by insurance against loss, damage, theft or vandalism. Contractor shall not, without Owner's prior written consent, purchase or order any Stored Materials for delivery more than forty-five (45) days prior to the scheduled incorporation of such Stored Materials into the Project. Owner shall make no Advance for Stored Materials except for the Hard Costs for Stored Materials provided (a) the Stored Materials are in Owner's possession stored at the Project Site or at an Off-Site Warehouse and are, unless otherwise agreed by Owner in writing, to be incorporated into the Project within forty-five (45) days from the date of receipt by Owner; (b) any Advance for Stored Materials shall not include any profit, fee or other mark-up beyond the charges made by the vendor to the first purchaser in connection with the Project, (c) the aggregate amount of all Advances for Stored Materials not yet incorporated into the Project shall not exceed $350,000.00 at anytime time unless otherwise agreed by Owner in writing; (d) not later than the time of the Advance. Owner's Lender shall have perfected a first priority security interest in such Stored Materials for which the Advance is requested, and unencumbered ownership of which Stored Materials has vested in Owner subject only to the security interest in favor of Owner's Lender. No temporary structures, including construction trailers, or other temporary office facilities, shall be placed or maintained at or in the vicinity of the Project Site until the appearance and location of such structures have received the prior written approval of Owner. Upon completion of the Work, Contractor shall remove from the Project Site all temporary structures, debris and waste incident to his operation and clean all surface, fixtures and equipment, relative to the performance of this Contract. If Contractor fails to perform any of the cleanup functions under this Contract within one (1) day after written field notification to Contractor (through the on-site representative of Contractor) by the Owner, Owner may proceed with such cleanup Work as Owner determines to be necessary and appropriate and in the manner Owner may deem expedient, and all costs and expenses incurred by Owner to clean up the Work shall be charged to Contractor and deducted from those monies due, or thereafter to become due, Contractor under this Contract. Representatives of the Owner and the Lender shall have the right to make inspections of the storage areas at any time.

V.5. Integration of Work.

If necessary to integrate the Work with the work of others at the Project Site, Contractor shall cut, fit and patch the Work so that it will be properly integrated with, receive or be received by, as applicable, the work of others. If the Work of others must be modified for the Work to be properly integrated, Contractor shall immediately notify Owner in writing and shall not alter the work of others without the written consent of Owner.
V.6. Warranty.

V.6.1 Contractor's Representations

Contractor represents and warrants to Owner that Contractor shall use reasonable care and due diligence in the supervision of all Subcontractors to insure that all portions of the Work performed by Subcontractors are of good and workmanlike quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these standards may be considered defective. If required by Owner, Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment employed or supplied in connection with the Project. The warranties contained in this subsection V.6 shall survive any termination of this Contract.

V.6.2 Warranty Duration

For a period of one (1) year from the date Contractor obtains a permanent certificate of occupancy for each residential unit in the Project, Contractor shall cause the warranty work to be performed as may be necessary to remedy defects in any Work or materials included in the Project. Such warranty work shall include, but not be limited to, accepting and responding to telephone and written service requests from the property manager for the Project within five (5) Business Days following receipt. Contractor shall be responsible for notifying all manufacturers, before the lapse of any applicable warranty period, of any manufacturing defects in any of the Work or materials included in the Project; provided, however, that Contractor shall be required to give such notice only with respect to those defects of which Contractor has actual knowledge, or which should have been discovered by Contractor in the performance of the Work pursuant to the provisions of this Contract. Upon receipt of written notice from Owner or telephonic or written service requests from the property manager, Contractor shall use its reasonable best efforts to cause the applicable Subcontractor to commence performance of the warranty work in question within five (5) Business Days and thereafter diligently pursue the completion of such warranty work, subject to the unavailability of materials beyond Contractor's reasonable control, delays by the applicable manufacturer, if any, in performing such manufacturer's obligations under any warranty issued by such manufacturer and delays caused by a Subcontractor's failure to promptly perform its warranty work (provided that such failure is not the result of Contractor's Breach). At such time as Contractor becomes aware that a Subcontractor or manufacturer will not or cannot perform its warranty work promptly, Contractor shall so notify Owner. In such event Contractor shall proceed with other Subcontractors or manufacturers as provided in Section III.7.2. Contractor shall cooperate with, and assist Owner in pursuing any claims against the defaulting Subcontractor or manufacturer which Owner or contractor may have. Upon failure by Contractor to cause the performance of any necessary repair or replacement Work required by this subsection V.6.2, Owner may, at its option, furnish or secure all materials and labor necessary to correct any defect. In the event a material supplier or Subcontractor fails to perform any warranty work as may be necessary to remedy defects in any Work or materials included in the Project for which Contractor may be responsible and such failure does not arise out of Contractor's Breach, and

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provided Contractor has used its reasonable best efforts to cause the performance of the warranty work by the Subcontractor, manufacturer or material supplier, including, without limitation, making written demand on the Subcontractor, manufacturer or material supplier. Contractor's written demand on the Subcontractor, manufacturer or material supplier shall include, without limitation, a notice to the Subcontractor, manufacturer or materials supplier indicating Owner's (or Contractor's) rights to perform the warranty work to seek recovery for all direct and indirect costs arising out of such warranty work from the Subcontractor or material supplier.

V.6.3 Limitation of Rights to Assert Claims for Damages

Nothing in this Contract shall in any way limit the right of Owner to assert claims for damages resulting from patent or latent defects in the Work for the period of limitations prescribed by California law. Nothing contained in this Section V.6 shall be construed as establishing a period of limitation with respect to any other obligation which Contractor may have under the Contract Documents. The establishment of the one (1) year time period set forth in subsection V.6.2 relates only to the specific warranty obligation of Contractor to correct the Work, and has no relationship to the time within which its other obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish Contractor's liability with respect to defects in the Work or the Project. Contractor's obligations under this Section V.6 shall survive the termination of this Contract.

V.6.4 Magnuson-Moss Warranty

Notwithstanding anything to the contrary contained in this Article V, to the extent any equipment installed in the Project is covered by warranty subject to the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (15 USC §2301, et seq.), Owner shall first pursue its remedies under such warranty prior to pursuing its remedies against Contractor under this Article V.

V.6.5 Title to Work and Materials

Contractor warrants and guarantees that title to all Work, materials and equipment covered by a Progress Payment will pass to Owner upon the receipt of such payment by Owner, free and clear of all liens, claims, security interests or encumbrances and that no Work, materials or equipment covered by any Progress Payment will have been acquired by Contractor, or by any other person performing the Work at the Project site or furnishing materials and equipment for the Project subject to an Contract under which an interest therein or an encumbrance thereon is retained by a seller or otherwise imposed by or against Contractor or such other person.

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V.6.6 Beneficiaries of the Warranty

The provisions of this Article V are for the benefit of and shall be applicable to Owner, its successors in interest and assigns.

V.6.7 Right of Contractor to Perform Warranty Work

Notwithstanding anything to the contrary contained in this Article V, and except in the event of an emergency, Owner agrees that before Owner shall engage any party other than Contractor or the applicable Subcontractor to perform any warranty work, Owner shall give Contractor written notice of the work in question. Contractor shall have the right to perform, or cause the applicable Subcontractor to perform, such warranty work provided that Contractor shall deliver written notice to Owner within (3) Business Days of Owner’s notice to Contractor setting forth Contractor’s proposed plan of repair. Subject to the limitations set forth in subsection V.6.2, Contractor or the Subcontractor shall commence the performance of such work within five (5) Business Days after notice from Owner and Contractor or the Subcontractor shall thereafter diligently pursue the completion of such warranty work.

V.7. Specifications and Drawings

Contractor shall keep at the Project an updated copy of all Plans and Specifications, Drawings, Addenda, Change Orders, Contract Modifications, Project Data and Samples and shall at all times give Owner access thereto. Any modifications to or deviations from any of the above items by Contractor without Owner’s prior approval shall be at Contractor’s own risk and expense.

V.8. No Interference

Without limitation of any other provision of the Contract Documents, the Contractor shall use best efforts to minimize any interference with the occupancy or beneficial use of (i) any areas and building adjacent to the site of the Work and (ii) the building(s) being construed in the event of partial occupancy. Without prior approval of the Owner, the Contractor shall not permit any workers to use any existing facilities at the Project site, including, without limitations, lavatories, toilets, entrances, and parking areas other than those designated by the Owner.

V.9. Use of Equipment

Contractor assumes all responsibility for, and shall hold Owner harmless from, all claims, actions, demands, liabilities or expenses, including attorneys’ fees and legal costs resulting from the use of Owner’s equipment or facilities used by Contractor, his Mechanics, Subcontractors or their respective invitees.

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V.10. Scaffolding, Staging and Hoisting

As part of this Work, Contractor shall provide, and at all times continuously maintain, in safe operational condition, the Work and all scaffolding, staging, bracing, hoisting, planks, ladders, rigging, barricades, protective devices and coverings, and all other associated equipment and accessories for the continuous safe and satisfactory accomplishment of the Work and all portions thereof, including all transportation, unloading, erection and removal of same from the Project Site. Usage of any equipment of Owner shall be permitted only with prior written approval from Owner and shall be subject to strict compliance with all terms and conditions imposed by Owner and shall be permitted when scheduled with Owner and when available and shall be at the sole risk of Contractor. CONTRACTOR HEREBY RELEASES OWNER OF ANY AND ALL CLAIMS WHETHER RELATING TO BODILY INJURY OR PROPERTY DAMAGE RESULTING FROM USE OF ANY FACILITIES OR EQUIPMENT AT THE PROJECT SITE.

V.11. Temporary Utilities.

Unless otherwise stated in the Contract Documents, Contractor shall provide, and pay for, temporary electric and water service to a main distribution point (from which Contractor shall furnish and maintain in a safe condition, the necessary temporary electrical power for the Work), temporary water and temporary sanitary facilities at the Project Site pursuant to standards for the construction industry in the stated in which the Project is located for Contractor's distribution and use during the course of the Work.

V.12. Indemnification by Contractor

With the exception that this Subparagraph shall in no event be construed to require indemnification by Contractor to a greater extent than permitted under the public policy of the State of California, Contractor shall indemnify and save harmless Owner, including its officers, agents, employees, affiliates, parents and subsidiaries, and each of them, of and from any and all claims, demands, causes of action, damages, costs, expenses, actual attorneys' fees, losses or liability, in law or in equity, of every kind and nature whatsoever ("Claims") arising out of or in connection with Contractor's operations to be performed under this Contract, arising out of or resulting from performance of the Work, but not limited to:

V.12.1 Personal Injury

Personal injury, including but not limited to bodily injury, emotional injury, sickness or disease, or death to persons, including, but not limited to, any employees or agents of Contractor, Owner, or any other subcontractor and/or damage to property of anyone (including loss of use thereof) caused or alleged to be caused in whole or in part by any negligent act or omissions of Contractor, a subcontractor, or anyone directly or indirectly employed by Contractor or anyone for whose acts Contractor may be liable regardless of whether such personal injury or damage is caused by a party indemnified hereunder.

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V.12.2 Penalties for Violations of Laws

Penalties imposed on account of the violation of any law, order, citation, rule, regulation, standard, ordinance, statute, caused by the action or inaction of Contractor.

V.12.3 Infringement of Patent Rights

Infringement of any patent rights which may be brought against the Owner arising out of Contractor's work.

V.12.4 Claims for Liens

Claims and liens for labor performed or materials used or furnished to be used on the job, including all incidental or consequential damages resulting to Owner from such claims or liens.

V.12.5 Violation or Infraction of Laws

Any violation or infraction by Contractor of any law, order, citation, rule, regulation, standard, ordinance or statute in any way relating to the occupational health or safety of employees, including, but not limited to, the use of Contractor's or other's equipment, hoists, elevators, or scaffolds.

The indemnification provisions of this Section V.12 shall extend to claims occurring after the Contract is terminated as well as while it is in force. Such indemnity provisions apply regardless of any active and/or passive act or omission of Owner or its agents or employees. Contractor, however, shall not be obligated to indemnify Owner for Claims arising from the sole negligence or willful misconduct of Owner or its agents, employees, or independent contractors who are directly responsible to Owner, or for defects in design furnished by such persons, or from or arising out of the existence of Hazardous Wastes which were present on the Property prior to the date of commencement of the Work by Contractor.

Contractor shall, at Contractor's own cost, expense and risk, defend all Claims as defined in this Section V.12 that may be brought or instituted by third persons, including, but not limited to, governmental agencies or employees of Contractor, against Owner or its agents or employees or any of them; Pay and satisfy any judgment or decree that may be rendered against Owner or its agents or employees, or any of them, arising out of any such Claim; and, reimburse Owner or its agents or employees for any and all legal expense incurred by any of them in connection herewith or in enforcing the indemnity granted in this Section V.12.

Contractor will cooperate with and permit Lender or its representatives to enter upon the Project at reasonable times for the purpose of inspecting the Work and all materials, fixtures and articles to be used in the Work, and to examine all Plans and Specifications which are or may be kept at the Project. Contractor agrees to make such changes or amendments to this Contract as Lender may reasonably request, provided such changes or amendments do not materially impair Contractor's rights or materially increase Contractor's liability or obligations hereunder.


