

# United States Department of the Air Force

**MAJCOMname**  
Air Force Real Property  
Agency (AFRPA)



Enhanced Use Leasing Project  
**Basename** Air Force Base

## In-Kind Consideration Delivery Agreement

RFQ No. AFRPA-**FY-XXXX**

**PROPOSALS ARE DUE NO LATER THAN  
5:00 P.M. ET **Proposal due date** AT:**

**RESSNAME**  
**RESSaddress**  
**RESScity**  
Voice: **RESSphone** Fax: **RESSfax**  
Email: **RESSemail**  
Web site: **RESSwebsite**

**IN KIND CONSIDERATION DELIVERY AGREEMENT**

By and Between

**THE UNITED STATES OF AMERICA**

acting by and through

**THE SECRETARY OF THE AIR FORCE,**

as the Government

and

[\_\_\_\_\_],

a, (type of entity)

as the Lessee

Dated as of [month, day, year]

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Exhibit A – Performance Conditions

## IN-KIND CONSIDERATION DELIVERY AGREEMENT

**THIS IN-KIND CONSIDERATION (“Agreement”)** is made and entered into as of [month, day, year] (“**Effective Date**”) by and among The United States of America, acting by and through the Secretary of the Air Force (the “**Government**”) and [\_\_\_\_], a [\_\_\_\_] created under the laws of the State of [\_\_\_\_] (“**Lessee**”). The Government and Lessee may sometimes be referred to jointly as the “**Parties**,” and each may be separately referred to as a “**Party**.”

### RECITALS

WHEREAS, the Government, as landlord, and the Lessee, as tenant, have entered into that certain Department of the Air Force Site Development Lease dated as of the Effective Date (“**Lease**”), on [\_\_\_\_] Air Force Base, [City,] [County,] [State] (“**Installation**”), for the Lessee’s use, occupancy and development of certain real property (“**Leased Premises**”) located on the Installation;

WHEREAS, under the Lease the Government may elect to receive rent in the form of in-kind consideration, as authorized by 10 U.S.C. § 2667 (the “**Enabling Statute**”);

WHEREAS, the Government and the Lessee desire to enter into an agreement regarding the Lessee’s delivery of in-kind consideration projects at the Installation should the Government to receive in-kind consideration;

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties agree as follows:

#### 1. General Rights and Obligations of Lessee.

##### 1.1. Provision of Project Services.

1.1.1. The Lessee shall provide or procure all consulting, estimating, design, engineering, construction, maintenance, repair, utilities and such other products and services (“**Services**”) as are reasonably necessary to complete in-kind consideration projects (each a “**Project**”) at the Installation, as requested by the Government pursuant to the Lease.

1.1.2. The Parties shall execute a Work Order Agreement (“**WOA**”) pursuant to Section 4 setting forth a detailed scope of Services required for a Project. A WOA may cover an entire Project or, where the Government deems appropriate, a discrete phase or component of a Project. Generally, when a Project involves discrete design and construction phases, the Government will utilize separate WOAs for each phase.

1.2. Release of Funds from In-Kind Consideration Account. For Projects where the Parties have established an In-Kind Consideration Account pursuant to Condition 5.5.3 of the

Lease, the Government shall authorize release of funds to the Lessee from the In-Kind Consideration Account in the amount of the Project Value (hereafter defined) set forth in the applicable WOA under the procedures set forth in Section 16 of the **Performance Conditions** attached hereto as **Exhibit A**.

- 1.3. Offset from Rent. For Projects where the Parties have not established an In-Kind Consideration Account pursuant to Condition 5.5.3 of the Lease, the Lessee shall be entitled to offset the Project Value against Rent as set forth in Condition 5.5.1 of the Lease.
2. Obligations of the Government. The Government's responsibilities are limited to the following with respect to each Project:
  - 2.1. Identifying a Representative as set forth in Section 15 of the Performance Conditions;
  - 2.2. providing any necessary Government-Furnished Information (defined in Section 1.3 of the Performance Conditions);
  - 2.3. providing reasonable access to the Project site, subject to all the terms of a WOA;
  - 2.4. reviewing and responding to submittals by the Lessee that are permitted or required by a WOA with reasonable promptness to avoid delay in the orderly progress of the Services on a Project;
  - 2.5. issuing certificates of final completion for Services completed by the Lessee and accepted by the Government in accordance with a WOA and the Performance Conditions; and
  - 2.6. authorizing disbursement of the Project Value from the In-Kind Consideration Account for Services completed by the Lessee and accepted by the Government in accordance with a WOA and the Performance Conditions.
3. Term of Agreement.
  - 3.1. This Agreement will commence on the Effective Date and expire upon the expiration or termination or expiration of the Lease
  - 3.2. Expiration or termination of this Agreement shall not affect any ongoing or completed WOAs. Termination of ongoing WOAs shall be accomplished as provided in the WOA and Performance Conditions.
4. Work Order Agreement Procedure.
  - 4.1. Project Notice.

- 4.1.1. The Government may initiate delivery of a Project as set forth in Conditions 5.5.2 or 5.5.3 of the Lease by notifying the Lessee (a “**Project Notice**”).
  - 4.1.2. The Project Notice shall identify the written Government technical and administrative policies, procedures, instructions, directives, restrictions, building codes, plans, specifications, Project/task delivery methods and other requirements of the Government applicable to the Services or the Project (“**Project Requirements**”).
  - 4.1.3. The Project Notice may include a detailed statement or scope of work (“**SOW**”) for the Project, or the Government may require the Lessee to prepare the SOW under Section 4.2.
  - 4.1.4. The Project Notice shall identify the Government Representative to whom the Lessee shall direct all communications required or permitted under this Section 4.
  - 4.1.5. The Project Notice may require the Lessee to attend one or more Project site visits or meetings to discuss the scope of the Project or the Project Requirements.
  - 4.1.6. The Project Notice may include a Government cost estimate.
  - 4.1.7. As part of the Project Notice (or if not, as part of its review of the Initial Proposal under Section 4.3), the Government shall notify the Lessee whether a Project Consultant, as defined in Section 6 of the Performance Conditions, will be required.
- 4.2. Statement or Scope of Work. The provisions of this Section shall apply if the Government has not provided a SOW in the Project Notice.
- 4.2.1. After receipt of a Project Notice under Section 4.1 and any site visits and meetings required by the Government, and within the time required by the Project Notice (or if not specified in the Project Notice, within a reasonable time), the Lessee shall prepare and submit to the Government a draft SOW for the Project.
  - 4.2.2. Promptly after the receipt of Government comments on the SOW, the Lessee shall submit to the Government a final SOW incorporating the Government’s comments.
- 4.3. Initial Proposal.
- 4.3.1. The Lessee shall, within a reasonable time if no other time is specified in either the Project Notice or Government’s approval of the Lessee’s SOW, submit to the Government a detailed initial proposal for accomplishing the SOW (the “**Initial Proposal**”), which must include the following:
    - 4.3.1.1. A proposed Project Value or method for determining the Project Value based on any commercially reasonable Project delivery method requested by

the Government, including fixed price, cost reimbursement and variations thereof. A proposed Project Value based on cost reimbursement shall include specific standards to ensure costs are allocable to the Project, reasonable and allowable;

- 4.3.1.2. a proposed schedule for completion of key milestones and Project completion for the Services described in the SOW (the “**Project Schedule**”) in any commercially reasonable form requested by the Government;
  - 4.3.1.3. the name of the proposed Project Consultant, if the Government requires a Project Consultant; and
  - 4.3.1.4. any other information or proposals reasonably requested by the Government in the final SOW.
- 4.3.2. If the Lessee intends to contract with a third party for the performance of substantially all of the Services necessary to accomplish the SOW (a “**Prime Subcontractor**”), the Lessee may submit one or more alternative Initial Proposals meeting the requirements of Section 4.3.1 based on the proposals received by the Lessee from prospective Prime Subcontractors. All such proposals must be in accordance with Section 7 of this Agreement and shall include the name of the proposed Prime Subcontractor and the proposed contract between the Lessee and the Prime Subcontractor.

#### 4.4. Review of Initial Proposal.

- 4.4.1. Upon receipt of the Lessee’s Initial Proposal(s), the Government will review the same for completeness and acceptability to the Government. In connection with such review, the Government shall advise the Lessee of any proposed changes to the Performance Conditions deemed necessary or appropriate by the Government based on the nature of the task, as set forth in Section 4.7.2 of this Agreement.
- 4.4.2. Within ten (10) business days after the receipt of Government’s comments, the Lessee shall submit to the Government any revised design, scheduling, cost or other elements of an Initial Proposal incorporating or addressing the Government’s comments.

4.5. Final Proposal. After review and revision of the Initial Proposal, and within the time reasonably required by the Government, the Lessee shall submit a final proposal to the Government that includes the final agreed-upon SOW, Project Requirements, Project Value and Project Schedule (the “**Final Proposal**”). The Final Proposal shall also include the executed contract between the Lessee and the Prime Contractor in the form previously approved by the Government.

4.6. Material Disagreement. If the Government and the Lessee are unable to agree on a material term of the Final Proposal after good faith negotiation, including without limitation the SOW, Project Schedule or Project Value, the Government may, in its sole discretion:

4.6.1. Require the Lessee to solicit proposals from one or more alternative Prime Subcontractors, in which case the Parties shall repeat the procedures set forth in Sections 4.3 through 4.5; or

4.6.2. terminate the Project and, where an In-Kind Consideration Account has been established pursuant to the Lease, direct the payment of all funds in the In-Kind Consideration Account as cash rent pursuant to the Lease; or

4.7. Work Order Agreements.

4.7.1. Upon the Government's approval of the Lessee's Final Proposal, the Government shall issue a WOA to the Lessee that incorporates the Final Proposal.

