

ORDINANCE NO. 14

SERIES 2017

AN ORDINANCE OF THE CRESTED BUTTE TOWN COUNCIL WAIVING THE REQUIREMENTS OF CHAPTER 4, ARTICLE 6 OF THE CRESTED BUTTE MUNICIPAL CODE WITH RESPECT TO THE CENTER FOR THE ARTS' RENOVATION AND EXPANSION PROJECT LOCATED AT LOTS 1-16, BLOCK 50, TOWN OF CRESTED BUTTE

WHEREAS, the Town of Crested Butte, Colorado (the "Town") is a home rule municipal corporation duly and regularly organized and validly existing as a body corporate and politic under and by virtue of the Constitution and laws of the State of Colorado;

WHEREAS, pursuant to Section 4-6-10 of the Crested Butte Municipal Code (the "Code"), any public improvement project undertaken by the Town, where the contract amount of such project is estimated to be in excess of \$25,000.00, shall be put up for bid under the procedures specified in Section 4-6-20 of the Code;

WHEREAS, the Town Council has leased to the Center for the Arts (the "Center") certain Town-owned property located at Lots 1-6, Block 50, Town of Crested Butte (the "Property") pursuant to a certain Lease Agreement dated December 23, 2010, as amended;

WHEREAS, the Center desires to improve the Property by performing and causing to be performed certain tenant improvement construction services and providing and causing to be provided certain materials in connection with the Property (the "Project") pursuant to the terms of a tenant improvements agreement to be entered into with the Town;

WHEREAS, the Town Council desires permit the Center to improve the Property by performing the Project pursuant to the terms of a tenant improvements agreement to be entered into with the Center;

WHEREAS, as the Project is budgeted at or around \$12,500,000.00, in order to enter into a tenant improvements with the Center to improve the Property by performing the Project, the Town Council must first waive the requirements of Chapter 4, Article 6 of the Code; and

WHEREAS, the Town Council hereby finds that the Center improving the Property by performing the Project is the best interest of the Town and the health, safety and general welfare of the residents and visitors of Crested Butte, thus necessitating the adoption of this ordinance waiving the Town's compliance with Chapter 4, Article 6 of the Code.

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF CRESTED BUTTE, COLORADO, THAT,

Section 1. Recitals and Findings. The Recitals set forth above are incorporated as if fully set forth herein. The findings set forth in such Recitals are hereby deemed findings of fact material to this ordinance.

Section 2. Waiver of the Requirements Chapter 4, Article 6 of the Code. The requirements of Chapter 4, Article 6 of the Code are hereby waived.

Section 3. Tenant Improvements Agreement. As a condition to the Town Council's waiver of Chapter 4, Article 6 of the Code, the Town and the Center shall enter into a tenant improvements agreement (the "**Tenant Improvements Agreement**") in substantially the same form as **Exhibit "A"** attached hereto.

Section 4. Approval of Tenant Improvements Agreement. The Town Council approves the Tenant Improvements Agreement, the same being in the best interest of the health, safety and welfare of the Town, its residents and visitors. The Mayor is hereby authorized to execute the Tenant Improvements Agreement on behalf of the Town. The Town Manager is hereby authorized to execute one or more Scopes of Work required thereby with such other terms effecting the Project not otherwise inconsistent with the Tenant Improvements Agreement.

Section 5. Other Conditions. The Center may not commence tenant improvement and construction activities on the Property until the Tenant Improvements Agreement and applicable Scope of Work thereunder are executed and all preconditions to the commencement of tenant improvements and construction are satisfied.

Section 6. Severability. If any section, sentence, clause, phrase, word or other provision of this ordinance is for any reason held to be unconstitutional or otherwise invalid, such holding shall not affect the validity of the remaining sections, sentences, clauses, phrases, words or other provisions of this ordinance, or the validity of this ordinance as an entirety, it being the legislative intent that this ordinance shall stand notwithstanding the invalidity of any section, sentence, clause, phrase, word or other provision.

Section 7. Savings Clause. Except as amended hereby, the Crested Butte Municipal Code, as amended, shall remain valid and in full force and effect. Any provision thereof that is in conflict with this ordinance is hereby repealed as of the enforcement date hereof.

INTRODUCED, READ AND SET FOR PUBLIC HEARING THIS 1st DAY OF May, 2017.

ADOPTED BY THE TOWN COUNCIL UPON SECOND READING IN PUBLIC HEARING THIS 15th DAY OF May, 2017.