Contractor shall advise Owner of all cash and trade discounts and rebates available during or as a result of performance of the Work, including but not limited to volume rebates to which Contractor may become entitled based in whole or in part upon performance of the Work. All cash discounts, trade discounts, rebates and refunds and all proceeds from the sale of surplus or salvaged materials and equipment shall accrue to Owner.

VI. COMMENCEMENT AND COMPLETION SCHEDULE

VI.1. Commencement.

Contractor shall begin the Work on the date or, if applicable, within the time limit specified in this Contract. Contractor acknowledges that performance of the Work as and when required is a material component of contractor's performance thereunder.

VI.2. Schedule

VI.2.1 Scheduling

During progress of the Work, Contractor will provide Owner with additional scheduling information consistent with the Progress Schedule in a form acceptable to Owner. The Progress Schedule shall be in a detailed precedence-style critical path management ("CPM") or format satisfactory to the Owner and the Architect that shall also (i) provide a graphic representation of all activities and events that will occur during performance of the Work; (ii) identify each phase of construction and occupancy; and (iii) set forth dates that are critical in ensuring the timely and orderly completion of the Work in accordance with the requirements of the Contract Documents (hereinafter referred to as "Milestone Dates"). Upon review and acceptance by the Owner and the Architect of the Milestone Dates, the Progress Schedule shall be deemed part of the Contract Documents and attached to the Contract as Exhibit G-1. If not accepted, the Progress Schedule shall be promptly revised by the Contractor in accordance with the recommendations of the Owner and the Architect and resubmitted for acceptance. The Contractor shall monitor the progress of the Work for conformance with the requirements of the Progress Schedule and shall promptly advise the owner of any delays of potential delays. The accepted

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Progress Schedule shall be updated to reflect actual conditions (sometimes referred to as "progress reports") or if requested by either the Owner or the Architect. In the event any progress report indicates any delays, the Contractor shall propose an affirmative plan to correct the delay, including overtime and/or additional labor, if necessary. In no event shall any progress report constitute an adjustment in the contract Schedule, any Milestone Date, or the Budget unless any such adjustment is agreed to by the Owner and authorized pursuant to Change Order.

VI.3. Review of Progress Schedule

VI.3.1 Approval by Owner not a Relief of Contractor’s Obligation

Approval of the Progress Schedule by Owner shall not, in any way, relieve Contractor of any of its responsibility for the Progress Schedule's accuracy or for the completion of each portion of the Work within the time periods specified therein.

VI.3.2 Requirement to Update Schedule

Not less than weekly during the term of this Contract, Contractor shall provide Owner and Lender an updated and revised Progress Schedule, in the form of Exhibit G-1 attached hereto or such other form satisfactory to Owner, showing the progress of the Work and the projected commencement date, sequence and completion date for each component of the Work and all Change Orders.

VI.3.3 Obligations Resulting from Delays

If Owner determines that the prosecution of the Work has fallen behind the Progress Schedule, as the same may have been amended or extended as provided herein, prior to the submission of the next scheduled Application for Payment, Owner shall notify Contractor in writing and Contractor shall submit a written remedial plan of action for recapturing such schedule slippage, together with supporting documentation therefor, no later than ten (10) Days following the receipt of such notice. Owner shall review the proposal with Contractor and Contractor shall make any necessary revisions thereto as mutually agreed upon during the review. If Owner finds the proposed remedial plan unacceptable, it may require Contractor to submit a new plan. If a satisfactory plan is not agreed upon, Owner may require Contractor to increase its work force or the number of shifts, as set forth in Section VI.3.5. Except in the case of remedial plan necessitated by Owner’s Breach, the resulting additional costs shall be paid by Contractor. The provisions of this subsection VI.3.3 are not intended to in any way limit or affect Owner’s rights under Section VI.2, or Section VI.3 and Owner shall have no obligation to perform under this subsection VI.3.3 prior to exercising its remedies for Contractor’s Breach.
VI.3.4 Manner of Performing Work

Work in a prompt, diligent and skillful manner in accordance with the Progress Schedule and without delaying or hindering the Project Work of other contractors or subcontractors. Contractor shall coordinate his Work with the Project Work of all other contractors, subcontractors in a manner that will facilitate the safe, timely and efficient completion of the Project Work.

VI.3.5 Failure to Maintain Schedule

If Owner determines that the performance of the Work, as of a Milestone Date, has not progressed or reached the level of completion required by the Contract Documents, the Owner shall have the right to order the Contractor to take corrective measures necessary to expedite the progress of construction, including, without limitation, (i) working additional shifts or overtime, (ii) supplying additional manpower, equipment, and facilities, and (iii) other similar measures (hereinafter referred to collectively as “Extraordinary Measures”). Such Extraordinary Measures shall continue until the progress of the Work complies with the stage of completion required by the Contract Documents. The Owner's right to require Extraordinary Measures is solely for the purpose of ensuring the Contractor’s compliance with the Progress Schedule.

It is the Owner’s intent that the rights conferred by this Article be interpreted as the right to require that the Contractor maintain progress in accordance with the approved Project Schedule and that it not be construed as an arbitrary right to require acceleration of the Work.

VI.3.5.1 No Adjustment to Budget for Delays

The Contractor shall not be entitled to an adjustment in the Budget Price in connection with Extraordinary Measures required by the Owner under or pursuant to this Section VI.3.

VI.3.5.2 Owner's Right to Require Acceleration

The Owner may exercise the rights furnished the Owner under or pursuant to this Section VI.3 as frequently as the Owner deems necessary to ensure that the Contractor’s performance of the Work will comply with any Milestone Date or completion date set forth in the Contract Documents.

If Contractor fails to take the action required to accomplish the foregoing within a reasonable period of time so as to cause no irrevocable delays, Owner may take action to attempt to put the Work on schedule and deduct the entire costs thereof from amounts due or to become due Contractor.

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VI.4.1 Change Orders Requested by Owner

Owner may, at any time, without invalidating this Contract, by written order designated or indicated to be a Change Order, make any change in the Work within the general scope of this Contract consisting of additions, deletions or revisions of the Plans and Specifications; the method or manner of performance of the Work; or the quantity or type of any facilities, equipment, service or site or direct any acceleration in the performance of the Work; provided, however, that Owner shall be responsible for all costs associated with such acceleration to the extent that such acceleration is not caused or required by Contractor’s Breach. Each change order shall be in the form of Exhibit F attached hereto or other form as may reasonably be required by Lender. Except in the case of any Change Order required as a result of Contractor’s Breach, in which event any resulting increased costs shall be paid by Contractor, the costs associated with any Change Order shall be borne by Owner and any cost savings resulting from any Change Order shall accrue to the benefit of Owner. In the event any single Change Order (other than a Change Order necessitated by Contractor’s Breach) results in a change in the scope of work which requires an increase in a “line item” of the Budget of five percent (5%) or more, prior to Contractor’s becoming obligated to proceed with the applicable Change Order, Owner and Contractor shall agree upon an appropriate increase in the Construction Services Fee. If the Completion Date or other date set forth in the Progress Schedule will be delayed as a result of any Change Order not caused by Contractor’s Breach, the parties will reasonably consider a revision to the Progress Schedule. Contractor shall have the right to approve Change Orders which do not result in a change in the Plans and Specifications without the prior written approval of Owner, provided that the amount of such Change Orders, either individually or in the aggregate, shall not cause the Spending Limit for any Line Item to be exceeded.

VI.4.2 Adjustment to Price and Time to Perform.

The increase or decrease to the Budget and the extension or reduction of time to perform or complete the Contract Work pursuant to the Contract, as the case may be, resulting from a Change Order shall be determined in one or more of the following ways: (1) by mutual acceptance of a lump sum or time extension or reduction; (2) by mutual acceptance of a unit price and quantity verification procedure; or (3) by actual directly incurred cost as set forth in the Contract. Contractor shall not perform work under any change order without first securing Owner’s written consent to such change order unless: (a) the Owner has certified to Contractor that Owner’s consent is not required for such change order; (b) the cost of or reduction resulting from any single change or modification does not exceed $40,000.00, or in the aggregate $300,000.00; and (c) Contractor has obtained the written consent of the surety issuing the performance and payment bonds relating to the Contract. In any such case, Contractor shall promptly provide Owner or its inspecting architects/engineers with a copy of such change order or other modification. Owner’s consent shall not constitute an assumption by Lender of any obligation under the Contract.

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VI.4.3 Change Order Request by Contractor.

VI.4.3.1 Change in the Budget.

Contractor shall not be entitled to the payment of any additional compensation for any act, or failure to act, by Owner, including failure or refusal to issue a Change Order, or for the happening of any event, thing, occurrence or other cause unless Contractor gives Owner written notice of a potential claim as hereinafter specified. Except as expressly permitted in this Contract, a change in the Budget or the time for commencement and completion of the Work shall be accomplished only by Change Order. Accordingly, no course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that Owner has been unjustly enriched by any alteration of or addition to the Work, whether or not there is in fact any unjust enrichment to the Work, shall be the basis of any claim to an increase in any amount due under the Contract Documents or a change in any time period provided for in the Contract Documents.

VI.4.3.2 Written Notice of a Potential Claim

The written notice of a potential claim must set forth the reason for which Contractor believes additional compensation or time will or may be due, the nature of the costs and time involved and, in so far as possible, the amount and impact of the potential claim. Such notice must be given to Owner before the time that Contractor shall have performed any Work giving rise to the potential claim for additional compensation, if based on an act or failure to act by Owner, or in all other cases within ten (10) days after the happening of the event, thing, occurrence, or other cause, giving rise to the potential claim.

VI.4.3.3 Time of Notification is of the Essence

The parties intend by this Section that differences between the parties arising under or by virtue of the Contract Documents be brought to the attention of Owner at the earliest possible time in order that such matters may be settled, if possible, or other appropriate action promptly taken. Contractor shall have no further right to additional compensation or time for any claim that may be based on any such act, event, thing or occurrence for which no written notice of a potential claim as herein required was filed.

VI.4.4 Approval of Change Orders

Except for those Change Orders ( ) Contractor has the right to approve without Owner's prior written consent as set forth in subsection VI.4.3, Contractor shall submit all proposed Change Orders to Own' in accordance with the requirements and limitations set forth in this subsection VI.4.4. Contractor shall submit to Owner its written cost

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proposal with respect to each such Change Order within the time limits enumerated in this subsection VI.4.4 or any extension of such time limits as may subsequently be granted by Owner.

VI.4.4.1 Form of Change Order Cost Proposals

cost proposals shall be submitted in the form of a lump sum or "not to exceed" proposal with supporting information satisfactory to Owner clearly relating elements of cost increase and decrease with the specific items of Work involved.

VI.4.4.2 Owner's Obligation to Respond

after receipt of a cost proposal, Owner shall act thereon within ten (10) Business Days, as such period of time may be extended to permit Lender to approve said cost proposal, if Owner determines such approval is necessary; provided, however, when the necessity to proceed with the change does not allow sufficient time to review the proposal, Owner may order Contractor to proceed on the basis of the actual expenditures and savings of those performing the Work attributable to the change. Contractor shall use its best efforts to insure that such portion of the Work is performed at the lowest cost reasonably possible.

VI.4.4.3 Payment to Subcontractors

in the event Owner order Contractor to proceed on the basis of the actual expenditures, pending final determination of the related cost of a proposed Change Order under subsection VI.4.4.2 above, Subcontractor(s) shall be paid by Owner, on account, for the actual expenditures of performing the Work attributable to the change, based on Contractor's itemized accounting of the cost of such Work, which accounting shall be accompanied by supporting invoices and other appropriate supporting data. Payment of costs in such event shall be subject to final audit of the cost of such Work, including cost of Subcontract work, materials, sales tax and cost of delivery, cost of labor, workers' compensation and liability insurance, bond premiums, if any, and rental value of equipment and machinery.

VI.4.4.4 Failure to Agree on a Change Order Cost

a failure to reach an Contract relative to a Change Order required as a result of Contractor's Breach will not relieve Contractor of its obligation to continue the prosecution of the Work diligently at all times in accordance with the Progress Schedule.

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VI.5. Approval by Lender.

Notwithstanding anything in this Contract and particularly this Article VI to the contrary, excluding, however, the provisions of subsection VI.4.2 above, Contractor shall submit all proposed changes in the Plans and Specifications to Owner at least fifteen (15) Days prior to the commencement of construction relating to such proposed change. Owner shall have the right to submit any proposed change to Lender for approval if Owner determines that such approval is necessary and any time periods specified herein shall be extended as may be required to permit Lender to review and act on any such proposed change.

VI.6. Control Over Project

Contractor shall have complete control of the Project Site and shall have the right to decide the time and order in which various portions of the Work shall be installed and the relative priority of the Work and the Project Work of other contractors, and, in general, all other matters pertaining to the timely and orderly conduct of the Work on the Project Site.

