

FUNDING AND ASSIGNMENT AGREEMENT

THIS FUNDING AND ASSIGNMENT AGREEMENT (the “Agreement”), by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (the “**City**”) and **DENVER BOTANIC GARDENS, INC.**, a Colorado nonprofit corporation (the “**Foundation**”).

RECITALS

WHEREAS, the qualified and registered voters of the City approved referred question 1G on November 6, 2007, approving the issuance of general obligation bonds (the “**Bonds**”) by the City in the aggregate principal amount of \$70,000,000.00 for the purpose of financing the cost of new cultural facilities; and

WHEREAS, the Denver Botanic Gardens, intends to construct new improvements including, new restrooms, café, and science pyramid (the “**Gardens**”) and the City desires to make a part of the proceeds, totaling an amount not to exceed \$6,619,000.00 of the Bonds (the “**Proceeds**”), available to fund costs associated with the above-stated improvements to the buildings and grounds all as more fully described below (the “**Project**”), in accordance with the terms and conditions of this Agreement; and

WHEREAS, the Foundation is willing and has the present capacity to satisfactorily complete and operate the Project for the use and benefit of the citizens of the City, as specified herein; and

WHEREAS, the Foundation has committed to raising private funds in the amount of One Million Five Hundred Twenty-Four Thousand Six Hundred Ninety Dollars (\$1,524,600.00) to partially fund projects at the Gardens toward the end of completing the 2007 Master Development Plan; and

WHEREAS, the Foundation is willing to advance private funds to the City for the Project that the City will repay with Proceeds when and if the Bonds are issued; and

WHEREAS, the undertaking of this Project is in accordance with the Cooperative Agreement dated April 5, 1991, as particularly amended by the First Amendment to Cooperative Agreement dated June 26, 1995 (City Clerk Filing 69682) (the “**Cooperative Agreement**”), by which the City has designated the Foundation as the City’s agent to develop, manage, control,

administer, and be in charge of the City-owned Gardens; and

WHEREAS, the City and the Foundation desire to specify the conditions upon which these funds, including the Proceeds and any private funds advanced by the Foundation to the City for the Project, will be used by the Foundation for the purposes of completing the Project.

NOW, THEREFORE, in consideration of the above, and the mutual promises and covenants contained herein, the City and the Foundation agree as follows:

1. **The Project**: The "Project," as used herein, refers to the improvements to be designed, constructed, and installed by the Foundation at the Gardens as described in **EXHIBIT A**. The Project is to be constructed and installed entirely within the boundaries of the existing Gardens property as described in the Cooperative Agreement. The Project will be funded by the Proceeds, to the extent such Proceeds are made available hereunder. The Foundation will perform or cause to be performed all work items and provide all supplementary funds necessary to satisfactorily complete the Project in accordance with the terms and conditions of this Agreement.

2. **Coordination and Liaison**:

A. The City's Project Manager for the Better Denver Bond Program, currently Scott Hergenrader, (the "Manager") is vested with the authority to act on behalf of the City in performing the City's obligations under this Agreement. The Manager may designate someone to act on the Manager's behalf as the authorized representative. The City may change its authorized representative at any time by providing written notice to the Foundation of such change.

B. The Chief Executive Officer of the Foundation is the Foundation's authorized representative under this Agreement and, as such, is responsible for overseeing the satisfactory completion of the Project, in accordance with the terms and conditions of this Agreement. The Foundation may change its authorized representative at any time by providing written notice to the City of such change.

3. **City Payment and Related Responsibilities**:

A. As consideration for the performance of the Foundation under this Agreement and in order to enhance the ability of the Foundation to perform the functions and services set forth in the Cooperative Agreement, the City agrees to pay towards the cost of completing the Project the Proceeds. All other expenditures required to complete the Project or

other costs associated with the Project are solely the responsibility of the Foundation, and shall be paid by the Foundation. The Foundation is willing to advance private funds to the City for the Project that the City will repay with Proceeds when and if the Bonds are issued. If the City utilizes on-call City contracts to complete work on the Project, the value of that work shall be deducted from the Proceeds available to reimburse the Foundation. The estimated costs of the component parts of the Project are included in Exhibit A.