TOWN OF CRESTED BUTTE, COLORADO

By: Glenn Michel
Glenn Michel, Mayor

ATTEST:



Lynelle Stanford, Town Clerk

(SEAL)



EXHIBIT "A"

Tenant Improvements Agreement

[attach form Tenant Improvements Agreement here]

TENANT IMPROVEMENTS AGREEMENT

THIS TENANT IMPROVEMENTS AGREEMENT (this "**Agreement**") is made and entered into effective this 1st day of May, 2017 (the "**Effective Date**"), by and between the **TOWN OF CRESTED BUTTE, COLORADO** (the "**Town**"), a Colorado home rule municipal corporation with an address of 507 Maroon Avenue P.O. Box 39, Crested Butte, Colorado 81224 and **THE CENTER FOR THE ARTS** (the "**Center**"; together with the Town, collectively sometimes the "**parties**", individually each a "**party**"), a Colorado non-profit corporation with an address of P.O. Box 1819, Crested Butte, Colorado 81224.

RECITALS:

A. The Town has leased to the Center certain Town-owned property (the "**Property**") pursuant to a Lease Agreement dated December 23, 2010, as amended by that certain Amendment to Lease Agreement dated May 1st, 2017.

B. The Center desires to improve the Property by performing (or causing to be performed) certain tenant improvements and providing (or causing to be provided) certain materials in connection with such tenant improvements of the Property pursuant to this Agreement (the "**Project**").

C. The Town agrees to allow the Center to improve the Property by performing (or causing to be performed) certain tenant improvements and providing (or causing to be provided) certain materials in connection with such tenant improvements of the Property for the Project pursuant to this Agreement.

NOW, THEREFORE, in consideration of the mutual agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

AGREEMENT:

ARTICLE 1 **CONTRACT DOCUMENTS**

The contract documents (the "**Contract Documents**") consist of the following:

1. This Agreement.
2. One or more scopes of work (each a "**Scope of Work**") defining the Project, the different "Phases" of the Project and/or any portions thereof. The format of each Scope of Work is attached hereto as **Exhibit "A"**. The parties shall complete and execute a Scope of Work for the Project and/or the Phases thereof, as applicable.
3. Any Change Orders (as defined below).

ARTICLE 2
WORK

2.1 Upon receipt of written notice from the Town that the Center may commence with initial site preparation for the Project (e.g., control fencing, Project trailer drop-off and material and equipment staging) (the "**Site-Prep Notice to Proceed**"), the Center may, on its own or by or through its general contractor, commence such activities. Such site-prep activities shall be generally identified in a Scope of Work.

2.2 Upon receipt of written notice from the Town to proceed with the Project (the "**Notice to Proceed**"), the Center shall, on its own or by or through its general contractor, forthwith construct, equip, provide, purchase, pay for, coordinate, manage and furnish on the Project location (the "**Project Site**") the work and materials described in a Scope of Work (collectively, the "**Work**").

2.3 Once commenced, the Work shall be performed until completion, without interruption or delay, based on the Project schedule and milestones set forth in the Scope of Work.

2.4 The Center shall, on its own or by or through its general contractor, furnish all labor, supervision, tools, equipment, materials, management and supplies necessary for the performance of the Work described in the Scope of Work.

2.5 The Work shall be performed in a professional and competent manner, consistent with the terms of the Contract Documents. The Center shall, on its own or by or through its general contractor, provide the Town and the Town's representatives and agents access to the Work in progress wherever located.

2.6 The Center, on its own or by or through its general contractor, shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work to the extent that the Contract Documents do not otherwise provide instructions and other requirements concerning such matters. If the Contract Documents give instructions and requirements concerning construction means, methods, techniques, sequences or procedures, the Center shall, on its own or by or through its general contractor, be fully and solely responsible for complying with such instructions.

2.7 The Center, on its own or by or through its general contractor, shall be responsible to the Town for acts and omissions of the Center and its general contractor's employees, subcontractors, agents and representatives, and other persons or entities performing portions of the Work for, on behalf of or through the Center and its general contractor or any of such persons.

2.8 The Center, on its own or by or through its general contractor, shall furnish professional and competent staff and representatives at all times during the performance of the Work. The Center, on its own or by or through its general contractor, shall designate a person

who shall be the Center's authorized representative. The Center or its general contractor's authorized representative for a Project shall be as set forth in a Scope of Work.

2.9 Notwithstanding anything in the Agreement to the contrary, those portions of the Work that the Center or its general contractor does not customarily perform with the Center or its general contractor's own personnel may be performed under subcontracts or by other appropriate agreements between the Center or its general contractor's and such subcontractors, representatives or agents; provided that, any such subcontractor performance shall be contemplated in the Scope of Work or a Change Order.

2.10 "**Work Product**" shall mean all deliverables and all intermediate and partial versions thereof, regardless of medium, and all documentation and other materials generated by the Center, its general contractor or its subcontractors in the performance of the Work. The Center and its general contractor acknowledge and agree that all Work Product is work made for hire and is the sole and exclusive property of the Town.