VI.7. Postponement and Rescheduling.

The Owner shall have the right to direct a postponement or rescheduling of any date or time for the performance of any part of the Work that may interfere with the operation of the Owner's premises or any tenants or invitees thereof. The Contractor shall, upon the Owner's request, reschedule any portion of the Work affecting operation of the premises during hours when the premises are not in operation. Any postponement, rescheduling, or performance of the Work under this Section VI.7 may be grounds for an extension of the Contract Time, if permitted under Section VI.9 below, and an equitable adjustment in the in the Budget if (i) the performance of the Work was properly scheduled by the Contractor in compliance with the requirements of the Contract Documents, and (ii) such rescheduling or postponement is required for the convenience of the Owner.

VI.8. Progress Schedule

Upon agreement by Owner and Contractor as to an extension of any portion of the Progress Schedule necessitated by a Change Order, Owner and Contractor shall revise the Project Schedule to reflect such extension. In the event the Project Schedule is extended by reason of delays caused by Contractor's Breach, Owner may, on delivery of written notice to Contractor or as a part of the applicable Change Order, adjust the Installment Amount to reflect such extension as specified in subsection VI.2.2.
VII. COMPLETION

VII.1. Completion

VII.1.1 Preconstruction Work

Owner and Contractor acknowledge that performance of the portion of the Work relating to the review of Drawings has commenced. Owner and Contractor further acknowledge that the Work will be built in phases, leading to staged "completions" of portions of the Project. The Work or any designated portion thereof shall be deemed to be Complete on the date when the Work satisfies all of the following conditions (except to the extent the same shall be specifically waived or modified in writing by Owner):

VII.1.1.1 Completion Defined

The Work has been completed in accordance with the Contract Documents, all conditions precedent to the release of related improvement bonds within Contractor's control have been met, all Punch List Work has been completed to Owner's and Lender's reasonable satisfaction and a permanent certificate of occupancy or equivalent has been issued with respect to the Improvements;

Subject to the limitations established in Article VI.4.2 and, more particularly, in Article VII, the following completion dates are established for the three major segments of the Work:

1.- Leasing and Recreation Building
2.- Building 'A'
3.- Building 'B'

1st, 2001
2nd, 2001
3rd, 2001

VII.1.1.2 Lender's Requirements Met.

All of Lender's requirements which require the participation or cooperation of Contractor with respect to the last disbursement of construction loan proceeds have been met to Lender's satisfaction;

VII.1.1.3 Systems Complete and Functioning.

All HV AC systems, utility systems and appliances included in the Work are functioning in accordance with the Contract Documents;

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VII.1.1.4 Life Safety Systems Functioning.

All life safety systems included in the Work are functioning in accordance with the Contract Documents;

VII.1.1.5 Valid Notice of Completion.

Provided that Owner has signed and acknowledged such Notice, a valid Notice of Completion with respect to the construction of the Improvements has been recorded in the Official Records of Santa Clara County, California; and

VII.1.1.6 Completed Exhibit K.

Contractor has provided to Owner, for Owner's permanent records on the Project, in written form, the information described on Exhibit K.

VII.2. Progress

VII.2.1 Time is of the Essence

All time limits stated in the Contract documents are critical and are of the essence of this Contract. Subject to subsection VII.2.2, Contractor hereby covenants and agrees to use reasonable best efforts to perform its obligations under this Contract with respect to the review of Drawings, and construction of the Improvements in accordance with the Progress Schedule, to perform its other obligations within the time specified herein, or, if no time is specified, as expeditiously as reasonably possible.

VII.2.2 Excusable Delay

Any delay in Completion of the Work in accordance with the Progress Schedule (or other applicable time period as specified herein) arising from causes not reasonably foreseeable by Contractor with the use of Contractor's reasonable best professional efforts and not involving Contractor's Breach, including, but not limited to, such events as labor strikes, epidemics, quarantine restrictions, freight embargoes, adverse weather conditions, unavailability of materials or delays (other than delays arising out of Contractor's Breach) by, or breach by, the Architect or Consultants, any delay by Owner in processing Change Orders, any unreasonable delay in obtaining Lender's approval when and as such approval is required, inability to obtain, or delay in obtaining, permits and delays resulting from inaccuracies in the reports or studies of Consultants (provided that Contractor has complied with its obligations with respect to such reports as set forth in subsection III.13) will be considered an excusable delay. In the event of the occurrence of an excusable delay, Owner shall grant appropriate extensions of the Progress Schedule, if required, to cover such periods of delay. Owner shall have no obligation to grant extensions of the Progress Schedule if such delays were not excusable delays pursuant to

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this subsection VII.2.2 or otherwise resulted, directly or indirectly, from Contractor's Breach. In addition, in the event any extension of the Progress Schedule is granted to reflect delays which were not excusable delays or which resulted, directly or indirectly, from Contractor's Breach, such extension may be accompanied by an adjustment in the applicable Installment Amount to an amount determined by dividing the remaining unpaid portion of the Construction Services Fee (as applicable and as shown on Exhibit B subject to any adjustment as provided in this Contract) by the number of days remaining for Completion of the Project, as shown on the revised Progress Schedule.

VII.2.3 Early Completion

In the event the Project is Complete prior to the completion date projected in the Progress Schedule, Owner shall pay to the Contractor the remaining amount of the Construction Services Fee then outstanding in accordance with Exhibit B. If the Contractor submits a progress report indicating, or otherwise expresses an intention to achieve, completion of the Work prior to any completion date required by the Contract Documents or expiration of the Scheduled Completion Date, no liability of the Owner to the Contractor for any failure of the Contractor to so complete the Work shall be created or implied. In addition, such reports shall not modify any schedule or the Budget or GMP notwithstanding any statements therein; only properly authorized change orders in accordance with this Section shall have such effect.

VII.2.4 Limitation of Claim

Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Time, to the extent permitted under Section VI.10 shall be the sole remedy of the Contractor for any (i) delay in the commencement, prosecution, or completion of the Work, (ii) hindrance or obstruction in the performance of the Work, (iii) loss of productivity, or (iv) other similar claims (collectively referred to in this Section 4.2 as "Delays") whether or not such Delays are foreseeable, unless a Delay is caused by acts of the Owner constituting active interference with the Contractor's performance of the Work, and only to the extent such acts continue after the Contractor furnishes the Owner with notice of such interference. In no event shall the Contractor be entitled to any compensation or recovery of any damages, in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages, or other similar remuneration. The Owner's exercise of any of its rights or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or directing suspension, rescheduling, or correction of the Work), regardless of the extent or frequency of the Owner's exercise of such rights or remedies, shall not be construed as active interference with the Contractor's performance of the Work.

VII.2.5 Adjustment to Price for Permissible Delays

Notwithstanding Section VI.3.5.1 above, the contractor shall be permitted an adjustment to the Budget if any Excusable Delays, either individually or taken in the aggregate,
cause the Progress Schedule to be increased by more than thirty (30) days (the “Elimination Period”). Any adjustment in the Budget under or pursuant to this Section VII.2.5 shall be limited to the increase, if any, of direct costs incurred by the contractor in performing the Work as a result of that portion of any Excusable Delay or Delays that cause the Progress Schedule to be increased in excess of the Elimination Period. Direct costs for purposes of this Section VII.2.5 are those items specifically set forth in Exhibit C (General Conditions) and do not include profit or overhead.

VII.2.6 Elimination Period

The Elimination Period shall not apply to an Excusable Delay caused by the Owner. Any extension in the Progress Schedule in connection with an Owner caused Delay shall not be considered in determining whether the contractor has incurred Excusable Delays that, in the aggregate, exceed the Elimination Period. Notwithstanding anything to the contrary herein, Contractor shall not be entitled to additional compensation or additional time if the delay is caused by inclement weather, unless the number of days of inclement weather in the aggregate exceeds the number of days predicted by the National Atmospheric and Oceanic Division of the National Weather Bureau; in which event Contractor may make a claim for additional time pursuant to this paragraph.

VII.2.7 Due Prosecution

As provided in Article III, Contractor shall prepare and obtain approval as required by the Contract Documents for all Submittals and do all other things necessary and incidental to the prosecution of his Work in conformance with Project Schedule. Except when a Excusable Delay is involved, Contractor shall at his own expense, work such overtime and engage such extra labor, equipment, materials, tools, supplies, supervision, construction plant and all other incidentals as may be required to ensure the diligent, continuous and uninterrupted prosecution of the Work in accordance with the Project Schedule.

VII.2.8 Damages for Delays.

If any act or omission of Contractor in the prosecution of the Work causes delay in the Project Work, Contractor shall be liable for all losses, costs, expenses, liabilities and damages sustained by Owner. The act of Owner in allowing Contractor to continue after a delay other than an Excusable Delay of the scheduled time to complete the Work shall not be construed as a waiver by the Owner for damages.
VIII. SUSPENSION OF WORK

VIII.1. Suspension.

Owner may, at any time, or from time-to-time, order, in writing, a Suspension of the Work; provided, however, that in the event any such Suspension by Owner, through no fault of Contractor, extends for a period in excess of one hundred twenty (120) days, Contractor shall have the right, upon delivery of thirty (30) Days' prior written notice to Owner, to terminate this Contract, unless, within such thirty (30) Day period, Owner delivers to Contractor written notice to resume the Work. If Contractor elects to terminate this Contract as provided above, any amounts to be paid to Contractor upon such termination shall be determined in accordance with Section IX.3. Unless the Suspension arises out of Contractor's Breach, Owner shall bear all increased costs in the Budget Line Items associated with any such Suspension, including, without limitation, subject to the prior approval of Owner, the cost of the project superintendent, and any assistant superintendent during the suspension period in accordance with Section XI.1.4 and any increase in the Construction Services Fee upon which Owner and Contractor may agree. If Owner does not approve the payment of the cost of the project superintendent, and any assistant superintendent during the suspension period and the Work is later resumed, the Progress Schedule shall be extended by the time reasonably necessary for Contractor to retain personnel to perform such job functions.

IX. TERMINATION OPTION.

IX.1. Right to Termination for Convenience

The performance of the Work under this Contract may be terminated by Owner, in whole or in part, whenever Owner shall determine, in its sole discretion, that such termination is in its best interest, without regard to whether Contractor is in default hereunder. Any such termination shall be affected by delivery to contractor of a Notice of Termination specifying the extent to which performance of Work under the Contract is terminated and the date upon which such termination shall become effective. In the event of a termination of this Contract, Contractor shall have no obligation to Owner under this Contract except to the extent expressly provided herein.

IX.2. Stoppage of Work Upon Termination.

Upon receipt of such notice, Contractor shall, unless the notice directs otherwise, immediately discontinue the Work and discontinue the placing of orders for materials, facilities and supplies in connection with the performance of the Work; however, Contractor shall preserve and protect the Work already in progress and material and equipment on and in transit to the Project Site. Contractor shall, if required by Owner, make every reasonable effort to procure cancellation of all existing orders or contracts upon terms satisfactory to Owner, or, at the option of Owner, assign all orders, contracts and rights to Owner, including all benefits to be derived therefrom. Contractor, as a condition to receiving any payment due Contractor upon termination pursuant to
this Section IX.2 shall execute any and all documents, instruments and Contracts requested by Owner to effectuate the assignment.

IX.3. Payments Upon Termination.

Upon such termination, Contractor shall be entitled to payment only as follows: (i) the actual, directly incurred cost to the effective date of termination of field labor, material and tools consumed, equipment, supervision, construction plant, shop drawings and samples, as-built drawings, accessories and all other incidentals, common in the trade, for the Work completed by Contractor in conformity with the Contract, plus (2) reasonable costs of termination (including payments pursuant to cancellation provisions contained in subcontracts that have been reviewed and approved by Owner), plus (3) a sum equal to (i) a pro rata portion (calculated by dividing applicable Installment Account by the number of days in the calendar month in which this Contract is terminated and multiplying by the number of days elapsed in such calendar month) of the Construction Services Fee as may be payable as of the date of such termination, plus (ii) any previous Installment Amount due, but not yet paid, to Contractor as of the date of such termination. There shall be deducted from such sums as provided in this Section the amount of any payments made to Contractor prior to the date of the termination of this Contract and any other amounts Owner is authorized to deduct pursuant to this Contract. Contractor shall not be entitled to any claims or claim of lien against Owner or the Project Site for any additional compensation or damages in the event of such termination and payment. As a condition to payment by Owner under this Section, Contractor shall return to Owner, all Contract Documents. Contractor shall submit to Owner, a termination invoice, complete with backup data, supporting information and Conditional Waiver and Release Upon Final Payment within thirty (30) days from the effective date of termination.

IX.4. Termination for Insolvency.