Unless otherwise specified herein, the Proceeds shall be made available to the Foundation to be expended to pay capital costs incurred in completing the Project including, but not limited to, costs associated with design, construction, Project management, furnishings, and equipment. The Foundation may reallocate the Proceeds among the Project components described on Exhibit A from time to time. The Foundation will not utilize the Proceeds for operating or other working capital expenditures.

B. Upon the City's receipt of the Proceeds, the City agrees to pay to the Foundation the Proceeds from available funds upon notice from the Foundation that it is ready to commence the Project and as draws are submitted and approved by the Manager for payment from the Proceeds, as further described in paragraph 5B below.

C. Upon final completion of the Project, the Foundation will provide to the City an accounting of all Proceeds and other funds expended on the Project and attaching all required or requested supporting documentation. Such accounting, including supporting documentation, shall be sufficient to demonstrate that the Proceeds have been expended only for actual costs associated with the completion of the Project and in accordance with the terms and conditions of this Agreement. The accounting shall itemize the expenditure of the Proceeds for Project design cost, construction cost, project management cost, furnishing cost, equipment cost, or other administrative cost category and must also provide a total of all expenditures, to date, for each referenced category, regardless of the source of funds.

D. The parties agree that the obligation of the City for all or any part of its payment obligation hereunder, whether direct or indirect, shall extend only to the payment of the Proceeds that are duly and lawfully appropriated by the City Council for the purpose of this Agreement.

4. **Assignment:** Pursuant to the authority granted in Section 2.3.3(A) of the City Charter, the Mayor hereby assigns to the Foundation, as agent for the City under the Cooperative

Agreement, all matters relating to the design, planning, and construction of the Project, including any demolition, and the qualification, selection and retention of all consultants, architects, and contractors engaged in connection therewith. The Project must be designed, planned, and constructed in accordance with master plans adopted by the Foundation and approved by the Manager of Parks and Recreation in accordance with paragraph 5 of the Cooperative Agreement or in accordance with any amendment to the master plan approved by the Manager of Parks and Recreation.

5. **Foundation Responsibilities:** Except as otherwise provided in this Agreement, the Foundation shall have sole responsibility with respect to undertaking and completing the Project in accordance with this Agreement.

A. Before any phase of the work is commenced, the Foundation shall submit design plans and specifications for such work to the Manager of Parks and Recreation and the Manager of Public Works of the City for the written approval of said documents by both of the managers or their authorized representatives. Design review will include a review for safety engineering purposes by City's insurance carrier and the City's Risk Management office, which review and recommendation will be reported to the Manager of Public Works. The design plans and specifications will be approved or disapproved, in writing, with the reasons for any disapproval being stated, within thirty (30) days of receipt by both of the managers of complete sets of design plans and specifications. Any deficiencies in said plans and specifications shall be remedied by the Foundation, to the reasonable satisfaction of both of the managers or their representatives, prior to the commencement of work.

B. The Foundation shall submit quarterly draw requests that anticipate the Proceeds and other funds needed for the coming quarter. With each draw request, the Foundation shall provide (1) a report of anticipated future expenditures for the next quarter and for the full Project, showing projected expenditures compared to the budget for the Project, and (2) a report of the expenditures made in the past on the Project, showing past expenditures compared to the budget for the Project.

C. The Foundation shall provide to the Manager a public communication plan for approval and will continue to coordinate its public outreach efforts with the Manager.

D. The Foundation shall at all reasonable hours ensure right of entry to any City inspector or other authorized agent of the City to the work site to conduct tests and

evaluations to determine that the work performed and materials used are of good quality and in conformance with the approved design plans and specifications. If it is determined that the work is not being so performed, the Manager of Public Works or the Manager of Parks and Recreation may order the cessation of the work until there is satisfactory evidence that the work conforms to the approved design plans and specifications. If the City determines that the work is not otherwise being performed in accordance with this Agreement, the Manager of Public Works may order that the Foundation cease to conduct the work until there is satisfactory evidence that the work will be performed in accordance with this Agreement.