2.11 The Town shall be reimbursed by the Center for costs incurred by the Town because of delays, improperly timed activities or defective construction caused by or on behalf of the Center.

2.12 As components of the Project are completed, such components shall become appurtenances to the Property upon installation.

2.13 Acceptance of the Project or any component thereof as contemplated in the Scope of Work by the Town shall occur following a final inspection. The Town shall not be required to accept any of the Project until the Town determines that: (a) the Project and all components thereof are constructed in accordance with the Town approved plans and specifications; (b) the Center, on its own or by or through its general contractor, has delivered as-built drawings to the Town respecting the Project or any component thereof; and (c) all Project components are free and clear of all liens, encumbrances or other restrictions. Acceptance of the Project or any component thereof shall not constitute a waiver by the Town of the right to draw upon the Surety (as defined below) to remedy any defect nor shall acceptance operate to release the Center from its warranty obligations described herein.

2.14 A certificate of occupancy shall not be issued for the Property or any component thereof until the Town has finally inspected and accepted the Project and all components thereof.

2.15 The Center and its general contractor shall keep their books and records for the Project according to recognized accounting principles and practices, consistently applied. The Center and its general contractor shall make such books and records available for the Town's inspection at all reasonable times. The Center and its general contractor shall retain such books and records for at least five (5) years after completion of the Project.

2.16 The Center and its general contractor shall promptly pay all bills for labor, suppliers and material performed and furnished in connection with the Project.

ARTICLE 3
SUBSTANTIAL COMPLETION

3.1 The Center, on its own or by or through its general contractor, shall achieve substantial completion (“**Substantial Completion**”) of the Work as delineated in the Scope of Work (the “**Time of Substantial Completion**”). Substantial Completion is defined as when the Work is sufficiently complete to be issued a certificate of occupancy. This includes the accepted final inspections by the applicable building authorities and the receipt of all lien releases. The Time of Substantial Completion shall be set forth in the Scope of Work, as may be amended and modified from time to time by Change Order. Any time limits set forth in this Agreement or a Scope of Work are of the essence. By executing this Agreement and the Scope of Work, the Center confirms that the Time of Substantial Completion is reasonable for performance of the Work.

3.2 Within ten (10) business days after Substantial Completion of the Work as described in a written notice from the Center, on its own or by or through its general contractor, to the Town, the Town may provide the Center or its general contractor with an itemized list of items which, in the Town’s opinion, do not conform to the Scope of Work (the “**Punch List**”). One or more Punch Lists may be provided to the Center or its general contractor in connection with the Work as contemplated in the Scope of Work. All Punch List items shall be remedied promptly by the Center, on its own or by or through its general contractor, at its sole cost and expense.

ARTICLE 4
COST OF THE WORK

The term “**Cost of the Work**” shall mean any and all costs whatsoever necessarily incurred by the Center in the performance of the Work. The Cost of the Work, including any increase affected by Change Order, shall be the sole and absolute responsibility of the Center.

ARTICLE 5
CHANGES IN THE WORK

5.1 The Center, on its own or by or through its general contractor, without nullifying any portion of the Contract Documents, may make changes in the Work, either to decrease, increase, modify or otherwise change the Work, by giving the Town a written change order request (each a “**Change Order Request**”) setting forth in detail the nature of the change. Upon receipt of a Change Order Request, the Town shall furnish to the Center or its general contractor a proposal setting forth in reasonable detail the Town’s agreed-to changes, the adjustment to the Time of Substantial Completion attributable to the changes set forth in such Change Order Request and any other matters that affect the performance of the Center or its general contractor under the Scope of Work. If the Town approves in writing such proposal by the Center or its general contractor, such Change Order Request and such proposal shall constitute a change order (each a “**Change Order**”) and the Time of Substantial Completion and any other Center or general contractor performance obligations under the Scope of Work shall be amended

accordingly. All costs associated with implementing any Change Order Request from the Center or its general contractor shall be included within the Cost of the Work.

5.2 The format of a Change Order shall be the same general format of a Scope of Work and is attached hereto also as Exhibit "A".

ARTICLE 6 **TAXES**

6.1 Unless otherwise provided in a Scope of Work, the Center shall pay or cause to be paid all sales, consumer, use and other similar taxes respecting the Work.

6.2 The Center shall pay or cause to be paid all taxes and all contributions imposed or required by any law for any employment insurance, pensions, old-age retirement funds or similar purposes.

6.3 The Center and its general contractor accept liability for all taxes and contributions required of it by any Federal or state requirement.

6.4 The obligations set forth in this Article 6 shall survive the expiration or earlier termination of the Contract Documents.

ARTICLE 7 **NO LIENS**

7.1 The Center, on its own or by or through its general contractor, shall cause the property that is the subject of the Work to remain free from any and all liens and claims arising out of the Work performed and materials supplied for a Project. The Center, on its own or by or through its general contractor, shall obtain lien releases from all contractors, suppliers and materialman at each phase and of each component of the Project.