4.7.2. The "**Performance Conditions**" set forth in **Exhibit B** attached hereto shall be incorporated into each Project WOA as though fully set forth therein. The Government may include provisions in a WOA that supplement, amend, replace or delete the provisions of the Performance Conditions in any of the following situations:

4.7.2.1. The Government determines in its sole discretion that such provisions are required by Applicable Laws (as defined in Section 1.1 of the Performance Conditions);

4.7.2.2. the Government and the Lessee agree to such provisions; or

4.7.2.3. The Government determines in its reasonable discretion that the nature of the Final Proposal requires that provisions of the Performance Conditions be supplemented, amended, replaced or deleted. In such case the terms of the WOA shall be commercially reasonable and shall not materially reduce the rights of Lessee or impose duties or obligations for which the Lessee is not equitably compensated in the Project Value. For example, the Government may include in a WOA for construction services commercially reasonable retainage requirements and requirements regarding maintenance and delivery to the Government of as-built drawings. While the Federal Acquisition Regulations and implementing regulations of the Department of Defense (collectively, the "**FARs**") are not Applicable Laws (as defined in the Performance Conditions), the Government may incorporate FARs provisions by reference into a WOA, subject to the requirements of this Section 4.7.2.3.

- 4.7.3. A WOA shall specifically identify any provisions of the Performance Conditions being supplemented, amended, replaced or deleted, provided that the failure to do so shall not render the WOA unenforceable.
- 4.7.4. No part of any Initial Proposal, Final Proposal or any other deliverable required by the Government, whether or not approved and included in a WOA, shall create any binding obligation on the Government in addition to those obligations set forth in Section 2 of this Agreement.
- 4.7.5. Within five (5) business days after receipt of a WOA executed by the Government, the Lessee shall execute and return the WOA to the Government.
5. Notice to Proceed. Unless otherwise agreed in the WOA, the Lessee shall not cause Services to be provided until the Government has issued a written authorization for the Lessee to proceed ("**Notice to Proceed**"). Within the time specified by the Notice to Proceed or the WOA, the Lessee shall commence and diligently proceed with delivery of the Services in accordance with the Project Schedule.
6. Lessee's Failure to Comply with Procedures. The failure of the Lessee to substantially comply with the procedures set forth herein for negotiation and execution of a WOA, where such failure continues for thirty (30) days after written notice thereof by the Government to the Lessee and all Approved Mortgagees (as defined in the Lease) shall constitute a **Procedural Event of Default**, which the Government may deem an "Event of Default" as defined in the Lease. In such event, the Lessee and the Government shall have the rights and remedies set forth in Condition 8 of the Lease, subject to compliance with the dispute resolution procedures set forth in Condition 23 of the Lease.
7. Assignment and Subcontracting.
- 7.1. Lessee shall not assign this Agreement or any WOA entered into hereunder or any of its rights or obligations under this Agreement or any WOA entered into hereunder, or subcontract with a Prime Subcontractor for the performance of a WOA, without the written consent of the Government, which consent shall not be unreasonably withheld. The Government's approval of a Final Proposal that identifies the Prime Subcontractor shall be deemed approval of such subcontract.
- 7.2. The Government's consent to an assignment or a subcontract shall not relieve the Lessee of any obligations under this Agreement, except as expressly set forth in the Government's written consent.
- 7.3. A subcontract with a Prime Subcontractor shall specifically require the subcontractor to comply with all the terms and conditions of a WOA, including the Performance Conditions, and all the terms and conditions of the relevant subcontract, for the benefit of the Government.

- 7.4. The Government may require Lessee to subcontract the performance of a WOA to a Prime Subcontractor if the Government determines that the Lessee lacks sufficient expertise or experience to execute the WOA in a manner acceptable to the Government.
- 7.5. If the Lessee enters into a subcontract with a Prime Subcontractor for the performance of a WOA, the Purchase Price may include a commercially reasonable fee for the Lessee's administration of the Project.
8. Entire Agreement. The this Agreement and WOAs executed hereunder contain the entire agreement between the Government and the Lessee with respect to their subject matter and supersede all prior agreements, communications, and negotiations between the Government and the Lessee in this regard, unless expressly made part of this Agreement.
9. Waiver. A failure to exercise, or any delay in exercising any right, power or remedy by a Party does not operate as a waiver under this Agreement or a WOA. A single or partial exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy. A waiver is not valid or binding against a Party unless made in writing.
10. Severability. Any provision of this Agreement or a WOA which is ruled unenforceable by a court of competent jurisdiction is ineffective as to the extent of the unenforceability in such jurisdiction. This does not invalidate the remaining provisions of this Agreement or a WOA. Where a provision is prohibited or unenforceable, the Parties shall negotiate in good faith to replace the invalid provision with a provision which is in accordance with all Applicable Laws and appropriate amendments (if any) will be made to this Agreement or a WOA, but if the Parties cannot so agree, then the unenforceable provision shall be excluded from this Agreement or a WOA.
11. Captions. Captions preceding sections or sub-sections of this Agreement or a WOA are solely for purposes of identification and ease of reference, and shall not be used in the construction or interpretation of this Agreement or a WOA.
12. Counterparts. This Agreement is executed in three (3) counterparts, each of which is deemed an original and all of which shall constitute one and the same instrument.

**IN WITNESS WHEREOF**, the Parties have caused this Agreement to be executed by their duly Authorized Officers as of the Effective Date.

[Remainder of Page Intentionally Left Blank]

**Government Signature Page to In-Kind Consideration Delivery Agreement**

**GOVERNMENT:**

**THE UNITED STATES OF AMERICA, acting by and through the Secretary of the Air Force, as the Government**

By: \_\_\_\_\_  
Kathleen I. Ferguson, P.E.  
Deputy Assistant Secretary of the Air Force  
(Installations)

**Lessee Signature Page to In-Kind Consideration Delivery Agreement**

**LESSEE:**

[Lessee Name], a [type of entity]

By: \_\_\_\_\_  
[Insert Printed Name and Title]

**EXHIBIT A**  
**PERFORMANCE CONDITIONS**

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## PERFORMANCE CONDITIONS

### 1. Performance by Lessee.

1.1. Standards. The Lessee will perform the Services under each WOA in accordance with these Performance Conditions and the following standards (hereinafter referred to collectively as the “**Standards**”):

1.1.1. All terms and conditions set forth in a WOA, including without limitation the Project Requirements.

1.1.2. All federal, state and local laws, rules, regulations, ordinances, codes, orders and other enforceable governmental standards and requirements applicable to Lessee, the Services or the SOW, as amended or superseded from time to time, whether or not identified as Project Requirements. (“**Applicable Laws**”). Applicable Laws include, without limitation, Government and Installation rules, regulations, policies and procedures pertaining to access and security, health, safety, environmental protection, and cultural and natural resources protection.

1.1.3. All principles, practices and standards of due care, skill and diligence normally practiced by recognized firms in performing services or providing products of a similar nature to those required under a WOA.

1.2. General Duties. The Lessee shall have the following general duties in the performance of the Services:

1.2.1. The Lessee will supervise and direct the work using the Lessee’s best skill and attention. Lessee shall be solely responsible for and have control over the construction means, methods, techniques, sequences and procedures, as applicable, for completion of a WOA, except as otherwise set forth in these Performance Conditions.

1.2.2. Lessee will comply with all lawful directions of the Government relating to the performance of the Services.

1.2.3. Lessee will perform all further functions and provide all further materials which by implication are necessary for the proper carrying out of the Services and a contractor observing the Standards would be reasonably expected to provide in carrying out services of a similar size, scope, complexity and nature to the Services.

1.2.4. The Lessee shall maintain control over the Project site until completion and facility turnover, when applicable.

1.2.5. The Lessee shall use reasonable care to avoid damaging existing buildings, equipment, and vegetation on the Installation. If the Lessee’s failure to use reasonable care causes damage to any of this property, the Lessee shall replace or

repair the damage at no expense to the Government as the Government directs. If the Lessee fails or refuses to make such repair or replacement, the Lessee shall be liable for the cost, which the Government may deduct from the Project Value.

1.2.6. The Lessee shall attend Project site visits, planning meetings, pre-construction conferences, inspections or other meetings as reasonably required by the Government.

### 1.3. Investigations.

1.3.1. Lessee agrees that, prior to commencing the Services under a WOA, and provided that the Government has given the Lessee the opportunity to conduct reasonable inspections of the Project site, that it will conduct such reasonable inspections and fully inform itself regarding the Project site and all local and other conditions affecting its performance of the Services, including without limitation meteorological, geological, environmental, labor, accommodation, fuel, power, water, telecommunications and transport conditions.

1.3.2. Unless otherwise provided in this Agreement or the Government advises otherwise in writing, Lessee shall be entitled to rely upon any information and/or documents provided to the Lessee by the Government (collectively, the "**Government-Furnished Information**") in the performance of the Services unless Lessee becomes aware, or in the exercise of due care should have become aware, of any material omission, error or inaccuracy in the information. Government-Furnished Information does not form part of the Agreement unless it is identified as a Project Requirement or as otherwise agreed in writing.

1.3.3. The Lessee shall promptly report to the Government any errors or omissions noted by the Lessee during its review of Government-Furnished Information. If the Lessee observes that any Government-Furnished Information is at variance with Applicable Laws, the Lessee shall promptly notify the Government.

1.3.4. If the Lessee performs any Services affected by a recognized error, inconsistency or omission in the Government-Furnished Information (or by an unrecognized error, inconsistency or omission in the Agreement or the Government-Furnished Information if the error, inconsistency or omission is of the type that it should have been recognized by a reasonably skilled and competent contractor) without first providing notice to the Government, the Lessee shall bear full responsibility for such Service and shall bear all costs of correction of such error, inconsistency or omission.