E. The City shall not charge the Foundation for the City's activities under this paragraph 5, including design plan and specifications review, inspections, material testing, and construction monitoring. Standard building permit fees and other fees mandated by existing ordinance or rule for construction approvals will be paid, from either Proceeds or by the Foundation.

F. The Foundation shall be solely responsible for assuring that all phases of the Project are properly contracted and performed and that the work done and the materials used are in conformance with all applicable laws (local, state, and federal) that govern the performance of the work, including (to the extent applicable) the requirements of the federal Americans with Disabilities Act and any other federal or state laws requiring access for the disabled to public accommodations.

G. In addition to compliance with the above-mentioned laws, the Foundation shall be governed and controlled by all limitations and provisions that are imposed on the City Department of Public Works by the Charter or ordinances of the City. Specifically, such work shall be performed in compliance with the provisions for competitive procurement set forth in the Denver City Charter at 2.3.3(A)(i) and Section 20-56 of the Denver Revised Municipal Code ("DRMC"); for payment of prevailing wages set forth in Sections 20-76 through 20-79, DRMC; for public art in Sections 20-85 through 28-90, DRMC; and for small business enterprise, equal employment opportunity, and minority and women business enterprise participation that are contained, respectively, in Sections 28-31 through 28-91, DRMC, as the same may be amended or re-codified from time to time. No construction contracts shall be entered until the Foundation has established to the City's reasonable satisfaction that these Charter and ordinance requirements have been fully and appropriately satisfied.

H. Insurance requirements.

a. **General Conditions:** Foundation agrees to secure, and maintain, the following insurance covering all operations, goods or services provided pursuant to this Agreement, or any extension thereof, during any warranty period, and for any claims-made policy, three (3) years after termination of the Agreement. The required insurance shall be underwritten by an insurer licensed to do business in Colorado and rated by A.M. Best Company as “A” and “Financial Size Category of Class VIII” or better, or other insurer acceptable to the City

If any policy is in excess of a deductible or self-insured retention, the City must be notified by Foundation. Foundation shall be responsible for the payment of any deductible or self-insured retention. The insurance coverages specified in this Agreement are the minimum requirements, and these requirements do not lessen or limit the liability of the Foundation. If a policy provides higher limits of coverage the policy shall not limit the City’s coverage as an additional insured to the minimum limits stated in this Agreement. The Foundation shall maintain, at its own expense, any additional kinds or amounts of insurance that it may deem necessary to cover its obligations and liabilities under this Agreement.

b. **Proof of Insurance:** Foundation shall provide a copy of this Agreement to its insurance agent or broker. Foundation shall provide proof of required insurance to the City, through a certificate of insurance or other proof of insurance as required by the City’s Risk Management Office. The parties agree that if Foundation provides an Accord (paper) Certificate it will satisfy the proof of insurance requirement under this paragraph. Each policy shall contain a valid provision or endorsement stating “Should any of the above-described policies be canceled or should any coverage be reduced before the expiration date thereof, the issuing company shall send written notice to the Denver Risk Administrator, 201 West Colfax Avenue, Dept. 1105, Denver, Colorado 80202 by certified mail, return receipt requested. Such written notice shall be sent thirty (30) days prior to such cancellation or reduction unless due to non-payment of premiums for which notice shall be sent ten (10) days prior.”

c. **Workers’ Compensation/Employer’s Liability Insurance:** Foundation shall maintain the Workers’ Compensation Coverage as required by statute and Employer’s Liability insurance with limits of \$100,000 for each bodily injury occurrence claim, \$100,000 for each bodily injury caused by disease claim, and \$500,000 aggregate for all bodily injuries caused

by disease claims. Foundation expressly represents to the City, as a material condition and requirement of this Agreement, that none of Foundation's officers or employees who may be eligible under any statute or law to reject Workers' Compensation Insurance shall effect such rejection during any part of the term of this Agreement, and that any such rejections previously effected, have been revoked as of the date Foundation executes this Agreement.

d. **General Liability:** Foundation shall maintain limits of \$1,000,000 for each occurrence claim, \$1,000,000 for each personal and advertising injury claim, \$2,000,000 products and completed operations for each occurrence, and \$2,000,000 policy aggregate.