7.2 The Center, on its own or by or through its general contractor, shall be responsible for the satisfaction or payment of any liens filed or placed of record against the property that is the subject of the Work that arise from the performance of the Work and the provision of materials by any contractor, supplier or materialman.

7.3 Should any such lien or claim of lien be filed against the property that is the subject of the Work, the Center, on its own or by or through its general contractor, shall cause the same to be cancelled and discharged of record by bond or otherwise within ten (10) days after notice of the filing thereof. Should the Center or its general contractor fail to discharge such lien within such ten (10)-day period, then the Town may discharge the same, in which event, the Center or its general contractor shall pay the Town, on demand, the amount of the lien or the amount of the bond, plus all costs and expenses incurred by the Town in connection therewith, inclusive of reasonable attorneys' fees and costs.

ARTICLE 8

SAFETY; DAMAGE TO PROPERTY

8.1 The Center, on its own or by or through its general contractor, shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Work. The Center, on its own or by or through its general contractor, shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: (i) employees, subcontractors and other persons on the Project Site who may be affected thereby; (ii) the Work, materials and equipment to be incorporated therein provided by or through the Center or its general contractor; and (iii) other property at the site or adjacent thereto.

8.2 The Center, on its own or by or through its general contractor, shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities required of it bearing on safety of persons and property and their protection from damage, injury or loss. The Center or its general contractor shall promptly remedy damage and loss to property caused in whole or in part by the Center, its general contractor or anyone directly or indirectly employed by or through the Center or its general contractor, or by anyone for whose acts the same may be liable and for which the Center or its general contractor is responsible.

ARTICLE 9 **COMPLIANCE WITH LAWS**

The Center, on its own or by or through its general contractor, shall be responsible for compliance with any building or other applicable laws attributable to the Project and the manner in which the Work is performed by the Center, its general contractor or any of its subcontractors. Notwithstanding the foregoing, the Center, on its own or by or through its general contractor, shall promptly notify the Town of any violations of laws that Center or its general contractor becomes aware of relative to the Project.

ARTICLE 10 **CENTER REPRESENTATIONS AND WARRANTIES**

10.1 The Center and its general contractor represent and warrant that they are duly qualified to do business and are in good standing in the locations in which the Work is performed.

10.2 The Center and its general contractor represent that they have the full power and authority to execute, deliver and perform their obligations under the Contract Documents.

10.3 The Center, on its own or by or through its general contractor represents that it will comply with applicable laws, ordinances, rules, regulations or orders issued by any public or governmental agency, body or authority, whether Federal, state, local or otherwise, and has obtained all applicable permits and licenses required of such party in connection with its obligations under the Contract Documents.

10.4 The representations and warranties set forth in this Article 10 shall survive the expiration or earlier termination of the Contract Documents.

ARTICLE 11 **INDEMNIFICATION**

11.1 To the fullest extent permitted by law, the Center and its general contractor shall indemnify, defend and hold harmless (i) the Town, (ii) the Town's electeds, officers, consultants, agents, employees, contractors, insurers and attorneys (iii) all parties listed as additional insureds, their officers, directors, members, managers, agents, employees, partners, subsidiaries and affiliates (items (i), (ii) and (iii) are hereinafter collectively the "**Town Indemnitees**") from any and all claims, suits, damages, liabilities, reasonable professional fees, including reasonable attorneys' fees, costs, court costs, expenses and disbursements (collectively, "**Claims**") related to death, personal injuries or property damage (including loss of use thereof), alleged or actual infringement or violation of any intellectual or proprietary rights brought or assumed against any of the Town Indemnitees by any person or firm, arising out of or in connection with or as a result of or consequence of the performance of the Work of the Center, on its own or by or through its general contractor, as well as any additional work, extra work or add-on work, whether caused in whole or in part by the Center, its general contractor or any person or entity employed thereby, either directly or indirectly, including any subcontractors thereof and their employees. The parties expressly agree that this indemnification covenant contemplates (x) full indemnity in the event of liability imposed against the Town Indemnitees without negligence thereby and solely by reason of statute, operation of law or otherwise, and (y) partial indemnity in the event of any actual negligence on the part of the Town Indemnitees either causing or contributing to the underlying claim in which case indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault thereby whether by statute, by operation of law or otherwise.

11.2 Where partial indemnity is provided under this Agreement, costs, professional fees, attorneys' fees, expenses, disbursements, etc. shall be indemnified on a pro rata basis. Indemnification under this Agreement shall operate whether or not the Center and its general contractor has placed and maintained insurance. Attorneys' fees, court costs, expenses and disbursements shall be defined, without limitation, to include those fees, costs, etc., incurred in defending the underlying claim and those fees, costs, etc., incurred in connection with the enforcement of this Agreement by way of, without limitation, cross-claim, third-party claim, declaratory action or otherwise.