## 2. Changes in Work Order Agreements.

### 2.1. Change Directive.

- 2.1.1. The Government may issue a “**Change Directive**” ordering changes in a WOA that are within the general scope of the WOA, even if such changes may impact the Project Schedule or the Project Value. A Change Directive shall include the Government’s proposed method for adjusting the Project Schedule and Project Value.
- 2.1.2. If Lessee agrees with the proposed adjustment in the Project Schedule and Project Value, the Lessee shall carry out a Change Directive no later than ten (10) calendar days after delivery.
- 2.1.3. If the Lessee disagrees with the proposed adjustment in the Project Schedule or Project Value, it shall notify the Government within ten (10) days after the delivery of the Change Directive to the Lessee. Failure to do so shall be deemed acceptance of the Government’s proposed method for adjusting the Project Schedule and Project Value.
- 2.1.4. If the Parties are not able to reach agreement within twenty one (21) days after Lessee’s notice, then the matter shall be resolved in accordance with Section 25 of these Performance Conditions. The Government may require the Lessee to carry out the Change Directive pending resolution of any dispute.

## 2.2. Change Order.

- 2.2.1. Either Party may request changes in a WOA by submitting to the other Party a proposed “**Change Order**” in a form approved by the Government. The other Party shall have ten (10) calendar days from receipt of the proposed Change Order either to accept or reject the proposed Change Order in writing; provided, however, that any proposed Change Order not expressly accepted in writing within ten (10) days of receipt shall be deemed rejected.
- 2.2.2. Whether submitting or responding to a proposed Change Order, the Lessee shall provide any proposed adjustment in the Project Value and shall state the impact, if any, in terms of calendar days of the proposed Change Order on the Project Schedule.
- 2.2.3. If there is no agreement on the adjustment in the Project Value or the Project Schedule, the disagreement shall be resolved in accordance with Section 25 of these Performance Conditions. The Government may convert a Government-proposed Change Order into a Change Directive, which the Lessee shall promptly carry out pending resolution of any dispute.

## 3. Project Schedule.

### 3.1. Adherence to Project Schedule.

3.1.1. Lessee shall perform the Services in accordance with the Project Schedule. Time is of the essence in the performance of the Lessee's obligations under these Performance Conditions.

3.1.2. If the Government determines that the Lessee will not be able to complete the Services or any part of the Services in accordance with the Project Schedule, then the Government (without prejudice to the Government's other rights under this Agreement) may instruct the Lessee to work overtime (including night shifts, Saturdays, Sundays and public holidays) and to provide all necessary additional labor, supervision, and plant facilities to achieve and maintain adherence to the Project Schedule without change to the Project Value, until such time as the performance of the Services is in accordance with the Project Schedule. The Lessee shall comply with any instruction from the Government given in accordance with this Section.

### 3.2. Changes to Project Schedule.

3.2.1. If the Lessee at any time believes that, despite all reasonable steps having been taken, it will not be able to comply with the Project Schedule due to the factors listed below, the Lessee shall, within fourteen (14) days after such event, give notice to the Government requesting an amendment to the Project Schedule and setting out in detail the reasons for the request. Failure to so notify the Government shall operate as a waiver of any right to request an adjustment to the Project Schedule. The factors are as follows:

3.2.1.1. A breach of any provision of the Agreement by the Government or any other act or omission of the Government or its personnel;

3.2.1.2. Force Majeure, as defined in Section 24 of these Performance Conditions;

3.2.1.3. a delay or suspension in access to the Project site as described in Section 18 of these Performance Conditions; or

3.2.1.4. a delay caused by the unreasonable interference by another supplier, contractor (or their personnel) engaged by the Government.

3.2.2. The Government shall, if it considers a request made by the Lessee in accordance with this Section to be reasonable, by notice amend the Project Schedule in such manner as it considers appropriate and such amendment will be the Lessee's sole remedy for any delay. The Lessee will not be entitled to any increase in the Project Value or any damages, costs or expenses in connection with such extension, provided that the Government may, in its discretion, authorize the Lessee to be reimbursed from the In-Kind Consideration Account for additional costs if it determines that such reimbursement would be fair and equitable under the circumstances.

#### 4. Project Value.

##### 4.1. Lessee agrees that the Project Value:

- 4.1.1. includes all reasonably and properly incurred costs, expenses, fees and charges (including taxes) incurred by the Lessee in performing all its obligations under the Agreement, including the fees of the Project Consultant (hereafter defined), if applicable;
- 4.1.2. includes payment for any services or work which are reasonably inferred or are reasonably necessary for the proper completion of the Services (which services and work shall be carried out by the Lessee);
- 4.1.3. includes the Lessee's profit, site allowances, supervision, on-site overheads, off-site overheads in connection with the performance of all of its obligations under a WOA; and
- 4.1.4. will not be subject to any adjustment for any reason except as expressly provided for in a WOA.

#### 5. Lessee's Quality Control.

- 5.1. The Lessee is responsible for quality control and shall establish and maintain an effective quality control system. The quality control system shall consist of plans, procedures, and organization necessary to manage all WOAs to produce end products which comply with the Standards. The system shall cover all construction operations, both on-site and off-site, and shall be keyed to the proposed construction sequence.
- 5.2. The Lessee shall furnish for review by the Government the Lessee's Quality Control (QC) Plan. The plan shall identify personnel, procedures, control, instructions, test, records, and forms to be used.
- 5.3. The Government reserves the right to require the Lessee to make changes in its QC Plan and operations as necessary to obtain the quality specified.
- 5.4. After acceptance of the QC Plan, the Lessee shall notify the Government in writing of any proposed change. Proposed changes are subject to acceptance by the Government.
- 5.5. The Lessee shall host regular meetings with the Project Consultant, if applicable, and the Government to address the status of the Project. The meetings shall cover the progress of all work with regard to the Project Schedule, any problems encountered and corrective actions taken and any anticipated delays. The Lessee shall provide documentation of these meetings to the Government.
- 5.6. If the Government notifies the Lessee of any noncompliance with the requirements of this Section or the QC Plan, the Lessee shall take immediate corrective action. If the

Lessee fails or refuses to comply promptly, the Government may issue an order stopping all or part of the work until satisfactory corrective action has been taken. The Government also may require that any work performed that does not comply with the Lessee's QC Plan be removed from the Project at the Lessee's own expense without any lost time to the Project Schedule. Any disputes under this Section shall be resolved pursuant to Section 25 of these Performance Conditions, "Dispute Resolution."

6. Independent Project Consultant.

6.1. Government May Require Project Consultant. The Lessee shall, if required by the Government in a WOA, retain an independent certified professional who is not affiliated with Lessee or any of its affiliates to ensure that the Lessee's QC Plan is being implemented ("**Project Consultant**"). The Project Consultant and SOW of the Project Consultant shall be approved in advance by the Government. The Project Consultant's fee shall be included in the Project Value.

6.2. Duties of Project Consultant. The Project Consultant shall, among other things, conduct reviews of Project deliverables, conduct basic and engineering site reviews, independently verify all processes, procedures, cover-up inspections and material tests, review and approve as-built plans, and certify to the Government that a Project or any portion thereof has been completed in accordance with the Standards.

6.3. Notices and Reports.

6.3.1. All reports prepared by the Project Consultant shall be delivered simultaneously to the Lessee and the Government. The Government shall have the right, at its election, to participate in any of the Lessee's meetings with the Project Consultant.

6.3.2. When this WOA requires Lessee to deliver a report or notice to the Government, the Lessee shall provide a copy to the Project Consultant.

6.4. Project Consultant Insurance. The Project Consultant shall provide written evidence to the Government that it maintains professional liability insurance for the benefit of the Government under terms and in an amount reasonably satisfactory to the Government.

7. Health, Safety and Environment Plans. If required by the Government, Lessee shall promptly provide to the Government Lessee's proposed health, safety, and environmental (HSE) management plan(s) in accordance with the Project Requirements. If the Government requires Lessee to submit a proposed HSE plan or plans, Lessee and its personnel shall not commence work on-site unless and until the HSE management plan(s) and any requested amendments have been approved by the Government. The Government may at any time direct Lessee to amend an approved HSE management plan to adequately reflect any amendments to the Government's HSE policies and standards. Lessee shall keep a copy of the approved HSE management plans at its on-site office or work area at all times during the term of a Project.

8. Access.

8.1. The Government and its representatives, agents, and employees shall have access to the Project site during performance of the Services for purposes of monitoring, observing, making inquiries, taking samples of materials for testing, as well as such other matters as the Government deems to be reasonably necessary for the Government to determine the Lessee's compliance with the Standards.

8.2. The Parties expressly understand and agree that: (i) any inspection activity by the Government shall not relieve the Lessee of its responsibility for completing the Project in accordance with the Standards; (ii) failure of the Government to make any on-site inspections or conduct any testing shall not limit, or be construed to limit, any of the Government's rights under this Agreement; and (iii) no action by the Government shall be deemed to be confirmation that any improvements shown in design plans approved by the Government comply with the Standards.

9. Permits. Lessee shall obtain all permits and approvals required by Applicable Laws, and the expense thereof shall be included in the Project Value.

10. Performance Security.

10.1. The Lessee must provide acceptable evidence to the Government that payment and performance bonds are in place with respect to construction work to be undertaken by the Lessee pursuant to a WOA. Each of the bonds must: (i) be issued by a Qualified Surety (as defined below); (ii) be in a form satisfactory to the Government and run in favor of the Government; (iii) be in the amount of the Project Value; (iv) guarantee the performance of the contract for the construction of improvements in accordance with the Standards; and (v) provide that the Government is an obligee on such bonds.

10.2. A "**Qualified Surety**" is a corporate surety or insurer authorized to do business, and to issue bonds for construction payment and performance, in the state of [ ] and possessing a long-term unsecured debt rating acceptable to the Government in its reasonable discretion.