e. **Automobile Liability:** Foundation shall maintain limits of \$1,000,000 for combined single limit applicable to all vehicles operating on City property and elsewhere which includes auto pollution liability coverage for any vehicle hauling cargo containing pollutants or contaminants.

f. **Crime/embezzlement:** Foundation shall carry an endorsement to its general policy naming the City as a Joint Loss Payee for crime or employee dishonesty, with limits no less than the maximum amount of funds in the Foundation's care, custody and control at any one time.

g. **Additional Provisions:**

(i) For all general liability, the policies must provide the following:

- (a) Unlimited defense costs outside of policy limits;
- (b) Contractual liability covering the indemnification provisions of this Agreement;
- (d) A severability of interests provision;
- (e) Waiver of exclusion for lawsuits by one insured against another;
- (f) A provision that coverage is primary; and
- (g) A provision that coverage is non-contributory with other coverage or self-insurance provided by the City.

(ii) For all general liability, if the policy is a claims-made policy, then the retroactive date must be on or before the date of this Agreement.

h. **Additional Insured's:** For all coverages, Foundation's insurer shall name the City as an additional insured.

i. **Waiver of Subrogation:** For the General Liability and Workers' Compensation coverages, Foundation's insurer shall waive subrogation rights against the City.

I. Prior to execution and delivery, the Foundation shall submit to the City the form of all contracts to be entered into by the Foundation in connection with the construction of the Project, which will be reviewed by the Office of the City Attorney to assure compliance with the requirements of this Agreement, including compliance with City insurance requirements for the construction, similar to those listed in **EXHIBIT B**, in amounts to be determined based on size and complexity of the Project, in consultation with the City's Risk Management Office. The Office of the City Attorney shall review such contracts within 21 days of the submittal of the contracts to the Office of the City Attorney by the Foundation, or such approval shall be deemed given. Any warranty to be provided by the contractor to the Foundation shall include the City as a beneficiary of the warranty.

J. The Foundation and its contractors and subcontractors shall pay all applicable taxes, including sales and use taxes and occupational privilege taxes, levied by the State and the City on any tangible property built into or incorporated into the work. Upon request by the City, an itemized and certified statement, including the names and addresses of the suppliers, the amount of such taxes owed or paid, and the dates of payment, shall be furnished to the City.

K. The Foundation or its contractors shall obtain a bond or bonds or other financial guarantee acceptable to the City Attorney, conditioned (1) that the Foundation and its contractors shall promptly make payment of all amounts lawfully due to all contractors, subcontractors, and persons or entities furnishing labor or materials used in the prosecution of the work on any phase of the Project, and shall indemnify the City to the extent of all payments in connection with performing the work, and (2) guaranteeing performance of the Foundation of its obligation to complete the Project. The dollar amount of such bonds shall be modified to reflect any change orders that modify the total value of the Project or part of the Project.

L. The Foundation will provide and install at the Project site signs, in a form mutually agreeable to the Manager of Parks and Recreation and the Foundation, stating the scope of the Project and acknowledging the participation of the City and the bond funding for the Project.

M. If, for any reason, construction of any phase of the Project is delayed or halted while in process for more than 21 days, the Foundation shall take reasonable measures to protect the existing Project site and buildings from weather damage, vandalism and other similar threats.

N. The Foundation agrees to complete the Project within three (3) years of the date of the first draw of Proceeds by the Foundation, in accordance with the terms and conditions of this Agreement.

O. The Foundation agrees that any Proceeds received from the City may not be invested, if at all, at a rate greater than the rate to be provided by the City's Finance Department at the time of disbursement of the Proceeds to the Foundation. The Foundation agrees to provide evidence of compliance with this responsibility at the time the investment, if any, occurs. The Foundation agrees to monitor the deposit and any investment of Proceeds pending disbursement to a third party and provide the City with copies of all bank statements relating to the investment and expenditure of such amounts.

6. **Reporting & Audits:**

A. The Foundation shall provide, or cause its contractors to provide, to the City Auditor documentation of expenditures for the Project, in form and detail sufficient to enable the Auditor to perform his responsibilities under the Charter and ordinances of the City. Such documentation shall include periodic invoices evidencing the work performed and the payroll reporting requirements contained in DRMC Section 20-76(d).