In addition to the right of Owner to terminate the right of Contractor to prosecute the performance of the Work, as provided above, Owner may terminate the right of Contractor to prosecute performance of the Work upon twenty-four (24) hours written notice upon the happening of any of the following events (i) the filing of a petition for relief under the Bankruptcy Code or the institution of any other insolvency proceedings by, against, or on behalf of Contractor, (ii) the appointment of a receiver for Contractor, (iii) the death, dissolution or liquidation of Contractor, (iv) the transfer to others of more than twenty-five (25%) of the assets or ownership interest of Contractor, and (v) any act of insolvency by Contractor. If an order for relief is entered under the Bankruptcy Code for the benefit of Contractor, Owner may terminate Contractor's right to prosecute performance of the Work by giving twenty-four (24) hours notice to Contractor, its trustee and its surety, if any, unless Contractor, the surety or its trustee: (1) promptly cures or takes action to cure all defaults of Contractor, (2) provides Owner adequate assurance of performance under this Contract, (3) makes Owner whole for all loss suffered by Owner as a result of Contractor's default, and (4) assumes all obligations of contractor within statutory time limits. If Contractor is not performing pursuant to the Progress schedule at the time of entering an order for relief, or subsequent thereto, Owner while awaiting the decision of Contractor or its trustee to reject or to accept the Contract and provide adequate assurance of its ability to perform hereunder, may avail itself of such remedies as are reasonably necessary to

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maintain the Progress Schedule; it being understood that such action will be beneficial to Contractor because of such action's mitigating effect on damages that Contractor would otherwise incur.

IX.5. Termination for Delays.

If Contractor is in default of this Contract as provided in this Article IX, or, subject to excusable delays permitted under subsection VI. 7, otherwise refuses or fails to prosecute the Work or any separate part thereof with such diligence as required by this Contract in order to Complete the Work in accordance with the Progress Schedule or other applicable time period as specified herein, such failure shall constitute a Contractor's Breach, and Owner may, by written notice to Contractor, terminate Contractor's right under this Contract to proceed with the Work, or such part of the Work as has been delayed. In such event, Owner may take over the Work and prosecute the same to Completion by contract or otherwise. Owner may take possession of and utilize in completing the Work such materials, appliances and plans as may be at the Project and necessary thereto, and, immediately upon Owner's request, Contractor shall assign all Subcontracts to Owner; provided, however, that Owner shall indemnify and hold Contractor free and harmless from and against all cost, expense or liability resulting from any claims arising from the acts or omissions of Owner in connection with such Subcontracts subsequent to the effective date of such assignment. The acceptance of such assignment by Owner shall not be deemed a waiver by Owner of any claim arising out of Contractor's Breach. If Contractor's right to proceed with the Work is terminated pursuant to this Section IX.4, Contractor shall comply in all respects with the provisions of Section XVI.13 hereof and shall not be entitled to receive any payment that may be claimed by Contractor until Completion and, in all events, after Owner has assessed and charged Contractor with costs and damages for which Contractor shall be liable to Owner pursuant to the Contract Documents. Whether or not Contractor's right to proceed with the Work is terminated, Contractor shall be liable for damages to Owner arising from Contractor's Breach.

IX.6. Employees of Contractor and SubContractors

IX.6.1 Removal at Direction of Owner.

All persons employed on the Work by or at the instance or request of Contractor shall be employed under conditions satisfactory to Owner. Contractor shall immediately remove, or cause to be immediately removed, from the Project Site any employee or Subcontractor considered to be unsatisfactory to Owner. If the reason for removal is Owner's good faith belief that the Consultant's, subcontractor's or employee's conduct or omission will lead to or has resulted in a breach of any term or provision of this Contract, Contractor shall replace such removed party and be solely responsible for all costs associated therewith, including without limitation, any increase to the Budget; provided, however, that to the extent any contingency remains unused, Contractor shall have the option of utilizing the contingency to cover such costs.

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IX.6.2 Substance Abuse Testing.

Contractor shall not allow anyone know or suspected to be under the influence of intoxicating beverages, drugs or controlled substances on the Project site. Neither intoxicating beverages nor controlled substances shall be allowed on the Project site at any time. Owner shall have the right (but not the obligation) to require all personnel of Contractor and his Subcontractors to be tested for substance abuse in connection with or relating to the Work. Contractor shall require the consent of all of the personnel of Contractor and his Subcontractors to any testing required by Owner as a condition to employment with regard to the Work subject to the terms and condition of applicable Owner labor Contracts.

IX.6.3 Compliance with Laws.

Contractor shall comply with all applicable Federal, State and local laws and regulations, including, but not limited to, all Fair Labor Standards Act provisions and California Labor Code provisions covering the Work.

IX.6.4 Work Stoppages or Slow Downs

The Contractor shall only employ or use labor in connection with the Work capable of working harmoniously with all trades, crafts and any other individuals associated with the Project. Contractor's employees or Subcontractors, whether one or more, creating a labor dispute or problem which causes any slowdown or stoppage to the Work or the Project, shall be the Contractor's responsibility and shall be subject to all terms and conditions of the Contract. Contractor shall affect a timely solution to the dispute or problem so that the Project Schedule can be maintained.

IX.6.5 Designation of Representatives

Contractor shall designate in writing to Owner the name(s) of an authorized representative(s) of Contractor and keep such representative on the Project Site during all times when the Work is in progress and such designated representative(s) shall be authorized to represent the Contractor in all phases of the Work and the Contract. Contractor designates Dan O'Donovan as the Project Executive, Jim Egner as the Project Manager Charles Martin as the Project Superintendent. Such designated representatives shall not be changed without the written consent of the Owner.

IX.6.6 Illegal Substance Abuse/Use of Site

Contractor shall not permit his employees, the employees of Contractor's Subcontractors, and any other persons associated with the Work, to consume alcoholic beverages or illegal substances at the Project Site, or to perform any labor or work or travel to the Project Site while under the influence of alcohol or illegal substances, and shall further prohibit pets, children and guests at the Project Site, the broadcasting of loud music and
unnecessary noise during non-business hours as well as the creation or participation in any nuisance. Parking of all's workmen vehicles and delivery vehicles shall be only in areas specifically designated by Contractor unless reasonably objected to by Owner.

X. FEES

X.1. Contractor’s Fee.

In consideration and as compensation for the complete performance of all of the Work related to the construction of the Improvements and all other services and obligations of Contractor under this Contract, and subject to the limitations set forth in this Contract, Owner agrees to pay Contractor the Services Fee, as more particularly described in Exhibit B.

X.2. Progress Payments

X.2.1 Payments to Contractor, in the manner hereinafter provided, shall be based upon an approved Application for Payment.

X.2.2 On a regular basis, as mutually agreed upon by Owner and Contractor, but no more often than monthly, Contractor shall furnish to Owner an itemized Application for Payment containing: (a) a description of the Work performed, material supplied and/or costs incurred in connection with the stage of completed Work for which a Progress Payment is requested, and (b) a description of the portion of the Work which has been completed through the last day of the period to which such Application for Payment is applicable.

X.2.3 Each Application for Payment shall be supported by the following documentation (held at Contractor's office or delivered to Owner, as hereinafter specified or as directed by Owner) on forms described below or to be supplied by Owner;

X.2.3.1 Contractor's conditional lien waiver for the entire amount covered by said Application for Payment, substantially in the form attached hereto as Exhibit E, which shall be delivered to Owner;

X.2.3.2 Subcontractors' (including to the extent such Subcontractors and material-suppliers are known to Contractor or have delivered a preliminary notice, Sub-subcontractors' and material suppliers') unconditional lien waivers substantially in the form attached hereto as Exhibit E for the portion of the Work included in the last Progress Payment received by Contractor, such lien waivers to be held at Contractor's office, unless Owner otherwise directs;

-December 4, 2000
X.2.3.3 all bills, invoices, itemized payment schedules, documents of title, vouchers, statements, payroll records, receipts and any other documents evidencing the total amount expended, incurred or due; and

X.2.3.4 such other documents in form, scope and substance as Lenders or Owner shall reasonably require.

X.2.4 Despite the fact that Owner may have received preliminary notices, Contractor will be solely responsible for obtaining all lien waivers. Owner shall provide to Contractors copies of such preliminary notices that it receives. In taking action on Contractor's Applications for Payment, Owner shall be entitled to rely on the accuracy and completeness of the information furnished by Contractor and shall not be deemed to represent that Owner has made audits of the supporting data, exhaustive or continuous on site inspections or that Owner has made any examination to ascertain how or for what purposes Contractor has used the monies previously paid on account of this Contract. In the event Owner determines that any amounts previously paid to a Subcontractor exceeded the amounts which were properly payable, Owner shall have the right, at its option, either to: (a) deduct the amount of such overpayment from the next succeeding Progress Payment(s) or Installment Amount due Contractor, or (b) require Contractor to repay the Owner the amount of such overpayment.

X.3. Payment Not Acceptance

No Progress Payment, disbursement of Retainage nor any partial or entire use of occupancy of the Work by Owner, shall constitute an acceptance of any Work not in accordance with the Contract Documents.
X.4. Payments Withheld

X.4.1 Owner may decline to approve an Application for Payment to the extent that the Work covered by such Application for Payment is not in accordance with the Contract Documents. Owner may also decline to approve any Application for Payment or may withhold, in addition to the applicable Retainage, all or any portion of an installment of the Construction Services Fee or, because of subsequently discovered evidence or subsequent inspections, it may nullify the whole or any portion of an installment of the Construction Services Fee or, because of subsequently discovered evidence or subsequent inspections, it may nullify the whole or any part of any Progress Payment previously issued, to such extent as may be necessary, in its sole reasonable opinion, to avoid loss because of:

X.4.1.1 defective Work not remedied or unsatisfactory prosecution of the Work;

X.4.1.2 subject to subsection, failure to prosecute the Work in accordance with the Progress Schedule, in which event, however, Owner shall only have the right to withhold, in addition to the applicable Retainage, all or any portion of any installment of the Construction Services Fee and to modify the payment schedule set forth in Exhibit B to reflect any required extensions of the Progress Schedule.

If owner does not approve payment of the entire amount included in an Application for Payment, Owner shall withhold paying only the disapproved portion of the Application for Payment.

X.5. Schedule for Payment of Progress Payments

Owner shall have ten (10) Business Days following receipt thereof to approve or disapprove an Application for Payment. Any disapproval shall be in writing and shall set forth the reasons for such disapproval. To the extent that an Application for Payment is approved by Owner, the applicable Progress Payment shall be paid within ten (10) Business Days following Owner’s receipt thereof. Unless otherwise agreed by Owner and Contractor, such Progress Payments shall be made by Owner’s check payable jointly to Contractor and Subcontractors.

X.6. Substantial Completion

When a contractor is of the opinion that the Work is Substantially Complete, Owner and Owner’s Lender shall conduct a pre-occupancy inspection of residential units, common areas and offsite improvements within the Project in order to determine completion of units and the existence of defects to be corrected, if any. Contractor shall, within two (2) Business Days (or forty-eight (48) hours in the event of an emergency) of receipt of a list of Punch List Work from Owner, contact, supervise and cause the appropriate Subcontractors or manufacturers to replace any defective material or perform any labor necessary to correct any defect in or damage to their work; In the event any Subcontractor or manufacturer fails to do so, Contractor, after obtaining

-December 4, 2000

-51-
**APPLICATION AND CERTIFICATION FOR PAYMENT**

**TO OWNER:**
Clinker Apartments, LLC  
1631 Willow Street  
San Jose, CA 95125

**FROM CONTRACTOR:**
Western National Construction  
8 Executive Circle  
Irvine, CA 92614

**PROJECT:**  
One Pearl Place

**APPLICATION NO:** 000

**PERIOD TO:**

**PROJECT NOS:**

**CONTRACT DATE:**

---

**CONTRACTOR'S APPLICATION FOR PAYMENT**

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

---

1. ORIGINAL CONTRACT SUM  
   $21,670,667.00

2. Net change by Change Orders  
   $0.00

3. CONTRACT SUM TO DATE (Line 1 + 2)  
   $21,670,667.00

4. TOTAL COMPLETED & STORED TO DATE (Column G on G703)  
   $0.00

5. RETAINAGE:
   a. 10% of Completed Work  
      $(Excl. General Conditions)  
      $0.00
   b. 0% of Stored Material  
      $0.00

   Total in Column I of G703)  
   $0.00

6. TOTAL EARNED LESS RETAINAGE  
   $0.00

7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 from prior Certificate)  
   $0.00

8. CURRENT PAYMENT DUE  
   $21,670,667.00

9. BALANCE TO FINISH, INCLUDING RETAINAGE (Line 3 less Line 6)  
   $21,670,667.00

---

**CHANGE ORDER SUMMARY**

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

**CONTRACTOR:**  
Western National Construction  
8 Executive Circle  
Irvine, CA 92614

By:  
John C. Atherton  
President

State of: California  
Subscribed and sworn to before me this day of 2000

Notary Public:
My Commission expires:

---

WNC 088845
# CONTINUATION SHEET

**AIA DOCUMENT G703**

- **APPLICATION NO:** 000
- **APPLICATION DATE:** 00/00/00
- **PERIOD TO:** 00/00/00

In tabulations below, amounts are stated to the nearest dollar.

Use Column I on Contracts where variable retainage for line items may apply.