11. Claims.

11.1. Except as otherwise specifically provided in a WOA, the Lessee shall give the Government written notice within fourteen (14) calendar days after the occurrence of any event or condition that Lessee believes may give rise to a claim by Lessee for an increase in the Project Value or delay in the Project Schedule. If the event or condition was not known to Lessee, the time for notice shall begin to run when Lessee reasonably should have known of the event or condition, whichever is earlier. Failure to do so shall constitute a waiver of any claim for an increase in the Project Value or Project Schedule based on the event or condition.

- 11.2. If the Government agrees with the Lessee's claim, the Parties shall execute a Change Order pursuant to Section 2.2 of these Performance Conditions, "Change Orders."
- 11.3. If the Government disputes the Lessee's claim, the Parties shall submit the matter to disputed resolution as provided in Section 25 of these Performance Conditions, "Dispute Resolution."
- 11.4. Any claim for an increase in the Project Value or any other sum of money resolved in favor of the Lessee, whether by agreement with the Government or as a result of the dispute resolution process under Section 25 of these Performance Conditions, or otherwise, including a final decision under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, shall be satisfied solely from the In-Kind Consideration Account or, to the extent funds in the In-Kind Consideration Account are insufficient to satisfy the claim, as an offset from cash rent payable under the Lease. **Under no circumstances shall the Lessee have any recourse to Government funds, whether appropriated or non-appropriated, to satisfy any claim arising under a WOA or this In-Kind Consideration Delivery Agreement.**

12. Completion and Project Turnover.

- 12.1. When the Lessee considers the Project complete and ready for its intended use, the Lessee shall notify the Government at least fourteen (14) calendar days prior to the scheduled date for a pre-final inspection to be conducted jointly with the Government to determine whether the Project has been completed in accordance with the Standards.
- 12.2. The Lessee shall correct all defects or deficiencies identified by the Government during the pre-final inspection before requesting a final inspection. When the Lessee has corrected all defects or deficiencies and verified that all documented defects or deficiencies have been adequately address, the Lessee shall notify the Government at least fourteen (14) calendar days prior to the scheduled date for a final inspection.
- 12.3. The Government shall conduct a final inspection and list any deficiencies on a "punch list" that the Lessee must correct before the Government will authorize final release of funds from the IKC Trust Account. The Lessee shall correct such punch list items within the time required by the Government. The Government may require turnover of the Project to the Government before the punch list items have been completed, but turnover does not relieve the Lessee from completing the punch list items.
- 12.4. The Project shall be deemed to have achieved final completion when the Lessee has completed all punch list items and delivered to the Government all documents, materials and training described in the Project Requirements, or otherwise required by

the WOA or these Performance Conditions and the Government has issued a certification of final completion.

13. Warranty and Post Completion Support.

- 13.1. Warranty. The Lessee warrants that work performed under a WOA conforms to the Standards and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Lessee or any subcontractor or supplier at any tier. This warranty shall continue for a period of one (1) year from the date of final acceptance of the work, except as otherwise set forth in a WOA. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for a period of one (1) year from the date the Government takes possession.
- 13.2. Correction of Defects. The Lessee shall remedy at the Lessee's expense any failure to conform, or any defect. In addition, the Lessee shall remedy at the Lessee's expense any damage to Government-owned or controlled real or personal property, when that damage is the result of the Lessee's failure to conform to contract requirements or any defect of equipment, material, workmanship, or design furnished. The Lessee shall restore any work damaged in fulfilling the terms and conditions of this Section. The Lessee's warranty with respect to work repaired or replaced will run for one (1) year from the date of repair or replacement.
- 13.3. Notice. The Government shall notify the Lessee, in writing, within a reasonable time after the discovery of any failure, defect, or damage.
- 13.4. Failure to Remedy. If the Lessee fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Lessee's expense.
- 13.5. Subcontractor and Manufacturer Warranties. With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under a WOA, the Lessee shall:
- 13.5.1. Obtain all warranties that would be given in normal commercial practice;
- 13.5.2. require all warranties to be executed, in writing, for the benefit of the Government, if directed by the Government; and
- 13.5.3. enforce all warranties for the benefit of the Government, if directed by the Government, provided that the Government may elect to bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty

14. Hazardous Substances.

- 14.1. Hazardous Substances. "**Hazardous Substances**" means any substance:

- 14.1.1. the presence of which requires reporting, investigation, removal and remediation under any Applicable Laws;
  - 14.1.2. that is defined as a pollutant, contaminant, dangerous substance, toxic substance, hazardous or toxic chemical, hazardous waste or hazardous substance under any Applicable Laws;
  - 14.1.3. that is toxic, explosive, corrosive, flammable, ignitable, infectious, carcinogenic or otherwise hazardous and is regulated by or forms the basis of liability under any Applicable Laws;
  - 14.1.4. the presence of which on the site or adjacent property causes or threatens to cause a nuisance upon the site or adjacent property or poses or threatens to pose a hazard to health or safety of persons on or about the site or adjacent property;
  - 14.1.5. that contains gasoline, diesel fuel or other petroleum hydrocarbons, including crude oil and fractions thereof, natural gas, synthetic gas and any mixtures thereof;
  - 14.1.6. that contains asbestos and/or asbestos-containing materials;
  - 14.1.7. that contains polychlorinated biphenyls ( PCBs), or PCB-containing materials or fluids; or
  - 14.1.8. that is waste generated by Lessee in the performance of the Services, such as equipment/machine oils, fuels, oily debris, shop rags, paints, paint residue, solvents and any containers in which substances described in this Section were or are stored.
- 14.2. General Duty. When use or storage of explosives or other Hazardous Substances or equipment or unusual methods are necessary for execution of the Services, the Lessee shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.
- 14.3. Pre-Existing Hazardous Substances. Lessee shall not be required to perform any Services relating to Hazardous Substances uncovered or revealed at the Project site and (i) not brought to the site by the Lessee or its subcontractors and (ii) not shown or indicated in any drawings or specifications or identified in a WOA to be within the scope of the Services. The Government shall not be responsible for any Hazardous Substances brought to the Site by the Lessee, its subcontractors or anyone else for whom the Lessee is responsible.
- 14.4. Remediation Within Scope of Services. If the remediation of any Hazardous Substances is included in the scope of the Services for a Project, the Lessee shall perform such Services in strict compliance with the Standards.
- 14.5. Hazardous Substances Used or Generated by Lessee.

- 14.5.1. With the written consent of the Government, the Lessee shall promptly and at the Lessee's sole expense take any and all necessary remedial actions in response to the presence, storage, use, disposal, transportation or discharge of any Hazardous Substances used or generated by the Lessee or its subcontractors or other persons subject to its control on, under or about the site.
- 14.5.2. The Government's prior written consent shall not be necessary in the event that the presence of Hazardous Substances on, under or about the site either (i) poses an immediate threat to the health, safety or welfare of any individual or (ii) is of such a nature that an immediate remedial response is necessary and it is not possible to obtain the Government's written consent prior to undertaking such action.
- 14.5.3. Lessee shall promptly notify the Government of any event or occurrence known to the Lessee, whether occurring on the site or nearby lands, which causes or poses a risk of contamination to the site or of the air or water on, under or near the site with any Hazardous Substances as a result of the activities of the Lessee or its subcontractors.
- 14.5.4. In the event the Lessee undertakes any remedial action with respect to any Hazardous Substances on, under or about the site, the Lessee shall immediately notify the Government of such remedial action, and shall conduct and complete all remedial actions in accordance with the Standards
- 14.6. Adjustment in Project Value and Schedule. If the Lessee incurs additional costs and/or is delayed due to the presence of known or suspected Hazardous Substances, the remediation of which is not identified in the WOA to be within the scope of the Services and such Hazardous Substances were neither brought to the site by the Lessee or its subcontractors, nor negligently aggravated or spread by the Lessee or its subcontractors (although existing at the site), the Lessee shall be entitled to an equitable adjustment in the Project Value and/or the Project Schedule, as appropriate, upon submission of a written claim made by the Lessee to the Government pursuant to Section 11 of these Performance Conditions.

## 15. Representatives.

- 15.1. The Lessee and the Government shall each designate in writing a person to act as its representative for each Project ("**Representative**"). Lessee's initial Representative for a Project shall be subject to the Government's approval. Lessee may not replace its Representative without the prior approval of the Government.
- 15.2. The authority of the Government's Representative shall be set forth in a written delegation executed by the Government and provided to the Lessee.

15.3. The Lessee Representative is responsible for coordinating with the Government Representative in relation to any of the matters referred to in these Performance Conditions or in the delegation referred to in Section 15.2.

15.3.1. The Lessee Representative will have full power to legally bind the Lessee in all matters arising out of a WOA.

15.3.2. Any direction which the Government Representative gives to the Lessee Representative in accordance with the delegation of authority referenced in Section 15.2 of these Performance Conditions is deemed to have been given to the Lessee for and on behalf of the Government and the Lessee shall comply with that direction accordingly.

15.3.3. Any communication given, or document signed, by the Lessee Representative is deemed to have been given or signed by the Lessee and will bind the Lessee.

15.3.4. Matters within the knowledge of the Lessee Representative are deemed to be within the knowledge of the Lessee.

16. Release of Funds. The following provisions apply only to Projects where an In-Kind Consideration Account has been established pursuant to the Lease and a Trust Agreement among the Government, the Lessee and the Trustee.

16.1. Application.

16.1.1. At each of the release claim intervals specified in a WOA, or if not specified, then each calendar month, Lessee shall prepare in reasonable detail and in a form approved by the Government an application for release of funds from the In-Kind Consideration Account (“**Release Application**”) showing the progress of the Services compared to the Project Schedule and the Project Value for the parts of the Services performed by the Lessee since the preceding Release Application, or in the case of the first Release Application since the commencement date.