B. The Foundation agrees that any duly authorized representative of the City shall, until the expiration of three (3) years after completion of the Project, have access to and the right to examine any directly pertinent books, documents, papers and records of the Foundation involving transactions related to this Agreement, including expenditure data and investment of Proceeds, if any, required by the City's Department of Finance.

7. **Term:** The term of this Agreement shall commence on the date above first written and shall terminate upon the completion of all phases of the Project.

8. **Title:** As provided in paragraph 13 of the Cooperative Agreement, upon completion of construction of any aspect of the Project, and upon approval and acceptance by the City, the Foundation shall be deemed to have conveyed to the City all right, title and interest in the improvement made as part of the Project.

9. **No Discrimination in Employment:** In connection with the performance of work under this Agreement, the Foundation agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and further agrees to insert the foregoing provision in all contracts and subcontracts hereunder.

10. **Limitation on Application of Agreement:** The provisions of this Agreement are intended to govern the commencement and completion of the Project and shall not be construed to prohibit, limit, waive, or modify other agreements between the parties currently existing or entered in the future as to improvements at the Gardens.

11. **Notices:** Any notices, responses, or communications given hereunder may be personally delivered or sent by first class mail, addressed to the following:

To the City:

Scott Hergenrader
Program Manager
Better Denver Bond Program
201 West Colfax Avenue, Dept. ____
Denver, CO 80202

City Attorney
c/o Shaun Sullivan
201 W. Colfax Avenue, Dept. 1207
Denver, CO 80202

To the Foundation:

Brian Vogt
Chief Executive Officer
Denver Botanic Gardens
909 York Street
Denver, CO 80206

The contacts and addresses specified above may be changed by the parties at any time upon written notice to the other party.

12. **Conflict of Interest:** The parties agree that no official, officer or employee of the City shall have any personal or beneficial interest whatsoever in the Project or related services or property described herein.

13. **No Third Party Beneficiaries:** The Parties expressly agree that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and the Foundation; and nothing contained in this Agreement shall give or allow any such claim or right of action by any other or third person on such agreements. The City and the Foundation expressly agree that any person other than the City and the Foundation receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

14. **Subject to Local Laws; Venue:** Each and every term, provision or condition herein is subject to and shall be construed in accordance with the provisions of Colorado law, the Charter and Municipal Code of the City and County of Denver, and the applicable ordinances, regulations, executive orders, or fiscal rules, enacted or promulgated pursuant thereto. Venue for any legal action relating to this Agreement shall lie in the District Court in and for the City and County of Denver, Colorado.

15. **Execution of Agreement:** This Agreement is expressly subject to, and shall not be or become effective or binding on the City and the Foundation until fully executed by all signatories of the City and the Foundation.

16. **Legal Authority:** The City and the Foundation each represent that it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement.

17. **Agreement as Complete Integration; Amendments:** Except for the Cooperative Agreement, this Agreement is intended as the complete integration of all understandings between the parties, and no prior or contemporaneous addition, deletion or other amendment shall have any force or effect, unless embodied herein in writing. Amendments to this Agreement will become effective only when approved by both parties and executed in the same manner as this Agreement.

18. **Counterparts of Agreement:** This Agreement may be executed in counterparts, each of which shall be deemed to be an original of this Agreement, and all of which, taken together, shall constitute one and the same document.

19. **Electronic Signatures and Electronic Records:** The Foundation consents to the use of electronic signatures by the City. The Agreement, and any other documents requiring a signature hereunder, may be signed electronically by the City in the manner specified by the

City. The Parties agree not to deny the legal effect or enforceability of the Agreement solely because it is in electronic form or because an electronic record was used in its formation. The Parties agree not to object to the admissibility of the Agreement in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.