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<th>ITEM NO.</th>
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<th>SCHEDULED VALUE</th>
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<th>THIS PERIOD D</th>
<th>MATERIALS PRESENTLY STORED (NOT IN D OR E) E</th>
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<th>% (% G) H</th>
<th>BALANCE TO FINISH (C - G) I</th>
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**DIRECT OFFSITE COSTS**

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<th>MATERIALS PRESENTLY STORED (NOT IN D OR E) E</th>
<th>TOTAL COMPLETED AND STORED TO DATE (D+E+F) G</th>
<th>% (% G) H</th>
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<td>3076 GRADEING, ROUGH &amp; FINE</td>
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<td>57</td>
<td>3082 HARDWARE, FINISH</td>
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<td>58</td>
<td>3084 HEATING/ A.C.</td>
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<td>3086 INSULATION</td>
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<td>3087 IRONWORK, ORNAMENTAL</td>
<td>185,260</td>
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Exhibit J-1

TO: ALL SUBCONTRACTORS
PROJECT: ALL OPERATIONS

BEFORE BEGINNING WORK ON THE JOBSITE, PLEASE PROVIDE A CERTIFICATE OF INSURANCE TO WESTERN NATIONAL CONSTRUCTION AS DESCRIBED BELOW:

INSURANCE CARRIERS ARE REQUIRED TO HAVE A GENERAL POLICYHOLDER'S RATING OF NOT LESS THAN AN "A" AND FINANCIAL RATING OF NOT LESS THAN "VII" IN THE MOST CURRENT BEST'S KEY RATING GUIDE.

A. GENERAL LIABILITY MUST STATE:
   $1,000,000 Per Occurrence CSL (limit of SIR or GL deductible specified on Certificate)
   
   1. Comprehensive or Commercial General Liability
   2. Bodily Injury & Property Damage on Occurrence Basis – NOT "Claims Made"
   3. Owner's Contractors Protective Liability
   4. Products & Completed Operations
   5. Contractual Liability
   6. Broad Form Property Damage
   7. Products completed Operations
   8. Personal & Advertising Injury Liability
   9. Premises & Operations Coverage
   10. Underground, Explosion & Collapse Hazard
   11. No General Liability deductible permitted

B. AUTOMOBILE LIABILITY MUST HAVE EITHER:
   $1,000,000 Limit
   
   1. All Owned Autos, or
      Scheduled Autos, and
      Hired Autos, and
      Non-Owned Autos
   2. Additional Insured

C. CERTIFICATE HOLDER MUST STATE:

   WESTERN NATIONAL CONSTRUCTION, CILKER ORCHARDS AND CILKER APARTMENTS LLC
   P.O. Box 19528
   Irvine, California  92623-9528

   MUST HAVE 30 DAY CANCELLATION NOTICE with the following x'd out (required for all policies listed above).

   "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives".

WNC 088848
D. ADDITIONAL INSURED FORM MUST STATE THE FOLLOWING – with the following statement either on the front of the additional insured form or on an attached form.

1. "It is understood and agreed that the coverage afforded by this policy shall also apply to the Western National Construction, Cikker Orchards, Cikker Apartments LLC and their respective officers, directors, agents, servants, employees divisions, subsidiaries, partners, shareholders and affiliated companies and Western National Construction as Additional Insured, but only with respects to legal liability or claims caused by, arising out of, or resulting from the acts or omissions of the named insured or of others performed on behalf of the named insured and the acts or omissions of the additional insured(s) in connection with any general supervision by the additional insured(s) of the Subcontractors work."

2. This insurance is primary and any other insurance maintained by such additional insured is non-contributing with this insurance as respects claims or liability arising out of or resulting from the acts or omissions of the named insureds, or of others performed on behalf of the named insured."

E. WORKMAN'S COMPENSATION
   $1,000,000 Limit

1. WAIVER OF SUBROGATION IN FAVOR OF CERTIFICATE HOLDER

F. PROFESSIONAL ERRORS & OMISSIONS LIABILITY:
   Only required for Subcontractor providing architectural, design or engineering services.
   $1,000,000 Limit
   Deductible and/or SIR Not To Exceed $25,000
Owner’s prior written consent with respect to the specific Punch List Work, shall secure such materials, labor and other Subcontractors as are necessary to correct and shall correct the defective or incomplete work to Owner’s satisfaction.

X.7. Completion and Disbursement of Retainage.

X.7.1 Following the completion of the final phase of the Work, and upon receipt of a final Application for Payment, Owner and Owner’s Lender shall promptly make or cause to be made an inspection of the Work. When Lender and Owner determine that the only portion of the Work yet to be completed is Punch List Work for the final phase, Owner shall pay Contractor, in addition to the approved portion of the Progress Payment included in such final Application for Payment, all Retainage applicable to the Construction Services Fee, less one and one-half times Owner’s reasonable estimate of the cost of completing the Punch List Work. When Owner determines that all Punch List Work has been completed to its satisfaction, Owner shall pay to Contractor the remainder of the Retainage applicable to the Construction Services Fee. The disbursement of the Contractor’s Retainage applicable to the Construction Services Fees notwithstanding, Owner acknowledges that the Retainage applicable to the Subcontractors listed on Exhibit N is to be disbursed within thirty (30) days of completion of the portion of the Work covered by each such Subcontractor’s respective Subcontract, subject, in all events to Owner’s acceptance of such portion of the Work as complete and satisfactory.

X.7.2 No portion of the Retainage payable to Contractor shall become due until Contractor submits to Owner and Owner approves the unconditional release of liens and claims from Contractor and, if requested by Owner, unconditional release of liens and claims from all Subcontractors (with the exception of all liens and claims for which a bond has been previously provided, or is otherwise being contested, in accordance with Section IX.1 hereof). The payment of the final Application for Payment shall not be made until Contractor submits to Owner and Owner approves: (a) Contractor’s affidavit that all payrolls, bills for materials and equipment and other indebtedness connected with the Work for which Owner may be responsible (other than claims or liens for which a bond has been previously provided pursuant to Section IX.1 hereof), have been paid or otherwise satisfied; and (b) a set of reproducible Drawings and microfilm on which changes in the Work made during construction have been accurately recorded, which Drawings shall include, at a minimum, the items listed on Exhibit K. Before Owner makes final payment, Contractor must submit the following to Owner:

X.7.2.1 Maintenance Manuals

Two sets of all operating and maintenance manuals;

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X.7.2.2  Manufacturer's Warranty Materials

Four sets of all manufacturers brochures, instructions and specifications and any other warranties or guarantees received from manufacturers, suppliers or Subcontractors by Contractor or any Subcontractor;

X.7.2.3  Waiver and Release

Notarized Waiver and Release Upon Final Payment; and

X.7.2.4  Evidence of Absence of Liens

Evidence of the absence of any liens recorded against the Project or any portion thereof as well as stop notices served on Owner's construction lender and that all fixtures and equipment required under this Contract for the operation of the Project have been installed and that the same are free and clear of all liens, title retention Contracts and security interest.

Contractor shall promptly and satisfactorily settle all claims for services performed and materials furnished in connection with the Work. If Contractor fails or refuses to promptly and satisfactorily settle any claim, Owner, after written notice to Contractor, shall have the right (but not the obligation) to settle such claims for Contractor's account and deduct the amount thereof from amounts payable to Contractor. In addition, Owner may pay sums due by joint check payable to Contractor and each such Subcontractor. The Contractor and such Subcontractor shall be responsible for the allocation and disbursement of funds included as part of any such joint payment. In no event shall any joint payment be construed to create any (i) contract between the Owner and subcontractor of any tier, (ii) obligations from the Owner to such Subcontractor, or (iii) rights in such Subcontractor against the Owner.

The acceptance of final payment by Contractor shall constitute a waiver of all monetary claims by Contractor, except those previously made in writing and identified by Contractor, as unsettled at the time of the Final Application for Payment.

X.7.3  The acceptance by Contractor of the last disbursement of the Retainage shall constitute a waiver of all monetary claims then known to Contractor arising out of the performance of the Work, except those previously made in writing and identified by Contractor as unsettled at the time of the final application for Payment.
X.8. Payments to Subcontractors.

Owner shall pay each Subcontractor, subject to any applicable holdback, an amount equal to the amounts then due and payable by Contractor to such Subcontractor for the completed portion of the Work covered by the applicable Subcontract and included in the Contractor's Application for Payment. All of such costs shall be evidenced by appropriate invoices and releases and such other documentation as Owner may require.


Contractor hereby agrees that it shall strictly enforce all material provisions of all Subcontracts and, unless Owner otherwise directs, will pursue, with attorneys of Owner's choice, for Owner's benefit, all available legal or equitable remedies following a breach by any Subcontractor of its Subcontract.


Unless Contractor provides Owner with a Payment Bond in the full amount of the Budget, all sums paid to Contractor for the partial or complete performance of the Work and any balance of the unearned Budget shall be imposed with a trust fund for the purpose of:

X.10.1 Payment to Consultants

First, payment to the Consultants, Subcontractors, laborers, material and service supplies of Contractor who have enforceable mechanic's lien claims or enforceable bond claims.

X.10.2 Payment Upon completion of the Work.

Second, full completion of the Project Work;

X.10.3 Back Charges Due Owner

Third, payment of any back charges or claims due Owner. from Contractor on the Project.

Such payments to Contractor shall not be due or payable to anyone else claiming in its place and stead, including, but not limited to a trustee in bankruptcy, receiver or assignee of Contractor, until and unless the Project Work is fully completed and any amounts under A, B or C above are fully paid and satisfied.
X.11. Liens

X.11.1 Lien Removal

SHOULD ANY CLAIM OF LIEN BE RECORDED AGAINST OR ATTACHMENT ATTACH TO THE PROJECT, OR ANY PORTION THEREOF, OR SHOULD OWNER OR LENDER BE SERVED WITH ANY STOP NOTICE OR COMPLAINT IN ANY MECHANIC'S LIEN SUIT OR SIMILAR PROCEEDING IN CONNECTION WITH OR ARISING OUT OF THE WORK, OTHER THAN A LIEN OR ATTACHMENT OF A CONSULTANT OR OTHER THIRD PARTY RETAINED DIRECTLY BY OWNER, CONTRACTOR SHALL, WITHIN TEN (10) DAYS AFTER WRITTEN DEMAND BY OWNER, CAUSE THE EFFECT OF SUCH LIEN, ATTACHMENT, STOP NOTICE OR SUIT TO BE REMOVED FROM THE PROJECT, OR ANY PORTION THEREOF, OR TO BE WITHDRAWN OR TERMINATED, AS APPLICABLE; PROVIDED, HOWEVER THAT CONTRACTOR SHALL HAVE NO OBLIGATION WITH RESPECT TO ANY OF THE FOREGOING TO THE EXTENT ANY SUCH LIEN, ATTACHMENT, STOP NOTICE, SUIT OR OTHER PROCEEDING ARISES SOLELY AND DIRECTLY OUT OF OWNER'S ACTS OR OMISSIONS IN BREACH OF THIS AGREEMENT, INCLUDING OWNER'S FAILURE TO PAY FOR THE PORTION OF THE WORK FROM WHICH THE LIEN OR STOP NOTICE ARISES. IF REQUIRED BY OWNER, CONTRACTOR SHALL PROCURE AND RECORD OR FURNISH TO OWNER A SURETY BOND IN AN AMOUNT EQUAL TO THE AMOUNT PROVIDED FOR IN SECTION 3143 OF THE CALIFORNIA CIVIL CODE OR ANY COMPARABLE STATUTE NOW EXISTING OR HEREAFTER ENACTED. IN THE EVENT CONTRACTOR FAILS TO MAKE SUCH PAYMENTS REQUIRED UNDER THIS SECTION 9.1 AND THE LIEN, STOP NOTICE, ATTACHMENT OR PROCEEDING IS THE RESULT OF CONTRACTOR'S BREACH, OWNER MAY MAKE SUCH PAYMENTS ON BEHALF OF CONTRACTOR, AND CONTRACTOR SHALL REIMBURSE OWNER, ON DEMAND, FOR THE AMOUNT ACTUALLY PAID.

XI. CONTRACTOR'S COSTS

XI.1. Costs to be Reimbursed by Owner.

The following shall be deemed costs of the Work for which Owner is obligated to reimburse Contractor as herein provided:

XI.1.1 Soils and Civil Engineer's Fees.

the fees and expenses of the soils engineer and the civil engineer (to the extent of the field work performed by such civil engineer, except that the cost of staking shall be considered a cost of the Work), as well as the fees and expenses of any other Consultant hired by Contractor with the consent of Owner;

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WNC 088853
XI.1.2 Cost of Materials

the cost of all materials incorporated into the Work;

XI.1.3 Payments to Subcontractors

amounts paid or payable in accordance with this Contract to Subcontractors employed pursuant to the terms hereof;

XI.1.4 Wages and Salaries of Site Personnel

the wages or salaries and reasonable additional compensation of the superintendent, any assistant superintendents or other field personnel, including a portion of the salary of the Project Manager as agreed upon by Owner and Contractor, employed by Contractor in connection with the Project, plus an additional percentage thereof as agreed upon by Owner and Contractor to compensate for fringe benefits paid or payable to such persons;

XI.1.5 Insurance Costs

costs of insurance for which the Contractor is entitled to be reimbursed as hereinafter provided in Section XII; and

XI.1.6 Other Reimbursable Costs

all other costs to which Contractor is entitled to be reimbursed as provided in this Contract;

XI.2. Costs to be Borne by Contractor.