11.3 The rights and obligations set forth in this Article 11 shall survive the expiration or earlier termination of the Contract Documents.

ARTICLE 12 **IMMUNITY**

The Center and its general contractor acknowledge and agree that the Town is relying on, and does not waive or intend to waive by any provision of this Agreement, the monetary limitations (currently \$350,000 per person and \$990,000 per occurrence) or any other rights,

immunities, and protections provided by the Colorado Governmental Immunity Act, § 24-10-101, *et seq.*, C.R.S., as from time to time amended, or otherwise available to the Town, its elected and appointed officials, employees, insurers, insurance pools, attorneys, agents, contractors and representatives.

ARTICLE 13 SURETY

13.1 The estimated cost (the "**Project Estimate**") of constructing the Project is set forth in the Scope of Work attached hereto. In order to secure the Center's obligations under this Agreement, prior to the Town's issuance of the Notice to Proceed, the Center shall obtain and provide cash to be held in a separate, segregated account (the "**Construction Account**") and/or an irrevocable standby letter of credit, held and/or issued by a lending institution, both of which shall be acceptable to the Town, in the amount of: (a) \$6,250,000.00, which is approximately fifty percent (50%) of the Project Estimate (the "**Performance Surety**"). The Performance Surety is in addition to the cash and in-kind contributions in support of the Project already committed by the Town in the amount of \$1,000,000.00. The Performance Surety shall serve as a guarantee of the Center and its general contractor's performance under this Agreement. All Costs of the Work, and only Costs of the Work, shall be paid from the Construction Account. Following issuance of the Notice to Proceed, the Center shall deposit all donations made in support of the Project into the Construction Account. Upon request, the Center shall provide an accounting to the Town of all deposits into the Construction Account and withdrawals from the Construction Account. Following Substantial Completion and upon the commencement of the Warranty Period (as defined below), the Performance Surety shall be converted into a "**Warranty Surety**," which shall serve as a surety for the warranty obligations under Article 17 of this Agreement. Like the Performance Surety, the Warranty Surety shall consist of cash to be held in a separate, segregated account (the "**Warranty Account**") and/or an irrevocable standby letter of credit, held and/or issued by a lending institution, both of which shall be acceptable to the Town. The amount of the Warranty Surety shall equal \$1,250,000.00, which is approximately ten percent (10%) of the Project Estimate. Any amount of the Performance Surety above the required amount of the Warranty Surety shall be released to the Center upon the commencement of the Warranty Period. The Warranty Surety shall remain in effect during the Warranty Period and shall be released by the Town upon the expiration of the Warranty Period. If there is an Event of Default by the Center under this Agreement, the Town shall use the Performance Surety or any funds realized therefrom for the purposes of completing the Project, correcting defects in or associated therewith, or otherwise curing the Event of Default. In the event of a breach of the Center's warranties hereunder, the Warranty Surety shall be used to remedy any such breach of warranty during the Warranty Period.

13.2 There shall be no reduction in the amount of the Performance Surety by the Center if there is an Event of Default that has not been cured by the Center in accordance with Section 15.1 of this Agreement.

13.3 If there is an Event of Default that has not been cured by the Center in accordance with Section 15.1 of this Agreement, the Town in its sole discretion, and without any other authority, may draw upon the Performance Surety or Warranty Surety, as applicable, upon

presentation by the Town to the depository lending institution or issuer of a written statement by the Town that such uncured default exists.

ARTICLE 14 **INSURANCE**

The Center, on its own or by or through its general contractor, shall obtain and maintain insurance coverage that meets the requirements of **Exhibit “B”** (the “**Insurance Requirements**”) attached hereto. Such insurance shall be kept in full force and effect as provided in the Insurance Requirements. Before proceeding with any Work pursuant to the Site-Prep Notice to Proceed, the Center or its general contractor shall furnish to the Town certificates of insurance executed by its insurance provider evidencing the insurance coverage contained in the Insurance Requirements.

ARTICLE 15 **TERMINATION**

15.1 The Town reserves the right to terminate all or any part of the Contract Documents on written notice to the Center if the Center, on its own or by or through its general contractor: (i) fails to prosecute the Work to completion thereof in a diligent, efficient, workmanlike, skillful and careful manner and in accordance with the Contract Documents; (ii) any breach of the requirements of Article 14; or (iii) breach of any term or provision of the Contract Documents and does not correct such breach within thirty (30) days of receipt of written notice from the Town specifying such breach, except that if such breach is not capable of being cured within thirty (30) days, the Center, on its own or by or through its general contractor, shall have such reasonable additional amount of time as may be reasonably required as long as the Center is promptly and diligently attempting to correct the same (each an “**Event of Default**”).