Contract Control Number:

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at
Denver, Colorado as of

SEAL

CITY AND COUNTY OF DENVER

ATTEST:

By_____

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

By_____


By_____

By_____



Contract Control Number: PWADM-201312398-00

Contractor Name: Denver Botanic Garder

By: _____

Name: Brian R. Vogt
(please print)

Title: CEO
(please print)

ATTEST: [if required]

By: _____

Name: _____
(please print)

Title: _____
(please print)



EXHIBIT A
PROJECT DESCRIPTION AND BUDGET

NEW CONSTRUCTION INCLUDING:

	<u>Amount to be Spent</u>
Reconstruct outdoor café, LePotager and deck area, add new restrooms	\$1,144,000.00
Construct Science Pyramid	<u>\$5,475,000.00</u>
TOTAL:	\$6,619,000.00

EXHIBIT B
EXAMPLE OF CONSTRUCTION INSURANCE REQUIREMENTS

INSURANCE:

A. General Conditions: General Contractor agrees to secure, at or before the time of execution of this Agreement, the following insurance covering all operations, goods or services provided pursuant to this Agreement. General Contractor shall keep the required insurance coverage in force at all times during the term of the Agreement, or any extension thereof, during any warranty period, and for eight (8) years after termination of the Agreement. The required insurance shall be underwritten by an insurer licensed or authorized to do business in Colorado and rated by A.M. Best Company as "A"VIII or better. Each policy shall contain a valid provision or endorsement stating "Should any of the above-described policies be cancelled or should any coverage be reduced before the expiration date thereof, the issuing company shall send written notice to the Denver Risk Administrator, 201 West Colfax Avenue, Dept. 1105, Denver, Colorado 80202 by certified mail, return receipt requested. Such written notice shall be sent thirty (30) days prior to such cancellation or reduction unless due to non-payment of premiums for which notice shall be sent ten (10) days prior." If any policy is in excess of a deductible or self-insured retention, the Foundation must be notified by the General Contractor. The General Contractor shall be responsible for the payment of any deductible or self-insured retention. The Foundation reserves the right to require the General Contractor to provide a bond, at no cost to the Foundation, in the amount of the deductible or self-insured retention to guarantee payment of claims. The insurance coverages specified in this Agreement are the minimum requirements, and these requirements do not lessen or limit the liability of the General Contractor. The General Contractor shall maintain, at its own expense, any additional kinds or amounts of insurance that it may deem necessary to cover its obligations and liabilities under this Agreement.

B. Proof of Insurance: General Contractor shall provide a copy of this Agreement to its insurance agent or broker. General Contractor further agrees to have its agent or broker provide proof of General Contractor's required insurance. The Foundation reserves the right to require the General Contractor to provide a certificate of insurance, a policy, or other proof of insurance as required by the Foundation's Risk Administrator in his sole discretion.

C. Additional Insureds: For general liability, excess/umbrella liability, and Builder's Risk, the General Contractor's insurer shall name the Foundation as an additional insured, and/or loss payee.

D. Waiver of Subrogation: For all coverages, General Contractor's insurer shall waive subrogation rights against the Foundation.

E. Subcontractors: All subcontractors, independent contractors, suppliers or other entities providing goods or services required by this Agreement shall be subject to all of the requirements herein and shall procure and maintain the same coverages required of the General Contractor. General Contractor shall include all such subcontractors, independent contractors, suppliers or other entities as insureds under its policies or shall ensure that all subcontractors maintain the required coverages. General Contractor agrees to provide proof of insurance for all such subcontractors, independent contractors, suppliers or other entities upon request by the

Foundation.

F. Worker's Compensation/Employer's Liability Insurance: General Contractor shall maintain the coverage as required by statute for each work location and shall maintain Employer's Liability insurance with limits of \$_____ for each bodily injury occurrence claim, \$_____ for each bodily injury caused by disease claim, and \$_____ aggregate for all bodily injuries caused by disease claims. General Contractor expressly represents to the Foundation, as a material representation upon which the Foundation is relying in entering into this Agreement, that none of the General Contractor's officers or employees who may be eligible under any statute or law to reject Workers' Compensation Insurance shall effect such rejection during any part of the term of this Agreement, and that any such rejections previously effected, have been revoked as of the date General Contractor executes this Agreement. These coverages shall apply to all work or services performed outside the United States. These coverages shall apply to any work or services performed by employees covered by the Federal Employee's Liability and Compensation Act.