Notwithstanding any other provision of this Contract, in no event shall Owner be responsible for any of the following costs incurred by Contractor in connection with the Work, all of which shall be borne by Contractor:

XI.2.1 Capital Expenses

No part of Contractor's capital expenses, including interest on Contractor's capital employed for the Work, or costs of financing, interest or other charges incurred by Contractor in the course of obtaining any funds to finance prosecution of any portion of the Work.
XI.2.2 Contractor's Overhead

Overhead or general expenses of any kind, such as (but not limited to) salaries or other compensation of Contractor's officers, executives, general managers, area managers, estimators, auditors, accountants, purchasing and contracting agents and other employees (other than the Project Manager), to the extent they are not directly related to the field supervision of the Work.

XI.2.3 Costs Resulting from Contractor's Breach

Costs incurred in connection with the Project which would not have been incurred but for Contractor's Breach or the negligence or willful misconduct of Contractor, its officers, executives, general managers, estimators, purchasing and contracting agents, superintendents or supervisory personnel, or other employees, including, but not limited to, the cost of correcting defective or nonconforming Work, disposal of materials and equipment wrongly supplied or repairing any damage to the Project, any personal property located thereon or any portion of any of the foregoing.

XI.2.4 Unauthorized Costs in Excess of Line Item Spending Limits

Costs incurred, without Owner's prior written approval, with respect to any Line Item, to the extent such costs, individually or in the aggregate, exceed the Spending Limit for such Line Item, including, without limitation, costs associated with any Contractor-initiated Change Order or Contract Modification, unless: (a) such Change Order or Contract Modification is expressly approved in writing in advance by Owner; or (b) such Change Order would not result in a change in the Plans and Specifications and with respect to any Line Item either individually or when combined with all other Change Orders not approved by Owner, would not exceed the Spending Limit for such Line Item.

Nothing herein shall be deemed to require Contractor to incur costs which exceed the spending limit for a Line Item.

XI.2.5 Costs of Repairing Nonconforming Work

Costs of removing and replacing any material condemned or rejected as a result of nonconformance with the Contract Documents, as set forth in Section XIII.2.

XI.2.6 Costs Resulting from Failure to Comply with Owner's Requests

Costs incurred by Contractor resulting from the failure of Contractor or its Subcontractors to comply with directives of Owner given in accordance with the terms of this Contract and not in conflict with the Progress Schedule.
XI.2.7 Acceleration Costs

As provided in subsection VI.3.5, any acceleration costs, including any and all overtime wages, not requested by Owner by Change Order.

XI.2.8 Failure to Procure or Maintain Insurance

Costs resulting from the failure of Contractor or any Subcontractor to procure and maintain insurance as provided in Section XII.

XI.2.9 Costs Resulting from Failure to Pass Inspections

Costs incurred as a result of any inspection or test which reveals nonconforming or defective Work not performed in accordance with the Contract Documents as set forth in Section III.1.7.

XI.2.10 Costs Resulting from Release or Contesting of Liens

Provided Owner has paid the amounts owed Contractor when due under the terms hereof, costs incurred in connection with the release, contest or bonding of any lien on the Project, or any portion thereof, or any stop notice where such costs are to be borne by Contractor pursuant to the provisions of Section X.7.

XI.2.11 Contractor's Travel or Living Costs

Travel and living costs of Contractor or any of Contractor's officers, employees, agents, or subcontractors, including but not limited to Contractor's Project Superintendent, assistant superintendents or other field personnel except such travel as is required for the execution of the Work and such authorization is sought and agreed to, in writing, by Owner prior to its occurrence.

XI.2.12 Cost of Contractor's Tools

The cost of any tools used in the performance of Contractor's work, whether consumed in the performance of the Work or not.

XII. INSURANCE

XII.1. Insurance Types

(a) Contractor shall not commence any Work under this Contract until it obtains all insurance required to be obtained by Contractor under this Contract. Contractor will not permit any Subcontractor to commence work on the Project until all insurance requirements described

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on Exhibit J-1 and elsewhere in this Contract have also been complied with by such Subcontractors or until Owner has approved, in writing, any lesser insurance for such Subcontractors.

(b) All insurance described under this Article XII to be carried by Contractor will be maintained by Contractor with insurance carriers licensed and approved to do business in California, having a general policyholders' rating of not less than an "A-" and financial rating of not less than "VII" in the most current Best's Insurance Report. In no event shall such insurance be terminated or otherwise allowed to lapse prior to (1) the earlier of the completion of the Work pursuant to the provisions of this Contract or the termination of this Contract, or (2) such longer period of time as may be specified herein. Contractor may provide the insurance described in this Article XII, in whole or in part, through a policy or policies covering other liabilities and projects of Contractor; provided, however, that any such policy or policies shall: (i) allocate to the Project the full amount of insurance required hereunder; and (ii) contain, permit or otherwise unconditionally authorize the waiver contained in Section XII.7. Premiums for all policies of insurance required hereunder (excluding Workers' Compensation Insurance as required by Section XII.4, the cost of which shall be paid by Contractor) shall be paid by Owner up to the amount allocated therefor in the Budget. In the event that the cost of such insurance is increased for reasons unrelated to Contractor's claim or accident history, the Budget shall be revised to reflect such increase. All increases in cost resulting from Contractor's claim or accident history shall be paid by Contractor.

XII.2. Evidence of Insurance

As evidence of Contractor's specified insurance coverage, Owner shall accept certificates issued by Contractor's insurance carrier acceptable to Owner showing such policies in force for the specified period, but owner has the right to review certified policies as reasonably necessary. Such evidence shall be delivered to owner promptly upon execution of this Contract or prior to commencement of Work, whichever earliest occurs. Each policy and certificate shall be subject to reasonable approval by Owner and shall provide that such policy shall not be subject to material alteration to the detriment of Owner or Contractor or cancellation without thirty (30) days notice in writing to be delivered by registered mail to Owner and Lender. Should any policy expire or be canceled prior to the earlier of the completion of the Work pursuant to the provisions of this Contract or the earlier termination of this Contract, and Contractor fails immediately to procure other insurance as specified herein, Owner reserves the right, but shall have no obligation, to procure such insurance for the benefit of Contractor. The cost of any insurance so procured by owner in excess of the amounts allocated therefore in the Budget shall be borne by Owner. Contractor shall also allow Owner to inspect such evidence of insurance as Contractor obtains from its Subcontractors, but Owner shall have no obligation to inspect such evidence of insurance.

XII.3. Damages.

Nothing contained in this Article XII is to be construed as limiting the type, quality or quantity of insurance Contractor should maintain for its own protection or the extent of Contractor's responsibility for the payment of damages resulting from Contractor's Breach (except as
provided in subsection V.6.3 nor shall anything contained herein be deemed to place any responsibility on Owner for ensuring that the insurance required hereunder is sufficient for the conduct of Contractor's business.

XII.4. Workers' Compensation Insurance.

Contractor shall maintain, at its expense, Workers' Compensation Insurance, including Employer's Liability (at a minimum limit of One Million Dollars ($1,000,000)) for all persons whom it employs in carrying out the Work under this Contract, including a waiver of subrogation by the insurance carrier with respect to Owner. Such insurance shall be in strict accordance with the requirements of the most current and applicable Workers' Compensation Insurance Laws in effect from time to time at the Project site.

XII.5. Comprehensive or Commercial General Liability Insurance.

Contractor shall, at Owner's sole cost and expense, maintain Comprehensive or Commercial General Liability Insurance on an "occurrence" basis, with reasonably acceptable deductibles, with a combined single limit for bodily injury and property damage of not less than Ten Million Dollars ($10,000,000) or limit carried, whichever is greater, covering operations, independent contractors, products and completed operations (renewed annually for ten (10) years after Completion of the Improvements), contractual liability specifically covering the indemnification contained in Section V.12, broad form property damage, including completed operations, severability of interest clause, personal injury and explosion, collapse and underground hazards (X, C, U). The limits of liability of the insurance coverage specified in this Section XII.5 may be provided by any combination of primary and excess liability insurance policies.

XII.6. Automobile Liability Insurance.

Contractor shall maintain, owned, hired and non-owned automobile liability insurance covering all use of all automobiles, trucks and other motor vehicles utilized by Contractor in connection with this Contract, with a combined single limit for bodily injury and property damage of not less than Ten Million Dollars ($10,000,000) or limit carried, whichever is greater.

XII.7. Waiver of Subrogation.

Contractor hereby waives all rights against Owner for damages caused by fire and other perils and risks to the extent that they are able to be covered by the policies of insurance required to be carried by Contractor pursuant to this Contract.

XII.8. Additional Insured.

Owner, as Owner is identified below, shall be included as an additional insured under the coverage specified in Sections XII.5 and XII.6, with the following endorsement or provision included within each applicable policy: "It is understood and agreed that the coverage afforded

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by this Policy shall also apply to Cilker Apartments, LLC, and its respective officers, directors, agents, servants, employees, divisions, subsidiaries, partners, shareholders and affiliated companies as additional insureds, but only with respect to legal liabilities or claims caused by, arising out of or resulting from the acts or omissions of the named insured or of others performed on behalf of the named insured and the acts or omissions of the additional insured(s) in connection with general supervision of Contractor's work. This insurance is primary and any other insurance maintained by such additional insured is non-contributing with this insurance as respect claims or liability resulting from the acts or omissions of the named insured or of others performed on behalf of the named insured." Prior to the commencement of the Work, Owner shall be provided with a copy of the additional insured endorsement, or the policy, containing such provision.


If requested by Owner in writing, Contractor shall obtain and maintain a fidelity bond, or comparable coverage acceptable to Owner, in an amount not less than Five Million Dollars ($5,000,000) per occurrence from a surety or insurance company reasonably acceptable to Owner for any of Contractor's employees who may handle funds or property in connection with the Project and to provide coverage to protect Owner.

XII.10. Insurance Audit; Refunds.

Any insurance charges which are submitted to Owner by Contractor shall be subject to audit by Owner. Any insurance dividends earned or returned premiums applicable to the policies required to be carried hereunder at Owner's expense shall be refunded by Contractor to Owner immediately upon receipt thereof.

XII.11. Owner's Election to Insure.

Owner reserves the right, but shall have no obligation, to procure the insurance, or any portion thereof, for which Contractor is herein responsible and which is described in this Article XII. Owner shall notify Contractor if Owner exercises its right, whereupon Contractor's responsibility to carry such duplicative insurance shall cease and the sums paid by Owner to Contractor hereunder shall be equitably adjusted by the parties to reflect any resulting cost saving to Contractor. Owner further reserves the right at any time, with thirty (30) days notice to Contractor, to require that Contractor resume the maintenance of any insurance for which Owner has elected to become responsible pursuant to this Section XII.11; in such event, the sums paid to Contractor by Owner shall increase to the extent of any previously agreed and implemented reduction as aforesaid attributable to Owner's prior assumption of the particular coverage.

XII.12. Project Property Insurance.

Owner shall maintain, at its sole cost and expense, an "all risk" (excluding earthquake and flood) Builder's Risk policy covering loss or damage to Property which becomes a final part of the Project in the amount of the full replacement cost thereof. The cost of such insurance shall not

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be a cost of the Work. Such policy shall cover the interest of Owner, the interest of Contractor at the Project site, and the interest of each Subcontractor in its work at the Project site. The Ten Thousand Dollars ($10,000) per occurrence deductible and all uninsured loss shall be the responsibility of the party whose negligence causes the loss, or, if no one is negligent, shall be the responsibility of Owner.

XII.13. Transit Insurance.

If requested by Owner in writing, Contractor shall, at Owner's sole cost and expense, maintain "all risk" insurance, on a replacement cost basis covering loss or damage to property (for which it has title and/or risk of loss) which becomes a final part of the Project, during its off-Project site transit and while stored or worked upon away from the Project site. Owner shall be an additional insured.

XIII. INSPECTION AND ACCEPTANCE

XIII.1. Inspection and Testing.

All Work shall be subject to such Inspections and testing at all reasonable times prior to acceptance of such Work by Owner: (a) as Owner shall direct and (b) in accordance with the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the Project. Any inspection and testing by Owner shall be for the sole benefit of Owner and shall not relieve Contractor of the responsibility of providing quality control measures to assure that the Work strictly complies with this Contract. No inspection or test by Owner shall be construed as constituting or implying acceptance, nor shall any inspection or testing relieve Contractor of its responsibility arising out of Contractor's Breach prior to acceptance, not in any way affect the continuing rights of Owner after acceptance of the completed Work under the terms of Section XIII.5, except as herein provided. Except in the event of Contractor's Breach, Owner shall bear all costs of such inspections, tests or approvals, including, without limitation, compensation for additional services made necessary by such failure, to the extent that any inspection or test reveals a failure of the Work to comply with the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the Project, and an appropriate Change Order shall be issued.