16.1.2. The Release Application shall be prepared in such a manner that each major item of the Services and each subcontracted item of the Services are clearly delineated.

16.1.3. In addition to and accompanying each Release Application, the Lessee shall furnish a report on the progress of the Services compared to the Project Schedule, which report shall give full details of any action proposed to overcome any failure by the Lessee to adhere to the Project Schedule.

16.1.4. The Release Application shall be signed by the Lessee Representative, who shall verify the validity and accuracy of the submitted charges.

- 16.1.5. If the Government has required Lessee to retain a Project Consultant, the Government may require that a Release Application be accompanied by a certification by the Project Consultant that:
- 16.1.5.1. the Services completed to date were performed in accordance with the Standards without substantial deviation therefrom unless approved in writing by the Government;
  - 16.1.5.2. the cost of such work is consistent with the applicable budget;
  - 16.1.5.3. the amount of the requested disbursement, together with the amount of all prior disbursements, does not exceed the value of the work completed to date; and
  - 16.1.5.4. the Services are progressing in accordance with the Project Schedule and are reasonably expected to be completed on or before the scheduled completion date.
- 16.1.6. The Lessee shall submit Release Applications to the Government for approval.
- 16.2. Invoice. Upon the Government's written approval of a Release Application, the Lessee shall render an invoice to the Trustee under the Trust Agreement, with a copy to the Government, for the Services to which the particular Release Application relates and calculated by reference to the prices, fees or other amounts specified in the Project Value. Invoices shall be in a form acceptable to the Government and shall contain a brief description of the Services provided in the period covered by the invoice and any further verification or documentation in relation to the invoice as is reasonably required by the Government.
- 16.3. Failure to Include Amount Payable. If the Lessee fails to include an amount payable to the Lessee on an invoice, it shall notify the Government in writing of its claim within twenty one (21) days after delivery of the relevant invoice and any claim not made within such 21-day period shall be deemed waived.
- 16.4. Final Release of Funds. Neither final release of funds nor any remaining retained percentage shall become due until the Lessee submits to the Government:
- 16.4.1. an affidavit that payrolls, bills for material and equipment, and other indebtedness connected with the Services for which the Government or the Government's property might be responsible or encumbered (less amounts withheld by Government) have been paid or otherwise satisfied;
  - 16.4.2. a current or additional certificate evidencing that insurance required by a WOA to remain in force after final release of security is currently in effect and will not be cancelled or allowed to expire until at least thirty (30) days prior written notice, by certified mail, return receipt requested, has been given to the Government;

- 16.4.3. a written statement that the Lessee knows of no substantial reason that the insurance will not be renewable to cover the period required by a WOA;
  - 16.4.4. the consent of a surety to final release of funds (if requested by a surety in a timely manner or by the Government);
  - 16.4.5. drawings, specifications, addenda, Change Orders and other modifications maintained at the site and the other documentation, if any, required to be furnished under these Performance Conditions or a WOA; and
  - 16.4.6. other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of these Performance Conditions, to the extent and in such form as may be designated by the Government.
17. Lessee Accounts and Records. Lessee shall provide the Government with any information reasonably requested by the Government in relation to the provision of the Services. Lessee shall maintain a complete set of accounts and records relating to the Services in accordance with prudent business practices and generally accepted accounting principles and retain, and ensure that all of its personnel retain, any of the items referred to above for a minimum period of two (2) years after final completion of the WOA.
18. Suspension of Services by Government.
- 18.1. Government's Right to Suspend Services. The Government may at any time, in its sole discretion and for its convenience, direct the Lessee to suspend in whole or part the Services under a WOA for such time as the Government deems necessary.
  - 18.2. Lessee Obligations During Suspension. The Lessee shall properly protect and secure the Project site in such manner as the Government may reasonably require in the event of a suspension. Unless otherwise instructed by the Government, Lessee shall during any such suspension maintain its staff and labor on or near the Project site and otherwise ready to proceed with the Services upon receipt of the Government's further instructions.
  - 18.3. Suspension for More than Six Months.
    - 18.3.1. If suspension of the whole or substantial part of the Services under a WOA continues for more than six (6) consecutive months, then the Government shall either (i) terminate the WOA with effect from a specified date by notice to the Lessee; or (ii) direct the Lessee to recommence the suspended Services as soon as reasonably practicable.
    - 18.3.2. If the Government terminates a WOA as provided above, then such notice shall be treated as if it were a termination for convenience under Section 22.

18.4. Suspension of Service Change Order. The Government and Lessee shall negotiate a Change Order to address the impact of such suspension on the Project Value and, if applicable the work budget and schedule; provided, however, that no adjustment shall be made to the extent that the performance is, was, or would have been suspended, delayed, or interrupted by any cause for which Lessee is responsible.

19. Insurance.

19.1. General Obligation. Without limiting any of the Lessee's obligations under a WOA, Lessee shall purchase and maintain in full force and effect throughout the term of each WOA, at the Lessee's sole expense, the types and limits of insurance coverage specified in this Section ("**Lessee Insurance**"). The insurance shall be underwritten by reputable insurers that have a rating from A.M. Best Government of at least A-/VII, and that are authorized to do business in the State of [\_\_\_\_]. In the event Lessee has entered into an agreement with a Prime Subcontractor for the performance of a WOA, and such Prime Subcontractor complies with the requirements of Section 19.14, the Lessee shall not be required to carry Lessee Insurance, but this shall not excuse the Lessee from carrying the insurance required by the Lease.

19.2. Commercial Liability.

19.2.1. Lessee shall carry commercial general liability ("**CGL**") insurance covering operations by or on behalf of Lessee (including coverage for explosion, collapse and underground hazards) and all liabilities in respect of any injury to, or death of, any person or any loss, damage or destruction to any property however caused, with limits of liability as set forth in the WOA for each occurrence and in the aggregate.

19.2.2. For the avoidance of doubt, the CGL insurance required by this Section shall provide coverage equivalent to that which is provided in Insurance Service Office (ISO) form CG 0001 0196 form. If a WOA is for construction services, the CGL insurance must not exclude liabilities incurred in the performance of construction services (understanding that if the policy does contain such an exclusion, Lessee must obtain separate construction liability insurance that provides the coverage required by this Section).

19.3. Workers Compensation. Lessee shall carry statutory workers' compensation insurance, including coverage for occupational disease benefits for those persons employed by or on behalf of Lessee, in compliance with and having limits of liability of no less than the amounts required by the Applicable Laws of the State of [\_\_\_\_].

19.4. Employer's Liability. Lessee shall carry employer's liability insurance covering all liabilities, whether arising under statute, common law or civil law, in respect of any injury to, or death of, persons employed by or on behalf of Lessee, with limits of liability as set forth in the WOA for each occurrence and in the aggregate.

- 19.5. Automobile Liability. If the performance of a WOA requires Lessee to use or provide for use motor vehicles, Lessee shall carry or require the owners or operators of such motor vehicles to carry automobile (motor vehicle) insurance covering all liabilities in respect of any injury to, or death of, any person or any loss, damage or destruction to any property arising from the use of all owned, non-owned, leased or hired vehicles, with limits of liability as set forth in the WOA for each occurrence and in the aggregate.
- 19.6. Professional Liability. If the Services include the provision of professional advice or services, Lessee shall carry for the term of the Project and for a period of not less than three (3) years after final completion of the WOA professional liability insurance or errors and omissions insurance in respect of any negligent acts, errors or omissions in the advice or professional services provided by Lessee under the WOA, with limits of liability as set forth in the WOA for each claim and in the aggregate.
- 19.7. Personal Property. If the performance of the WOA requires Lessee to use or provide for use any plant and/or equipment that will be used on site in connection with a WOA, Lessee shall carry or require the owner of such plant and/or equipment to carry insurance covering all loss and damage to such plant and/or equipment, with limits of liability of no less than one hundred percent (100%) of replacement value.
- 19.8. Pollution Liability. If the performance of a WOA requires Lessee to perform any operations using or involving Hazardous Substances, Lessee shall carry Hazardous Substances (pollution) liability insurance covering all liabilities in respect of any injury to, or death of, any person or any loss, damage or destruction to any property arising from the use of or the operations using or involving Hazardous Substances, with limits of liability as set forth in the WOA for each occurrence and in the aggregate.
- 19.9. Hazardous Substances Transportation. If the performance of a WOA requires Lessee to transport or haul Hazardous Substances, Lessee shall carry insurance covering all liabilities in respect of any injury to, or death of, any person or any loss, damage or destruction to any property arising from transporting or hauling Hazardous Substances (specifically including MCS 90 coverage), with limits of liability as set forth in the WOA for each occurrence and in the aggregate.
- 19.10. Builder's Risk. Lessee shall carry course of construction/builder's all risk insurance covering the risk of loss to property that is in the course of construction or which has been delivered to the site for incorporation into the Project, including clearance of debris and necessary professional fees, with limits of liability of no less than one hundred percent (100%) of replacement cost of the work.
- 19.11. Excess Liability.
- 19.11.1. If Lessee is unable to obtain the applicable insurance coverage required in this Section, Lessee may carry excess liability insurance and/or umbrella insurance that, when combined with Lessee's primary coverage in a given category of insurance,

brings the total coverage in such category to be no less than the required amount for that category of insurance.

19.11.2. For the avoidance of doubt, in the event that third parties have made claims against Lessee's excess liability and/or umbrella insurance such that the amount of insurance coverage available hereunder has been reduced below the minimum required limits above, Lessee shall obtain additional excess liability and/or umbrella insurance coverage so that the insurance coverage required in this Section is available.

19.12. Terms of Insurance. The insurance to be maintained pursuant to this Section shall be on the following terms:

19.12.1. Coverage shall begin no later than the Notice to Proceed and shall continue throughout for a period of two (2) years following final completion of the WOA (except in the case of professional liability insurance, which shall be carried for a period of three (3) years following completion of the Project).