15.2 In the event of termination by the Town, the Center and the general contractor shall transfer the Project and all components of the Work and all contracts and funds held by the Center to be used in connection therewith to the Town, by instrument required by the Town. The foregoing requirements are in consideration for the Town allowing the Center, on its own or by or through its general contractor to perform the Project. The rights and obligations set forth in this Article 15 shall survive the expiration or earlier termination of the Contract Documents.

ARTICLE 16 **REMEDIES**

16.1 Upon the occurrence of Event of Default, the Town shall have one or more of the following remedies: (i) recover any and all damages due to the Event of Default plus expenses, reasonable attorneys’ fees and costs; (ii) terminate any of the Contract Documents; (iii) require specific performance of the Center and its general contractor; (iv) pursue any and all claims at law and in equity; (v) pursue self help and cure of all Events of Default; and/or (vi) require the Center and its general contractor to transfer to the Town all funds on hand to be used for the Cost of the Work.

16.2 If the Center, on its own or by or through its general contractor, fails to promptly correct Work which is not in accordance with the requirements of the Contract Documents, or fails to carry out the Work or its other obligations in accordance with the terms of the Contract Documents, the Town may issue a written order to the Center and its general contractor to immediately suspend performance of the Work, or any portion thereof, until the cause for such order is eliminated; however, the right of the Town to suspend the Work shall not, in and of itself, give rise to a duty on the part of the Town to exercise this right for the benefit of the Center or its general contractor or any other person or entity.

16.3 If the Center, on its own or by or through its general contractor, fails to carry out the Work in accordance with the terms of the Contract Documents, or fails to perform a provision of the Contract Documents, the Town, after prior written notice to the Center or its general contractor and a reasonable opportunity under the circumstances for the Center, on its own or by or through its general contractor, to correct such deficiencies, and without prejudice to any other remedy the Town may have, may make good and correct such deficiencies by award of separate contracts in connection with such portions of the Project, and the Center, on its own or by or through its general contractor, shall pay the Town on demand such cost and expenses incurred by the Town, including reasonable attorneys' fees and associated costs incurred in connection therewith.

16.4 The rights and remedies reserved to the Town in this Agreement shall be cumulative and in addition to all other or further remedies provided at law or equity. All remedies afforded may be enforced cumulatively and concurrently.

16.5 The rights and obligations set forth in this Article 16 shall survive the expiration or earlier termination of the Contract Documents.

ARTICLE 17 WARRANTY

17.1 The Center, on its own or by or through its general contractor, represents and warrants to the Town that all materials included in the Work under this Agreement will be new and of good quality unless otherwise identified in a Scope of Work.

17.2 All Work shall be performed in a good and workmanlike manner consistent with the highest industry standards.

17.3 The Center, on its own or by or through its general contractor, represents and warrants that the Project shall remain free from defects in materials and workmanship for a period of two (2) years from the date that a certificate of occupancy is issued for the Project (the "**Warranty Period**"). During such two-year Warranty Period, any defect with respect to the Project shall be repaired, or the defective component replaced, at the Town's option, at the Center or its general contractor's sole cost and expense.

17.4 On receiving notification from the Town, the Center, on its own or by or through its general contractor, agrees to remedy, repair or replace forthwith, without cost to the Town and to the Town's reasonable satisfaction, all defects, damages or material imperfections appearing in the Work within a period of two (2) years after issuance of the certificate of occupancy for the Project.

17.5 The Center, on its own or by or through its general contractor, shall obtain from all its subcontractors warranties of no less than two years on all materials and workmanship relating to the Work.

17.6 The Center, on its own or by or through its general contractor, shall assign to the Town on a pass-through basis any warranty or guaranty of materials or workmanship relating to the Work from any supplier, contractor, materialmen or other third parties.

17.7 The rights and obligations set forth in this Article 17 shall survive the expiration or earlier termination of the Contract Documents.

ARTICLE 18 **ASSIGNMENT**

Except as otherwise provided herein, the Center may not assign or otherwise transfer any of its obligations or rights hereunder, any such transfer being void ab initio

ARTICLE 19 **TABOR; COLORADO CONSTITUTION, ARTICLE X, SECTION 20**

Notwithstanding other provisions in this Agreement to the contrary, the parties understand and acknowledge that the Town is subject to Article X, § 20 of the Colorado Constitution ("TABOR"). The parties do not intend to violate the terms and requirements of TABOR by the execution of this Agreement. It is understood and agreed that this Agreement does not create a multi-fiscal year direct or indirect debt or obligation within the meaning of TABOR and, therefore, notwithstanding anything in this Agreement to the contrary, all payment obligations of the parties are expressly dependent and conditioned upon the continuing availability of funds beyond the term of the parties' current fiscal period ending upon the next succeeding December 31. Financial obligations of the parties payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available in accordance with ordinances and resolutions of the responsible party and other applicable law.