G. General Liability: General Contractor shall maintain limits of \$_____ for each occurrence, \$_____ for each personal and advertising injury, \$_____ products and completed operations for each occurrence, and \$_____ policy aggregate. Aggregate limits must be "per project" or "per location".

H. Automobile Liability: General Contractor shall maintain \$_____ combined single limit applicable to all vehicles operating on Foundation property and elsewhere which includes auto pollution liability coverage for any vehicle hauling cargo containing pollutants or contaminants.

I. Builder's Risk: General Contractor shall provide, until Final Acceptance of the Work, builder's risk insurance including as insureds the General Contractor and all Subcontractors performing Work at the Project Site. Such insurance shall cover all equipment, machinery, supplies, and other property intended to be permanently incorporated in the Work, for which title or risk of loss shall have passed at the time of loss to an insured. Coverage shall apply to the foregoing items while are located on the Project Site or located at temporary off-site storage or staging areas approved by Foundation, or while in land-based transit to the Project Site within the continental United States. Coverage shall be written on an "All Risk" form, including but not limited to, fire, lightning, windstorm, hail, riot, riot attending a strike, civil commotion, aircraft, vehicle, smoke, explosion, vandalism, malicious mischief, damage to glass, theft, flood and earthquake (including sinkhole) coverages, subject to normal industry policy provisions. Limits under the Foundation-provided builder's risk insurance shall not be less than 100% of the replacement value of the Project for physical damage to property and related expenses, except the functional replacement valuation of the useable existing structure. Sublimits shall be established for losses due to earthquake (including sinkhole) and for losses due to flood. The builder's risk insurance shall include a deductible of not more than \$50,000 for each loss, except \$250,000 per occurrence for flood, water damage, earthquake or losses to existing property.

The builder's risk must include, but is not limited to, the following: (1) loss resulting from mysterious disappearance or caused by any wrongful removal of any property of a named

insured or any additional insured by the employee(s) of such named insured or additional insured, (2) loss or damage to any automobiles, (3) loss or damage to the Design-Builder's or any insured Subcontractor's owned, leased or rented property or construction-type tools, equipment, machinery, or supplies used for construction but not intended to be permanently incorporated in the Work, (4) loss or damage covered by a manufacturer's warranty or guarantee, (5) resultant damage as respects to error/omission/deficiency in design/plans/specifications, and (6) acts of terrorism.

The General Contractor shall be responsible for the ultimate costs associated with deductibles under the builder's risk insurance as a Cost of the Work.

J. Excess/Umbrella Liability: General Contractor shall maintain \$_____ excess/umbrella liability coverage.

K. Additional Provisions:

(1) For all general liability and excess/umbrella liability, the policies must provide the following:

- (a) If any aggregate limit is reduced by twenty-five percent (25%) or more by paid or reserved claims, the General Contractor shall notify the Foundation within ten (10) days and reinstate the aggregates required;
- (b) Unlimited defense costs in excess of policy limit;
- (c) Contractual liability covering the indemnification provisions of this Agreement;
- (d) A severability of interests provision;
- (e) Waiver of exclusion for lawsuits by one insured against another;
- (f) A provision that coverage is primary; and
- (g) A provision that coverage is non-contributory with other coverage or self-insurance provided by the Foundation.

(2) For all general liability, excess/umbrella liability, and pollution liability, if the policy is a claims-made policy, then the retroactive date must be on or before the contract date or the first date when any goods or services were provided to the Foundation, whichever is earlier.

(3) For all general liability and excess/umbrella liability, the policies must not contain an exclusion for subsidence or earth movement; and exclusion for residential or habitational construction, reconstruction, remodeling, repair or similar activity; an exclusion for the hazard of explosion; and exclusion for the hazard of collapse; or an exclusion for the hazard of underground work.

(4) For all general liability, excess/umbrella liability and pollution liability, the policies must not contain an exclusion for injury or damage from mold, fungus, or other biological pathogens.

(5) For all general liability and excess/umbrella liability, the policies must not contain an exclusion for discrimination or similar offenses.