XIII.2. Nonconforming Work.

To the extent such nonconformance does not arise out of Owner’s Breach, Contractor shall, at its expense and not as a cost of the Work, promptly replace any material or correct any workmanship which does not conform to this Contract, whether observed before or after Completion, and whether or not fabricated, installed or completed and shall pay all costs incurred in connection with any such inspection or test which reveals nonconformity or defective work. Contractor shall promptly segregate and remove the rejected material from the Project.

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XIII.3. Owner's Right to Correct.

XIII.3.1 Owners Right Upon Contractor's Failure to Correct

If Contractor does not promptly replace rejected material or correct rejected workmanship (without regard to the reason for such rejection), Owner may: (a) by contract or otherwise, replace or correct such nonconforming Work and charge the cost thereof to Contractor, or (b) terminate Contractor's right to proceed in accordance with Article IX. Owner's right under this subsection XIII.3.1 shall survive the termination of this Contract.

XIII.3.2 Cost Responsibility

In the event Owner elects to exercise its right to correct such nonconforming Work, an appropriate Change Order shall be issued deducting from the payments then or thereafter due Contractor( ) the cost of correcting such deficiencies. If the payments then or thereafter due Contractor are not sufficient to cover such amount, Contractor shall pay the difference to Owner.

XIII.4. Method of Inspection.

XIII.4.1 Contractor's Obligation to Facilitate

Contractor shall obtain and provide, at Owner's request and at Owner's expense, all facilities, labor and material reasonably needed to permit Owner to perform such safe and convenient inspection and testing as may be required by Owner. All inspection and testing by Owner shall be performed in such manner as not to unnecessarily delay the Work.

XIII.4.2 Proof of Inspection

Required certificates of inspection, testing, or approval shall be secured by Contractor and promptly delivered to Owner.

XIII.5. Acceptance.

Unless otherwise provided in this Contract, acceptance by Owner shall be made as promptly as practicable after Completion and inspection of all Work required by this Contract, or that portion of the Work that Owner determines can be accepted separately. Acceptance shall be final and conclusive except with regard to latent defects, fraud or gross negligence; provided, however, that no such acceptance shall limit or in any way affect Owner's rights under any warranty or guarantee, including, without limitation, those specified in Article V.

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XIII.6. **Cost of Unnecessary Inspections.**

Owner has the right to deduct from Contractor's Fee or otherwise charge to Contractor all costs of inspections or testing incurred by Owner as a result of Contractor's calling for any inspection when the Work is not sufficiently complete to pass said inspection or when re-inspection or re-testing is necessitated by prior rejection caused by Contractor's Breach.

**XIV. MISCELLANEOUS PROVISIONS**

XIV.1. **Royalties and Patents.**

If any design, device, material or process covered by letters patent or copyright is used by Contractor, it shall provide for such use by legal Contract with the owner of the patent or copyright or a duly authorized licensee of such owner, and shall indemnify, defend (with attorneys approved by Owner in its reasonable discretion), hold harmless Owner from and against any and all claim, liability, damage, cost, expense, award, fine or loss arising out of or in connection with any royalty, patent or license infringement. Contractor shall not be responsible for patent, copyright or license infringement caused by the use of products or equipment specified by Architect, any Consultant or Owner or in any of the Contract Documents by parties other than Contractor.

XIV.2. **Remedies Cumulative.**

No remedy herein reserved to Owner is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and shall be in addition to any other given in the Contract Documents as now or hereafter existing or at law, equity or by statute.

XIV.3. **Nonwaiver.**

The failure of Owner to notify Contractor of any default under the Contract Documents shall not be deemed to be a waiver by Owner of any continuing default by Contractor of any term, covenant or condition set forth in this Contract, nor of Owner's right to declare a default for any such continuing breach, and the failure of Owner to insist upon strict performance of any of the terms, covenants or conditions of the Contract Documents, or to exercise any option the Contract Documents in anyone or more instances, shall not be construed as a waiver or relinquishment of any such terms, covenants, conditions or options, but the same shall be and remain in full force and effect.

XIV.4. **Claims for Damages.**

Should either party to the Contract suffer injury or damage to person or property because of any act or omission of the other party or of any of its employees, agents or others for whose acts it is legally liable, claim shall be made in writing to such other party within a reasonable time after

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the first observation of such injury or damage. This provision shall, however, be subject to any more specific provisions of the Contract Documents.

XIV.5. Successors and Assigns.

Owner and Contractor each binds itself, its partners, successors, assigns and legal representatives to the other party hereto and to the partners, successors, assigns and legal representatives of such other party in respect to all covenants, Contracts and obligations contained in the Contract Documents. Contractor shall not assign this Contract in whole or in part, sublet it as a whole or assign, pledge or otherwise hypothecate its right to the Construction Service Fee without the prior written consent of Owner, nor shall Contractor assign any other monies due or to become due to it hereunder, without the previous written consent of Owner, which consent may be withheld by Owner in its sole discretion. Owner shall have the right, without Contractor's consent, to assign its rights under the Contract Documents to any lender, and/or to any party to which Owner leases, sells or otherwise transfers the Property. If, in connection with such assignment, Owner wishes to be released of liability under the Contract Documents, Owner must provide Contractor with reasonably satisfactory evidence that the assignee has the financial capability to perform Owner's obligations hereunder. Contractor shall notify Owner, within ten (10) days of receipt of such assignee's financial statements, whether Contractor has determined, in its reasonable judgment, that such assignee has such financial capability. Failure to deliver such notice within such ten (10) day period shall be deemed to be approval of such assignee's financial capacity. Upon any such approval, or deemed approval, by Contractor, Owner shall be released from all liability under this Contract accruing on or after the date of such approval. Contractor agrees to cooperate in any such assignment including, without limitation, executing such consents to assignment as Lender may reasonably require.

XIV.6. Written Notice.

Written notice shall be deemed to have been duly served if delivered in person to any of the individual set forth in Exhibits L or M (Exhibit L as to Owner, Exhibit M as to Contractor) registered or certified mail, return receipt requested, to the address set forth below in care of those individuals set forth in Exhibits L and M:

Owner: Cilker Orchards,
1631 Willow Street
Suite No. 225
San Jose, CA 95125

Contractor: Western National Construction
8 Executive Circle
Irvine, CA 92614

on the third Business Day following deposit in the United States mail.

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XIV.7. Attorneys' Fees.

Should either party employ an attorney or attorneys to enforce any of the provisions hereof, or to protect its interest in any matter arising under the Contract Documents, or to recover damages for the breach thereof, the non-prevailing party in any final judgment arising therefrom agrees to pay to the other party all reasonable costs, charges and expenses, including attorneys' fees and fees and charges attributable to services performed by legal assistants or other non-attorney personnel working under the supervision of an attorney, expended or incurred in connection therewith.

XIV.8. Severability.

In case anyone or more provisions set forth in the Contract Documents shall for any reason be held invalid, illegal or unenforceable in any respect, any such invalidity, illegality, or inability to enforce shall not affect any other provision of the Contract Documents, and the Contract Documents shall be construed as if such invalid, illegal or unenforceable provision had never been incorporated therein provided that the deletion of such provision does not materially alter this Contract.

XIV.9. No Third-Party Beneficiaries.

The Contract Documents are not intended and shall not be deemed or construed to confer any rights, powers or privileges on any person, firm, partnership, corporation or other entity not a party hereto.

XIV.10. Incorporation of Exhibits.

The Exhibits attached or to be attached hereto shall be construed with and as integral parts of the Contract Documents to the same extent as if the same had been set forth verbatim herein.

XIV.11. Oral Agreements.

No oral order, objection, claim or notice by any party to the other shall affect or modify any of the terms or obligations contained in any of the Contract Documents, and none of the provisions of the Contract Documents shall be held to be waived or modified by reason of any act whatsoever, other than by a definitely agreed waiver or modification thereof in writing signed by the party to be charged therewith, and no evidence shall be introduced in any proceeding of any other waiver or modification.

XIV.12. Counterparts.

The Contract Documents may be executed in any number of counterparts, and each of such counterparts for all purposes shall be deemed to be an original, and all of such counterparts should constitute one and the same Contract.

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The Contract Document shall be governed by the laws of the State of California.


Contractor will not discriminate against any employee or applicant for employment by Contractor because of race, creed, color, age, sex or national origin. Contractor agrees that applicants shall be employed, and employees shall be treated during employment, without regard to their race, creed, color, sex or national origin. Contractor agrees to post in conspicuous places notices setting forth the provisions of this Section XIV.14.

XIV.15. Contractor's License.

XIV.15.1 State Contractor's License Board

Contractors are required by law to be licensed and regulated by the Contractor's State License Board which has jurisdiction to investigate complaints against contractors if a complaint is filed within three (3) years of the date of the alleged violation. Any questions concerning a Contractor may be referred to the Registrar, Contractors' State License Board, P.O. Box 26000, Sacramento, California, 95826.

XIV.16. Contractor's Representation

Contractor represents and warrants that it is duly licensed and in good standing under the laws of the State of California and that its Contractor's License Number is 721295.

XIV.17. Special Exculpation.

Except for payment for Work performed in accordance with this Contract, the liability of Owner hereunder shall be limited to its interest in the Project, and in no event shall any other assets of Owner or any constituent partner of Owner be subject to any claim arising out of or in connection with this Contract.

XIV.18. Services Prior to Execution.

Notwithstanding the fact that this Contract is executed as of the date first set forth above, the parties recognize that a portion of the Work required hereunder was performed by Contractor prior to such date, all of which Work shall be governed by the terms and conditions of this Contract and shall be deemed to be a part of the Work. Contractor shall not be entitled to any compensation for such prior activities and services, in excess of the Construction Services Fee and reimbursement for the cost of the Work in accordance with the terms hereof. Without limiting the foregoing, all of Contractor's liabilities and obligations to Owner and Owner's liabilities and obligations to Contractor hereunder shall apply to all work and services provided.
by Contractor for the Project prior hereto, notwithstanding the fact that the Work may have been performed prior to the date hereof pursuant to prior negotiations, representations, Contracts, understandings or otherwise.

XIV.19. Subsurface and Site Information.

XIV.19.1 Owner Information Regarding Soil and Subsurface Conditions

Owner will make available, or has made available, to Contractor the information that it has as to subsurface conditions and site geology, including, but not limited to, utility locations at the Project. Except as expressly provided in subsection XI.4, Owner does not assume any responsibility whatsoever with respect to the sufficiency or accuracy of borings made, or of the logs of test borings, or of other investigations, or of the interpretations made thereof, and there is no warranty or guarantee, either express or implied, that the conditions indicated by such investigations, borings, logs or information are representative of those existing throughout such area, or any part thereof, or that unforeseen developments may not occur.

XIV.19.2 Contractor's Right to Rely on Owner's Information

Any test borings logs showing a record of the data obtained on subsurface conditions represent only opinions as to the character of the materials encountered in test borings and are included only for the convenience of Contractor. Contractor shall have no obligation to conduct any independent investigation of subsurface conditions and site geology and, to that extent, shall be entitled to rely on the accuracy of such reports, investigations and information. In no event, however, shall such right to rely in any way relieve Contractor of its duty to request interpretations and report discrepancies as set forth in subsections III.1.3, III.1.4. and XIV.18.3

XIV.19.3 Owner's Obligation to Supply Site and Soils Information to Contractor

All material relating to subsurface and site information, including, but not limited to, utility locations, all surveys, title reports and soils analysis available to Owner shall be provided to Contractor by Owner. Owner makes no representations or warranties with respect to the accuracy or completeness of any material so delivered to Contractor and Contractor agrees to notify Owner promptly following Contractor's discovery of any inaccuracy therein.

XIV.19.4 Owner's Indemnification to Contractor for Information Provided

Notwithstanding the limitations on Owner's representations and warranties set forth herein, Owner shall indemnify and hold Contractor harmless from and against any loss, damage, cost, expense (including reasonable attorneys' fees and costs) suffered by Contractor as a result of any liability directly connected with any claim made by a third
party against Contractor and arising out of errors or omissions in the information provided by Owner to Contractor pursuant to this Article XIV

XIV.19.5 Contractor's Obligation to Provide Owner with Site Information

Contractor shall make available to Owner, upon Owner's request without any warranty or guaranty, express or implied, as to the accuracy thereof, the results of any site investigation, test borings, analyses, studies or other tests conducted by or in the possession of Contractor or any of its agents. Immediately prior to the commencement of the Work, Owner shall make available to Contractor, without any warranty or guaranty, express or implied, as to the accuracy thereof, any site investigation, test borings, analysis, studies or other tests conducted as of such date. From and after the date of the commencement of Work, Contractor shall use its best reasonable efforts and diligence in the supervision of the soils engineer and shall be responsible for any inaccuracy in reports or other information provided thereafter by such soils engineer to the extent such inaccuracy results from Contractor's Breach. Such supervision to be provided by Contractor shall be that which would be provided by a diligent owner supervising the activities of a soils engineer employed by it, and Owner acknowledges that Contractor is not a soils engineer and does not have a soils engineer on staff.