ARTICLE 20 **PROHIBITIONS ON PUBLIC CONTRACTS FOR SERVICES**

20.1 The Center certifies that it shall comply with the provisions of section 8-17.5-101 *et seq.*, C.R.S. The Center shall not knowingly employ or contract with an illegal alien to perform work under this Agreement or enter into a contract with a subcontractor that fails to

certify to the Center that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement.

20.2 The Center represents, warrants, and agrees (i) that it has confirmed the employment eligibility of all employees who are newly hired for employment to perform work under this Agreement through participation in either the E-Verify or the Department Program; (ii) that the Center is prohibited from using either the E-Verify Program or the Department Program procedures to undertake pre-employment screening of job applicants while services under this Agreement are being performed; and (iii) if the Center obtains actual knowledge that a subcontractor performing work under this Agreement for services knowingly employs or contracts with an illegal alien, the Center shall be required to: (a) notify the subcontractor and the Town within three days that the Center has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and (b) terminate the subcontract with the subcontractor if within three days of receiving the notice required pursuant to 8-17.5-102(2)(b)(III)(A) the subcontractor does not stop employing or contracting with the illegal alien; except that the Center shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

20.3 The Center further agrees that it shall comply with all reasonable requests made in the course of an investigation under section 8-17.5-102(5), C.R.S. by the Colorado Department of Labor and Employment. If the Center fails to comply with any requirement of this provision or section 8-17.5-101 et seq., C.R.S. the Town may terminate this Agreement for breach and the Center shall be liable for actual and consequential damages to the Town.

ARTICLE 21 **RELATIONSHIP**

21.1 The Center and its general contractor shall be independent contractors. The Town shall have the right to insist that the Center, on its own or by or through its general contractor, carry out all the provisions and requirements of the Contract Documents; however, the Center, on its own or by or through its general contractor, shall have the complete and exclusive control and direction over the method and manner of obtaining results.

21.2 The Center, its general contractor and the Town are independent contracting parties and nothing in the Contract Documents shall make either party the agent or legal representative of the other for any purpose whatsoever, nor do the Contract Documents grant either party any authority to assume or create any obligation on behalf of or in the name of the other party.

ARTICLE 22 **SIGNAGE**

Neither the Center, on its own or by or through its general contractor, nor any person acting by or through the Center or its general contractor hereunder shall be permitted to place signage at the Project Site except upon prior written approval of the Town.

ARTICLE 23
WAIVER

No consent or waiver, express or implied, by either party to this Agreement of any breach or default by the other in the performance of any obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default by such party hereunder. Unless the Contract Documents specify a time period for notice of a particular claim, failure on the part of any party hereto to complain of any act or failure to act of the other party or to declare the other party in default hereunder, irrespective of how long such failure continues, shall not constitute waiver of the rights of such party hereunder. Inspection or failure of the Town to perform any inspection hereunder, shall not release the Center, on its own or by or through its general contractor, of any of its obligations hereunder unless the Town accepts such portion of the Work in writing.

ARTICLE 24
CONFLICTS

In case of conflict between any provision of this Agreement and any provision in any other Contract Document, the provisions of this Agreement shall in cases control and prevail.

ARTICLE 25
ENTIRE AGREEMENT; AMENDMENT

All of the Contract Documents form the entire agreement of the parties with respect to the subject matters and transactions contemplated therein and are as fully a part of the agreement of the parties as if attached to this Agreement or repeated herein. All prior negotiations, representations and agreements, whether written or oral, with respect to the transactions contemplated herein not incorporated herein are hereby cancelled and superseded hereby. The Contract Documents may be modified or amended only by a document duly executed on behalf of the parties hereto.

ARTICLE 26
SURVIVAL

All terms, conditions and agreements contained in the Contract Documents of an ongoing nature shall survive the expiration or earlier termination of the Contract Documents. Any provisions that are expressly stated to survive the expiration or earlier termination of the Contract Documents shall be enforced accordingly

ARTICLE 27
NOTICES

27.1 All notices, demands and requests required to be given by either party to the other shall be in writing, and with a copy given to counsel for each such party as provided below. All notices, demands, and requests shall be delivered personally or sent by electronic mail (e-mail),

nationally recognized overnight courier, certified or registered mail, return receipt requested, postage prepaid, or via facsimile, addressed to the parties at the addresses set forth below or at such other addresses as the parties may designate in writing delivered pursuant to the provisions hereof. Any notice when given as provided herein shall be deemed to have been delivered on the day of delivery if delivered personally, on the first business day following the confirmation of sending of an e-mail when sent by electronic mail, on the first business day following deposit with the courier service when delivered by overnight courier, three business (3) days subsequent to the date that said notice was deposited with the United States Postal Service, or on the first business day following the date of confirmation of receipt when delivered by facsimile.