19.12.2. If any of the insurance referred to in this Section 19 is subject to the application of any self-insured retention or deductible, Lessee shall declare the amount of the self-insured retention or deductible to the Government. The Government reserves the right to require Lessee to reduce the amount of any self-insured retention or deductible where such amount is considered unreasonable in the circumstances of the WOA.

19.12.3. Before performing or providing any of the Services, and within fourteen (14) calendar days after each time the policies are renewed or varied, Lessee shall provide to the Government certificates of insurance and endorsements consistent with this Section 19.12 as evidence of the insurance required under the WOA. Lessee shall furnish certificates of insurance and endorsements annually following final completion of the WOA until insurance is no longer required pursuant to the terms hereof;

19.12.4. All insurance arranged by Lessee pursuant to the terms hereof shall not be varied to the detriment of the Government, cancelled or allowed to lapse until thirty (30) days written notice of the intention to so vary, cancel or lapse has been given to the Government. In addition, the certificates of insurance shall state that the insurer will provide thirty (30) days prior written notice of any cancellation to the Government in the event that the insurance policy is cancelled before the expiration date thereof.

19.12.5. Unless prohibited by Applicable Laws, Lessee shall provide coverage endorsements for each category of insurance required in this Section 19 as follows:

- 19.12.5.1. except in the case of the insurance described in 19.3, 19.4 and 19.6 of these Performance Conditions, an endorsement including the Government as additional insured (understanding, for the avoidance of doubt, the endorsement shall use the wording of ISO from CG 20 10 or the equivalent and ISO from CG 20 37 or the equivalent), which wording shall also be reflected in the certificate of insurance;
- 19.12.5.2. except in the case of the insurance described in Sections 19.3, 19.4 and 19.6, an endorsement providing that despite any conflicting provisions in the insurance policy to the contrary, the inclusion of more than one insured under the insurance policy shall not operate to (1) impair the rights of one insured against another insured and the coverages afforded by the insurance policy will apply as though separate policies had been issued to each insured; (2) increase the limit of the carrier's liability under the policy; or (3) create any liability by the Government to the insurer for payment of all or any portion of the premium for the policy (understanding, for the avoidance of doubt, that if a "no insured-versus-insured" exclusion exists in the policy, it will need to be waived for the purposes of the WOA);
- 19.12.5.3. an endorsement waiving all express or implied rights of subrogation against the Government which waiver shall also be reflected in the certificate of insurance;
- 19.12.5.4. in the case of the insurance described in Section 19.2, an endorsement covering "Goods in the physical and legal control of the insured" for an amount not less than the fair value of the "Goods" held by Lessee; and
- 19.12.5.5. except in the case of the insurance described in Sections 19.3, 19.4 and 19.6, an endorsement providing a severability article to the effect that a breach by one insured will not adversely affect the coverage of the other insureds;
- 19.13. Independent Obligations. In no event will the coverage or limits of any insurance maintained by Lessee hereunder, or the lack or unavailability of any other insurance, limit or diminish in any way Lessee's obligations or liability to the Government under the WOA.
- 19.14. Subcontractor Insurance. If Lessee awards any Prime Subcontract in order to satisfy substantially all of its obligations under a WOA, Lessee will ensure that the Prime Subcontractor procures, carries and maintains insurance in form and amounts consistent with this Section 19. Copies of the Prime Subcontractor's certificate of insurance and policy endorsements will be provided to the Government prior to the Prime Subcontractor undertaking any of such obligations.

20. Indemnification.

20.1. The Lessee assumes all liability for and will indemnify the Government from and against all claims and liabilities or assertion of liabilities or potential liabilities by or to any person which arise out of, or in connection with:

20.1.1. the performance, non-performance or breach by the Lessee or its personnel of any of the Lessee's obligations, covenants, undertakings, representations or warranties under the WOA;

20.1.2. the entry onto and the activities undertaken on, and in, the Project site by the Lessee and its personnel, including, without limitation, any release or discharge, whether or not intentional, or any Hazardous Substances, arising from the matters or activities referred to in Sections 14.2, 14.4 and 14.5 above (which release, discharge, pollution or contamination the Lessee will promptly investigate and remediate at its sole expense to the satisfaction of the Government and the relevant governmental officials);

20.1.3. employment with or engagement of personnel by the Lessee or its subcontractors including without limitation claims relating to income tax, workers' compensation, unemployment compensation, overtime, compensation, salary, benefits (including, without limitation, annual or long service leave), discrimination, harassment, retaliation, breach of implied or express agreement, breach of implied covenant of good faith and fair dealing, promissory estoppel, unjust enrichment, libel, slander, interference with economic relations, wrongful discharge or termination or infliction of emotional distress arising under any federal, state or provincial statute, local ordinance or common law;

20.1.4. any violation or breach of any Applicable Laws by the Lessee or the Lessee's personnel in connection with the performance or provision of the Services; or

20.1.5. the Lessee's failure to procure or maintain the insurance required under a WOA.

20.2. Lessee shall have no obligation to indemnify pursuant to this Section if and to the extent that the relevant claim or liabilities are caused by the sole negligence, gross negligence or wilful misconduct of the Government's personnel.

21. Public Announcements. Except as required by any Applicable Law or as otherwise permitted by a WOA, Lessee may not make any public announcements or disclosures (in marketing materials or otherwise) as to a WOA, or otherwise in relation to the subject matter of a WOA, without the prior written consent of the Government. In this regard, no media release or public announcement may be made in relation to the existence of a WOA without the Government's prior written approval.

22. Termination for Convenience of Government.

- 22.1. The Government may terminate a WOA, in whole or in part, at any time and for any reason upon giving Lessee not less than thirty (30) days notice of its intention to do so under this Section.
- 22.2. Upon receipt of a termination notice, the Lessee shall:
- 22.2.1. immediately cease performance of the Services in accordance with, but only to the extent specified in, the termination notice;
  - 22.2.2. immediately take all possible action to ensure the safety of all personnel and the protection of the Project;
  - 22.2.3. immediately take all possible action to mitigate any liabilities, such as obligations to subcontractors and suppliers, incurred by it as a result of such termination; and
  - 22.2.4. take any other action reasonably required by the Government in relation to the termination.
- 22.3. On the date of termination specified in the termination notice, the Lessee shall:
- 22.3.1. provide the Government with a detailed report in such form as the Government may require in relation to the Services performed up to and including the date of receipt of the termination notice;
  - 22.3.2. return to the Government any Government-Furnished Information;
  - 22.3.3. offer the Government the option to purchase any of Lessee's equipment used on Site exclusively for the purposes of the Project, to be purchased by the Government at its depreciated value or such other value as agreed by the Parties; and
  - 22.3.4. take any other action relating to the termination of the WOA as the Government may reasonably require.
- 22.4. Following termination of a Project by the Government pursuant to this Section, upon submission of a Release Application and Invoice pursuant to Section 16 of these Performance Conditions, "Release of Funds," Lessee shall be entitled to a release of funds from the In-Kind Consideration Account equal to the value all Services supplied prior to termination, all reasonable out-of-pocket expenses which Lessee has incurred or will incur solely as a result of the termination and which it is unable to otherwise recover or mitigate.
- 22.5. The amounts outlined above represent the only amounts or liabilities recoverable by Lessee following termination of a WOA by the Government in accordance with this Section.

23. Default/Remedies.

- 23.1. Breach of Performance. If the Lessee breaches any term of these Performance Conditions, the Government may serve a notice of default (hereinafter, a “**Default Notice**”) on the Lessee.
- 23.2. Default Notice. A Default Notice may:
- 23.2.1. either require that the breach be remedied within a specified period of not less than thirty (30) days after service of the Default Notice on the Lessee (except in the event of an emergency) or state that the breach is incapable of remedy; and
  - 23.2.2. state that if the breach is not remedied within the period specified in the Default Notice or is incapable of remedy, then the Government may by further notice to the Lessee do one or more of the following:
    - 23.2.2.1. elect wholly or partly to suspend release of funds from the In-Kind Consideration Account until the breach has been remedied by the Lessee;
    - 23.2.2.2. take such action as the Government deems necessary to cure the breach (the cost of such action so taken by the Government being recoverable from the Lessee as a debt due to the Government by the Lessee);
    - 23.2.2.3. terminate the WOA with effect from a specified date; or
    - 23.2.2.4. pursue any other right or remedy allowed in law or equity.
- 23.3. Termination of Work Order Agreement. If the Government terminates the WOA for default, the Lessee shall at its cost:
- 23.3.1. cease performance of the Services;
  - 23.3.2. continue to ensure the safety of all personnel and the protection of all property;
  - 23.3.3. immediately take all possible action to mitigate any liabilities incurred by it as a result of such termination;
  - 23.3.4. provide the Government with a detailed report in such form as the Government may require in relation to the Services performed up to and including the WOA termination date;
  - 23.3.5. return to the Government any Government-Furnished Information issued to the Lessee during the performance of the Services;
  - 23.3.6. if directed by the Government to do so, assign in favour of the Government’s nominee any subcontracts or rights under any subcontracts entered into or obtained by the Lessee in connection with the carrying out of the Services; and terminate any other outstanding subcontracts and recover from the subcontractors

any items issued to the subcontractor by the Lessee or the Government during the performance of the Services;

23.3.7. provide the Government with any deliverables, designs and other documentation prepared by or on behalf of the Lessee; and

23.3.8. take any other action reasonably required by the Government in relation to the termination.

23.4. Lessee Insolvency. If the Lessee becomes insolvent, the Government may either:

23.4.1. terminate the WOA with effect from a specified date by notice to the Lessee or any other person in whom the WOA has been vested, in which case the Government will be deemed to have terminated the WOA in accordance with Section 23.2.2.3 and Section 22.3 shall apply;

23.4.2. or give the person in whom the WOA has been vested the option to perform the Services in accordance with the Agreement, subject to that person providing a guarantee satisfactory to the Government up to the value of the Services remaining to be performed pursuant to the WOA.