XIV.19.6 Contractor's Obligation to Exercise Care in Subsurface Work

Contractor shall exercise special care in executing subsurface work in proximity of known subsurface utilities and easements, in order to avoid damage thereto and encroachments upon the areas encumbered by such easements.

XIV.20. Construction Loan Agreement.

Upon Contractor's receipt of the applicable provisions thereof, Contractor shall cooperate with Owner's Lender and shall comply with all terms of the construction loan agreement pertaining to the Work, including, without limitation, Lender's right to approve Subcontractors and any subcontracts, the agreements with Architect and other Consultants and all conditions precedent to the disbursement of loan proceeds thereunder so long as such provisions do not materially impair Contractor's rights or materially increase Contractor's liability or obligations under the Contract. Notwithstanding the foregoing, any references in this Contract to specific inspection or approval rights of Lender shall only apply in the event and to the extent Lender elects to exercise such rights by agreement with Owner.

XIV.21. Time

Time is of the essence of this Contract and each provision hereof of which time is an element.
XIV.22. Execution, Correlation, Intent and Interpretations.

XIV.22.1 Intent of Contract Documents

The Contract Documents are complementary, and what is required by anyone shall be as binding as if required by all. The intent of the Contract Documents is to include all labor, materials, equipment and other items necessary for the proper execution and completion of the Work. It is the intent of the Plans and Specifications that Work not covered under any heading, section, branch, class or trade thereof shall be supplied in order to deliver to Owner a completed turnkey Project unless it is not required elsewhere in the Contract Documents or is reasonably inferable therefrom as not being necessary to produce the intended result. Words which have well-known technical or trade meanings are used herein in accordance with such recognized meanings.

XIV.22.2 Organization of Plans and Specifications

The organization of the Plans and Specifications into divisions, sections and articles, and the arrangement of Drawings shall not control Contractor in dividing the Work among Subcontractors or in establishing the extent of the Work to be performed by any trade.

XIV.23. Copies Furnished and Ownership

XIV.23.1 Ownership of Plans and Specifications

All Plans and Specifications and Drawings and copies thereof, or copies made by Contractor, are and shall remain Owner's property.

XIV.23.2 Copy of Contract Documents Held at Site

Contractor shall keep one copy of the Contract Documents, excluding this Contract, at the Project updated, in good order and available to Owner at all times.

XIV.24. Independent Contractor.

It is expressly understood and agreed that Contractor will act as an independent contractor in the performance of its duties and responsibilities set forth in this Contract. No provisions hereunder shall be intended to create a partnership, joint venture or agency relationship between Owner and Contractor with respect to the Project or otherwise, and neither party shall have the power to bind or obligate the other party, except as expressly set forth in this Contract.

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XIV.25. Gifts.

Contractor agrees not to accept any "gift" from vendors or others employed in connection with the Project, other than gratuities of nominal value received in the ordinary course of business. Contractor shall not, on Owner's behalf or in connection with the services being rendered under this Contract, provide any "gift" to or otherwise entertain any "public official" or any other person required under California law to file a Statement of Economic Interest. The term "public official" means every member, officer, employee or consultant of a state or local agency. The term "gift," as used herein, includes any service or merchandise of any kind, discounts on merchandise or services, meals and other entertainment expenses and all other transfers of cash or any other item of value. Under no circumstances shall Owner be deemed to have waived the provisions of this Section as to a specific gift unless the waiver is in writing and signed by a partner.


Except as provided in this Section XIV.25, Contractor shall treat this Contract as confidential and shall not disclose the contents of this Contract to any party or record or file this Contract in any public records. Contractor shall hold confidential any information which Contractor receives in connection with the performance of its obligations hereunder and which concerns Owner or its operations or business and shall not disclose all or any portion of such information to any third party, except for such disclosures as are necessary to perform Contractor's obligations hereunder or are required by law or by any proposed lender or mortgagee of the Project.

XIV.27. Hazardous Wastes.

XIV.27.1 Contractor's Contract Not to Place Hazardous Materials at Site

Contractor agrees that it shall not place or cause or permit to be placed on the Project, other than in the ordinary course of performing its obligations under this Contract and in compliance with applicable law, any hazardous or toxic wastes or substances, as such terms are defined during the period up to and including the end of the Construction Period by Federal, State or municipal statues or regulations promulgated thereunder (collectively, "Hazardous Wastes"). In the event Contractor discovers the existence of any Hazardous Wastes on the project, Contractor shall immediately notify Owner. If such Hazardous Wastes were placed or permitted to be placed on the Project by Contractor, Contractor shall, at its cost, diligently arrange for and complete the immediate removal thereof in accordance with the terms of this contract. Except as expressly provided herein to the contrary, Contractor shall not be responsible for any Hazardous Wastes present on the Property prior to the date hereof, unless deposited thereon by Contractor; provided, however, Contractor shall immediately notify Owner of any notice received by Contractor from any governmental authority of any actual or threatened violation of any applicable laws, regulations or ordinances governing the use, storage or disposal of any
Hazardous Wastes and shall cooperate with Owner in responding to such notice and correcting or contesting any alleged violation.

XIV.27.2 Obligation to Advise

Without limiting the generality of anything contained in Section XIV.26.1, if, as a result of any act or failure to act on the project by Contractor or its employees, agents, representatives or, subject to the limitations hereinafter set forth, Subcontractors, the presence, use or onsite or offsite disposal or transport of Hazardous Waste on, to, under, from or about the Project results in any spills or releases, any injury to the environment or to any other real or personal property wherever situated, any injury to any person or injury or damage to the project, or if Contractor, Owner, or any governmental entity reasonably suspects that any such spill, injury or damage has occurred or is likely to occur, Contractor shall promptly and at its sole cost: (a) notify Owner; (b) if such spill, injury or damage has occurred, obtain all permits and approvals necessary to remove such Hazardous Waste or otherwise remedy any suspected problem; (c) if such spill, injury or damage has occurred, remove such Hazardous Wastes and remedy any associated problems to the reasonable satisfaction of Owner, in accordance with applicable legal requirements and good business practices; and (d) if such spill, injury or damage is likely to occur, take all measures reasonably necessary to prevent such spill, injury or damage.

XIV.27.3 Obligations Upon Discovery

If any Hazardous Waste comes to be located on the Project during the term of this Contract as a result of illegal or unauthorized disposal or dumping by any person, Contractor shall promptly upon discovery of the Hazardous Waste: (a) notify Owner; and, at Owner's cost, (b) take all measures reasonably necessary to secure the site to prevent further disposal or dumping.

XIV.27.4 Contractor's Obligations to Others

Contractor shall be responsible for providing its employees, agents, Subcontractors, governmental entities and the public with any notices or disclosures concerning Hazardous Waste associated with the Project required to be delivered by Contractor under any applicable laws, including, without limitation, any notices or disclosures concerning Hazardous Waste which Contractor has received from Owner. Owner shall have the right to review such notices and disclosures prior to their distribution or submission by Contractor and shall have the right, but not the obligation, to prescribe the form and content of any such notices or disclosures as long as the form and content prescribed by Owner complies with all applicable laws relating to such notice or disclosures. Owner shall provide Contractor with any notices or disclosures concerning Hazardous Waste associated with the Project required to be delivered by Owner under any applicable laws.
XIV.27.5 Asbestos-containing Materials

Contractor shall not, and shall ensure that all employees, agents and Subcontractors of Contractor do not, cause or permit any asbestos-containing materials to be brought upon or incorporated into the Project, unless: (a) such materials are specifically authorized in the Plans and Specifications approved by Owner; or (b) no substitute is available at a reasonable cost and Contractor obtains Owner's prior written approval.

XIV.27.6 Notification to Owner

Contractor shall immediately notify Owner in writing of any circumstances or incident known to Contractor involving Hazardous Waste that may affect the Project or that may give rise to liability on the part of Owner or Contractor. Promptly upon receipt or submission thereof, Contractor shall provide Owner with true, correct, complete and legible copies of all notices, complaints, orders, reports, citations, listings, disclosure forms and correspondence received or submitted by Contractor with respect to any Hazardous Waste associated with the Project.


XIV.28.1 Contractor's Obligation to Ensure Compliance

Contractor shall ensure that all of its employees, agents and Subcontractors comply with all of the terms of Section XIV.26. Contractor shall monitor all such persons to ensure such compliance. Contractor shall be deemed to have complied with this Section XIV.27.1 if Contractor exercises prudent supervision over its employees, agents and Subcontractors in accordance with Contractor's obligation hereunder.

XIV.28.2 Notification in Subcontracts

Contractor shall include in its contracts with employees, agents, consultants and Subcontractors, a specific provision requiring compliance by such persons with the terms of Sections XIV.26 and XIV.27.

XIV.29. Mandatory Arbitration.

Any controversy or claim between or among the parties, including but not limited to those arising out of or relating to the Contract Documents or any Contracts or instruments relating hereto or delivered in the State of California in connection herewith and any claim based on or arising from an alleged tort, shall, at the request of any party, be determined by arbitration. The arbitration shall be conducted in Santa Clara County, California, under the Commercial Rules of the American Arbitration Association ("AAA"). The arbitrators shall give effect to statutes of limitation in determining any claim. Any controversy concerning whether an issue is able to be arbitrated shall be determined by the arbitrators. Judgment upon the arbitration award may be

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entered in any court having jurisdiction. The institution and maintenance of any action for judicial relief or pursuit of a provisional or ancillary remedy shall not constitute a waiver of the right of any party, including the plaintiff, to submit the controversy or claim to arbitration if any other party contests such action for judicial relief.


A controversy or claim which is not submitted to arbitration as provided and limited in Section XIV.28 shall, at the request of any party, be determined by a reference from the Superior Court of Santa Clara County in accordance with California Code of Civil Procedure Sections 638 et seq. If such an election is made, the parties shall designate to the court a referee or referees selected under the auspices of the AAA in the same manner as arbitrators are selected in AAA-sponsored proceedings. The presiding referee of the panel, or the referee if there is a single referee, shall be an active attorney or retired judge. Judgment upon the award rendered by such referee or referees shall be entered in the court in which such proceeding was commenced in accordance with California Code of Civil Procedure Sections 644 and 645.

WAIVER OF RIGHT TO TRIAL BY JURY.

EACH PARTY TO THIS CONTRACT HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION (1) ARISING UNDER THE CONTRACT DOCUMENTS, INCLUDING, WITHOUT LIMITATION, ANY PRESENT OR FUTURE MODIFICATION THEREOF OR (2) IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO THE CONTRACT DOCUMENTS (AS NOW OR HEREAFTER MODIFIED) OR ANY OTHER INSTRUMENT, DOCUMENT OR CONTRACT EXECUTED OR DELIVERED IN CONNECTION HERewith, OR THE TRANSACTIONS RELATED HERETO OR THERE TO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION, IF NOT SUBJECT TO SECTIONS XIV.28 OR XIV.29 SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY TO THIS CONTRACT MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY. HOWEVER, THIS SECTION SHALL BE OF NO EFFECT AND NO WAIVER OF THE RIGHT TO TRIAL BY JURY IS MADE IN CONNECTION WITH THE TRIAL OF ANY CLAIM BROUGHT BY A THIRD PARTY FOR DAMAGES DUE TO CLAIMED DEFECTS IN THE WORK, OR FOR ANY CLAIMS TO INDEMNITY MADE BY OWNER AGAINST CONTRACTOR IN CONNECTION WITH ANY SUCH THIRD PARTY CLAIMS.

INITIAL: [Signature]

-December 4, 2000
IN WITNESS WHEREOF, the undersigned have executed this instrument as of the first day of November, 2000.

OWNER: CILKER APARTMENTS, LLC.
William H. Cilker - Manager

By: William H. Cilker
Its: Owner

By: ____________________________
Its: ____________________________

CONTRACTOR: WESTERN NATIONAL CONSTRUCTION
a California corporation

By: ____________________________
Its: President and Chief Operating Officer

-December 4, 2000
EXHIBIT 'A'

DESCRIPTION OF THE PROPERTY

BEING ALL THAT CERTAIN REAL PROPERTY SITUATED IN THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA AND STATE OF CALIFORNIA DESCRIBED AS FOLLOWS:

BEING ALL OF PARCEL 2 AS DESCRIBED ON THAT CERTAIN MAP, FILED FOR RECORD IN BOOK 672 AT PAGE 15, SANTA CLARA COUNTY RECORDS – APN 458-11-016.
EXHIBIT 'B'

CONTRACTOR'S FEE FOR THE WORK

The Contractor's Fee for the Project shall be:

$455,000.000 (FOUR HUNDRED and FIFTY-FIVE THOUSAND and 00/100 DOLLARS

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