#### 24. Force Majeure.

24.1. “**Force Majeure**” means an event or cause which is beyond the control of the Lessee, is not able to be overcome by the exercise of reasonable care, proper precautions and the consideration of reasonable alternatives with the intention of avoiding the effects of the force majeure by Lessee, and could not have been reasonably foreseen, and consists solely of, subject to satisfying the requirements of the foregoing, acts of war, acts of public enemies, terrorist acts, riots or civil commotions, inability to obtain permits on reasonable terms, acts of God and natural catastrophes such as earthquakes, floods, volcanic activity and fires, but specifically does not include extreme or inclement weather which is not unusual at the Project site or other place where the Services are to be performed, lack of raw materials or supplies, mechanical breakdown (unless caused by a Force Majeure event), strikes, lockouts, slowdowns or other labor disruptions of Lessee or its personnel or the financial condition of Lessee.

24.2. The Lessee will not be liable for any delay or failure to perform any of its obligations under a WOA (other than an obligation to pay money) due to Force Majeure if, as soon as possible after the beginning of any Force Majeure affecting the ability of the Lessee to perform such obligations, it gives a notice of such Force Majeure to the Government.

24.3. Within fourteen (14) days after giving the initial notice referred to in Section 24.2, the Lessee shall give a further notice that shall:

24.3.1. specify the obligations the Lessee cannot perform;

- 24.3.2. fully describe the Force Majeure;
  - 24.3.3. estimate the time during which the Force Majeure will continue and estimate the cost effect of the Force Majeure; and
  - 24.3.4. specify the measures proposed to be adopted to remedy or abate the Force Majeure.
- 24.4. If the Lessee is prevented from carrying out its obligations under the WOA as a result of Force Majeure, it shall:
- 24.4.1. remedy and mitigate the effects of the Force Majeure to the extent reasonably practicable and resume performance of its obligations as soon as reasonably possible;
  - 24.4.2. take all action reasonably practicable to mitigate any liabilities suffered by the Government as a result of its failure to carry out its obligations under the WOA; and
  - 24.4.3. only be relieved from performing its affected obligations under WOA for the duration of the Force Majeure.
- 24.5. Lessee is not entitled to any increase in the Project Value or the recovery of any damages, costs or expenses in connection with the Force Majeure. The existence of a Force Majeure shall not relieve the Lessee of its insurance or indemnity obligations under the WOA.
- 24.6. Once the effects of the Force Majeure have been overcome, Lessee shall provide the Government with a further written notice stating the actual effect on the Project Schedule and any work budget.
- 24.7. If the time period during which Lessee's performance is prevented or delayed by Force Majeure exceeds thirty (30) days from the date of the notice described in Section 24.3, the Government shall have the right to terminate the WOA by written notice to the Lessee.

## 25. Dispute Resolution.

- 25.1. Disputes under a WOA are subject to Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601 *et seq.*
- 25.2. If a dispute should arise, the Parties agree to first attempt to resolve the dispute using unassisted negotiation techniques (i.e., without the assistance of a neutral third party). Either Party may request in writing that unassisted negotiations commence. As part of the unassisted negotiation, the Parties shall consider employing joint fact-finding, if material factual disputes are involved, and shall use other early resolution techniques appropriate to the circumstances.

- 25.3. If the dispute involves material issues of fact, the Parties may employ a neutral third party to provide a confidential evaluation of the issues of fact.
- 25.4. If the dispute is not resolved within sixty (60) days of the request for unassisted negotiations, and the Parties do not mutually agree to continue the unassisted negotiations, the Parties shall employ alternative dispute resolution (ADR) procedures involving nonbinding mediation of the dispute by a neutral third party. The ADR procedures employed shall include a confidential evaluation of both the facts and the law and the issuance of confidential recommendations by the third party neutral.
- 25.5. If the Parties are unable to resolve the dispute following unassisted negotiations and/or the ADR proceeding, the Government, through its designated contracting officer, shall issue a final decision under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613. Before the Government's contracting officer can issue a final decision on a contractor claim, the claim must be submitted in writing to the contracting officer and must comply with all requirements of 41 U.S.C. § 605. The Lessee may appeal the contracting officer's final decision as provided in 41 U.S.C. §§ 607 and 609.
- 25.6. By entering into a WOA, the Parties have voluntarily adopted ADR procedures in accordance with 5 U.S.C. § 572(c). These procedures shall not be employed if determined by either Party to be inappropriate after taking into consideration the factors enumerated at 5 U.S.C. § 572(b). A Party rejecting ADR as inappropriate shall document its reasons in writing and deliver them to the other Party. The Parties shall enter into a master written ADR Agreement governing ADR proceedings that may be amended as needed to fit individual proceedings. (A template of an acceptable ADR agreement may be found at [www.adr.af.mil](http://www.adr.af.mil)).

## 26. Notices.

- 26.1. All notices and other communications ("**Notices**") hereunder by a Party shall be in writing, sent or delivered by one of the means identified below and addressed (i) if to Lessee, to the attention of Lessee's Representative at the address specified in the WOA; and (ii) if to the Government, at the address specified in the WOA. Unless a later time is specified in the Notice, a Notice will be effective with respect to a Party:
- 26.1.1. in the case of a hand delivery or delivery by courier, upon receipt;
- 26.1.2. in the case of a letter sent by registered or certified mail, return receipt requested, five (5) days after postmark (seven (7) days if postmarked from a country other than the country to which it was sent); and
- 26.1.3. in the case of a facsimile, upon confirmation by the machine from which the facsimile was sent that indicates that the facsimile was sent in its entirety to the facsimile number of the recipient.

26.2. If a Notice is received on a day other than a business day in the jurisdiction of receipt or if received after 5:30 pm local time, then the Notice will be deemed effective on the next day. Either Party may change its address for future notices by providing written Notice to that effect to the other Party.

27. Mandatory Clauses Required by Law. The Lessee shall comply with the provisions of **Appendix 1.**

28. Equal Opportunity Clause. The following provisions are applicable unless a WOA is exempt under the rules, regulations and relevant orders of the Department of Labor (41 C.F.R. ch 60).

28.1. Lessee shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. Lessee shall, in all solicitations or advertisements for employees placed by or on behalf of Lessee, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

28.2. Lessee shall take proactive steps to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

28.3. Lessee shall post, in conspicuous places available to employees and applicants for employment, the notices to be provided by the Government for this Lease that explain this clause.

28.4. Lessee shall send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, the notice to be provided by the Government advising the labor union or workers' representative of the Lessee's commitments under this equal opportunity clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.

28.5. Lessee shall comply with all provisions of Executive Order No. 11246, as amended, and of the rules, regulations, and relevant orders of the Department of Labor. Lessee shall furnish all information required by Executive Order No. 11246 and by the rules, regulations, and orders of the Department of Labor, or pursuant thereto, and shall permit access to its books, records, and accounts by the Government and the Department of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

28.6. In the event of Lessee's noncompliance with the equal opportunity clause of this Section 28 or with any of the rules, regulations, or orders described in this Section 28,

the Government may take appropriate action to enforce compliance, may terminate a WOA for default as provided in Section 23 of these Performance Conditions, and Lessee may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246, as amended, or by rule, regulation, or order of the Department of Labor, or as otherwise provided by law.

28.7. Notwithstanding any other provision in a WOA, disputes relative to this equal opportunity clause will be governed by the procedures in 41 C.F.R. § 60 1.1.

## APPENDIX 1 TO PERFORMANCE CONDITIONS

### MANDATORY CLAUSES

#### CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—OVERTIME COMPENSATION

(a) *Applicability.* This clause shall apply only in the case of projects undertaken by the Lessee for the construction of a public building or public work to be delivered by the Lessee to the Government as in-kind consideration as set forth in the Lease. “Public building or public work” means a building or work the construction of which is carried on directly or indirectly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(b) *Overtime requirements.* No Lessee or subcontractor contracting for any part of the applicable work which may require or involve the employment of laborers or mechanics shall require or permit any such laborers or mechanics in any workweek in which the individual is employed on such work to work in excess of 40 hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than 1-1/2 times the basic rate of pay for all hours worked in excess of 40 hours in such workweek.

(c) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the provisions set forth in paragraph (b) of this clause, the Lessee and any subcontractor responsible therefore shall be liable for the unpaid wages. In addition, such Lessee and subcontractor shall be liable to the United States (in the case of work done under lease for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions set forth in paragraph (b) of this clause in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime wages required by provisions set forth in paragraph (b) of this clause.

(d) *Withholding for unpaid wages and liquidated damages.* The Government shall upon its own action or upon written request of an authorized representative of the Department of Labor cause to be withheld, from any moneys payable on account of applicable work performed by the Lessee or subcontractor under a WOA or any other federal contract with the same Lessee, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act which is held by the same Lessee, such sums as may be determined to be necessary to satisfy any liabilities of such Lessee or subcontractor for unpaid wages and liquidated damages as provided in the provisions set forth in paragraph (c) of this clause.

(e) Payrolls and basic records.

(1) The Lessee or subcontractor shall maintain payrolls and basic payroll records during the course of accomplishing the applicable “in kind” work and shall preserve

them for a period of 3 years from the completion of the construction for all laborers and mechanics working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classification, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Nothing in this paragraph shall require the duplication of records required to be maintained for construction work by Department of Labor regulations at 29 CFR 5.5(a)(3) implementing the Davis-Bacon Act.

(2) The records to be maintained under paragraph (e)(1) of this clause shall be made available by the Lessee or subcontractor for inspection, copying, or transcription by authorized representatives of the Government Representative or the Department of Labor. The Lessee or subcontractor shall permit such representatives to interview employees during working hours on the job.

(f) *Subcontracts.* The Lessee or subcontractor shall insert in any applicable subcontract exceeding \$100,000 the provisions set forth in paragraphs (b) through (f) of this clause and also a clause requiring the subcontractors to include these provisions in any lower tier subcontracts. The Lessee shall be responsible for compliance by lower tier subcontractor with the provisions set forth in paragraphs (b) through (f) of this clause.

#### Section 1.01 **DAVIS-BACON ACT**

The Davis-Bacon Act shall apply only in the case of projects undertaken by the Lessee or subcontractor, for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA. "Public building or public work" means a building or work the construction of which is carried on directly or indirectly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. The Government's involvement in the oversight of the Davis-Bacon Act requirements will be limited to monitoring the Lessee's responsibilities only during the applicable construction period(s). This oversight involves validating the Lessee ensures that the wage rates paid to all classes of laborers or mechanics employed or working on the site are in compliance with the Davis-Bacon wage classifications and standards.

#### Section 1.02 **WITHHOLDING OF FUNDS**

(a) *Applicability.* This clause shall apply only in the case of projects undertaken by the Lessee or subcontractor for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA. "Public building or public work" means a building or work, the construction of which is carried on directly or indirectly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(b) The Government shall, upon his or her own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the Lessee under this lease or any other Federal contract with the same Lessee, or any other Federally assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same Lessee, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Lessee or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the Government, after written notice to the Lessee, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

### Section 1.03 **PAYROLLS AND BASIC RECORDS**

(a) *Applicability.* This clause shall apply only in the case of projects undertaken by the Lessee or subcontractor for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA. "Public building or public work" means a building or work, the construction of which is carried on directly or indirectly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(b) Payrolls and basic records relating thereto shall be maintained by the Lessee during the course of the applicable "in kind" construction work and preserved for a period of 3 years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made, and actual wages paid. Whenever the Secretary of Labor has found that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Lessee shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. The Lessee agrees that it and subcontractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(c) (1) The Lessee shall submit weekly for each week in which any lease work is performed a copy of all payrolls to the Government. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under paragraph (a)

of this clause. This information may be submitted in any form desired. Optional Form WH-347 (Federal Stock Number 029-005-00014-1) is available for this purpose and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. The Lessee is responsible for the submission of copies of payrolls by all subcontractors.

(2) Each payroll submitted shall be accompanied by a "Statement of Compliance" signed by the Lessee or his or her agent who pays or supervises the payment of the persons employed under the lease and shall certify—

(i) That the payroll or the payroll period contains the information required to be maintained under paragraph (b) of this clause and that such information is correct and complete;

(ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the lease during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in the Regulations, 29 CFR Part 3; and

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by subparagraph (b)(2) of this clause.

(4) The falsification of any of the certifications in this clause may subject the Lessee or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code.

(5) The Lessee or subcontractor shall make the records required under paragraph (b) of this clause available for inspection, copying, or transcription by the Government or the Department of Labor. The Lessee or subcontractor shall permit the Government or the Department of Labor to interview employees during working hours on the job. If the Lessee or subcontractor fails to submit required records or to make them available, the Government may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment. Furthermore, failure to submit the required records upon request or to make such records available, may be grounds for debarment action pursuant to 29 CFR 5.12.

#### Section 1.04 **APPRENTICES AND TRAINEES**

(a) *Applicability.* This clause shall apply only in the case of projects undertaken by the Lessee or subcontractor for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA. "Public building or public work" means a building or work, the construction of which is carried on directly or indirectly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(b) *Apprentices.* Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Lessee as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in this paragraph, shall be paid not less than the applicable wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a Lessee is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate specified in the Lessee's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the Lessee will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(c) *Trainees.* Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the

plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed in the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate in the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate in the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate in the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Lessee will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(d) *Equal employment opportunity.* The utilization of apprentices, trainees, and journeymen under this clause shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

#### Section 1.05 **COMPLIANCE WITH COPELAND ACT REQUIREMENTS**

In the case of projects undertaken for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA, the Lessee or subcontractor shall comply with the requirements of 29 CFR Part 3, which are hereby incorporated by reference in a WOA.

#### Section 1.06 **SUBCONTRACTS (LABOR STANDARDS)**

(a) *Applicability.* This clause shall apply only in the case of projects undertaken by the Lessee or subcontractor for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA. "Public building or public work" means a building or work, the construction of which is carried on directly or indirectly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(b) The Lessee or subcontractor shall insert in any subcontracts the clauses herein entitled Davis-Bacon Act, Contract Work Hours and Safety Standards Act--Overtime Compensation, Apprentices and Trainees, Payrolls and Basic Records, Compliance with Copeland Act Requirements, Withholding of Funds, Subcontracts (Labor Standards), Contract Termination--Debarment, Disputes Concerning Labor Standards, Compliance with Davis-Bacon and Related

Act Regulations, and Certification of Eligibility, and such other clauses as the Government, by appropriate instructions, require, and also a clause requiring subcontractors to include these clauses in any lower tier subcontracts. The Lessee shall be responsible for compliance by any lower tier subcontractor with all of the lease clauses cited in this paragraph.

(c) (1) Within 14 days after award of the lease, the Lessee shall deliver to the Government Representative a completed Statement and Acknowledgment Form (SF1413) for each subcontract, including the subcontractor's signed and dated acknowledgment that the clauses set forth in paragraph (b) of this clause have been included in the subcontract.

(2) Within 14 days after the award of any subsequently awarded subcontract the Lessee shall deliver to the Government Representative an updated completed SF 1413 for each additional subcontract.

#### Section 1.07 **LEASE TERMINATION—DEBARMENT**

In the case of projects undertaken for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA, a breach of the clauses entitled *Davis-Bacon Act, Contract Work Hours and Safety Standards Act-- Overtime Compensation, Apprentices and Trainees, Payrolls and Basic Records, Compliance with Copeland Act Requirements, Subcontracts (Labor Standards), Compliance with Davis-Bacon Related Act Regulations, or Certification of Eligibility* may be grounds for termination of the WOA, and for debarment as a Lessee and subcontractor as provided in 29 CFR 5.12.

#### Section 1.08 **COMPLIANCE WITH DAVIS-BACON AND RELATED ACT REGULATIONS**

All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are hereby incorporated by reference in this lease. Such rulings and interpretations shall apply only in the case of projects undertaken by the Lessee or subcontractor for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA.

#### Section 1.09 **DISPUTES CONCERNING LABOR STANDARDS**

The United States Department of Labor has set forth in 29 CFR Parts 5, 6, and 7 procedures for resolving disputes concerning labor standards requirements. Such disputes, to the extent they relate to projects undertaken by the Lessee or subcontractor for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA, shall be resolved in accordance with those procedures. Disputes within the meaning of this clause include disputes between the Lessee (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

#### Section 1.10 **CERTIFICATION OF ELIGIBILITY**

(a) By entering into a WOA, the Lessee certifies that neither it (nor he or she) nor any person or firm who has an interest in the Contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(b) No part of this any project undertaken by the Lessee for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(c) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

#### Section 1.11 **BUY AMERICAN ACT - CONSTRUCTION MATERIALS**

(a) The requirements of this clause shall apply only in the case of projects undertaken by the Lessee or subcontractor for the construction of a public building or public work to be delivered by the Lessee to the Government under a WOA. "Public building or public work" means a building or work, the construction of which is carried on directly or indirectly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(b) The Buy American Act (41 U.S.C. §§ 10a – 10d) provides that the Government give preference to domestic construction material, as defined below. Components, as used in this clause, means those articles, materials, and supplies incorporated directly into construction materials.

*Construction material*, as used in this clause, means an article, material, or supply brought to the construction site for incorporation into the building or work. Construction material also includes an item brought to the site pre-assembled from articles, materials or supplies.

Free Trade Agreement country means Canada, Chile, Mexico, or Singapore. Designated country means any of the following: Aruba, Austria, Bangladesh, Belgium, Benin, Bhutan, Botswana, Burkina Faso, Burundi, Canada, Cape Verde, Central African Republic, Chad, Comoros, and Denmark. Djibouti, Equatorial Guinea, Finland, France, Gambia, Germany, Greece, Guinea, Guinea-Bissau, Haiti, Hong Kong, Iceland, Ireland, Israel, Italy, Japan, Kiribati, Korea-Republic of, Lesotho, Liechtenstein, Luxembourg, Malawi, Maldives, Mali, Mozambique, Nepal, Netherlands, Niger, Norway, Portugal, Rwanda, Sao Tome and Principe, Sierra Leone, Singapore, Somalia, Spain, Sweden, Switzerland, Tanzania U.R., Togo, Tuvalu, Uganda, United Kingdom, Vanuatu, Western Samoa, Yemen.

*Domestic construction material*, as used in this clause, means (1) an unmanufactured construction material mined or produced in the United States, or (2) a construction material

manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States, exceeds 50 percent of the cost of all its components.

(c) Construction materials. Construction materials that are from a designated country, a Free Trade Agreement country, or domestic construction material are allowable. Construction material originating from countries other than these and are of the same class, kind, and quality, may be approved for use by the Government, when requested, if the available construction materials are determined to be not timely available in sufficient quality or quantity, or to be unreasonable in cost.

(d) Notwithstanding any other language in this clause or elsewhere in a WOA, the Lessee or subcontractor shall not acquire or use any materials, supplies, or services originating from, located in, or transported from or through, any country or source prohibited from lawful importation into the United States by applicable statute, Executive Order, or regulation.

(e) The Lessee agrees that only allowable construction material will be used by the Lessee, subcontractors, material men, and suppliers in the performance of applicable work, except for foreign construction materials, if any, listed in this lease.

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