27.2 To the Town: Town of Crested Butte
507 Maroon Avenue
P.O. Box 39
Crested Butte, CO 81224
Attn: Town Manager

with a copy in case
of a dispute to: Town of Crested Butte
507 Maroon Avenue
P.O. Box 39
Crested Butte, CO 81224
Attn: Town Attorney

To the Center: Crested Butte Center for the Arts
606 6th Street
P.O. Box 1819
Crested Butte, CO 81224
Attn: Executive Director

To the Center's general
contractor: Black Dragon Development LLC
201 Sopris Ave.
P.O. Box 579
Crested Butte, CO 81224

27.3 By giving the other party at least five (5) days written notice thereof, the parties shall have the right to change their respective addresses or to whom notices are to be sent.

ARTICLE 28
SEVERABILITY

If any term of the Contract Documents is determined to be invalid or unenforceable under any statute, regulation, ordinance, executive order or other rule of law, such term shall be

deemed reformed or deleted, but only to the extent necessary to comply with such statute, regulation, ordinance, order or rule and the remaining provisions of the Contract Documents shall remain in full force and effect.

ARTICLE 29
PREVAILING PARTY

In the event of any dispute between the Center, on its own or by or through its general contractor, and the Town in connection with the Contract Documents, the non prevailing party shall pay to the prevailing party all costs and expenses, including, without limitation, reasonable attorneys' fees, costs and expenses, incurred in such dispute. This Article 29 is intended to be severable from the other provisions of this Agreement, and the prevailing party's rights under this Article shall not merge into any judgment and any judgment shall survive until all such fees and costs have been paid.

ARTICLE 30
GOVERNING LAW; VENUE

The Contract Documents shall be construed, performed and enforced in accordance with, and governed by, the laws of the State of Colorado (without giving effect to the principles of conflicts of laws thereof). Any legal action or proceeding with respect to the Contract Documents or the transactions contemplated hereby and thereby may be brought in the courts of the State Colorado sitting in Gunnison, Colorado, and by execution and delivery of this Agreement, each of the parties consents to the jurisdiction of those courts. Each of the parties irrevocably waives any objection, including any objection to the laying of venue or based on the grounds of *forum non conveniens*, which it may now or hereafter have to the bringing of any action or proceeding in such jurisdiction in respect of the Contract Documents or the transactions contemplated hereby and thereby.

ARTICLE 31
HEADINGS; COUNTERPARTS; TELECOPY

The headings of all sections and subsections herein are included solely for convenience of reference and shall not control the meaning or interpretation of any of the provisions of the Contract Documents. Each of the Contract Documents may be executed in one or more counterparts, each of which, when taken together, shall constitute one and the same instrument. For purposes of enforcement of the terms of the Contract Documents, photocopy and facsimile reproduced signatures shall be deemed to be originals.

ARTICLE 32
CONSTRUCTION

Each of the parties hereto agrees that the Contract Documents represents an arms' length transaction and are the product of negotiations between sophisticated parties and individuals, all of whom were represented by legal counsel, and each of whom had an opportunity to participate in, and did participate in, the drafting of each provision hereof and thereof. Accordingly,

ambiguities in the Contract Documents, if any, shall not be construed strictly in favor of or against any party, hereto, but rather shall be given a fair and reasonable construction without regard to the rule of *contra proferentum*.

ARTICLE 33
NO THIRD PARTY RIGHTS

Except as expressly provided herein, the Contract Documents are for the benefit of the parties hereto and are not entered into for the benefit of, and shall not be construed to confer any benefit upon, any other party or entity.

ARTICLE 34
BINDING AGREEMENT

The Contract Documents and the rights, benefits and obligations contained herein and therein shall be binding upon and inure to the benefit of the parties hereto and their respective permitted successors and assigns.

ARTICLE 35
PRONOUNS

References to any term hereof including by use of a pronoun shall be deemed to include the masculine, feminine, singular, plural, individuals, etc.

ARTICLE 36
INCORPORATION

All exhibits attached hereto are by reference hereby incorporated herein and made a part hereof.

IN WITNESS WHEREOF, this Agreement is entered into by the parties' authorized representatives as of the Effective Date.

TOWN:

TOWN OF CRESTED BUTTE, COLORADO,
a Colorado home rule municipal corporation

By: Glenn Michel

Name: Glenn Michel

Title: Mayor

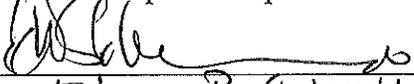
By: Lynelle Stanford

Lynelle Stanford, Town Clerk

(ATTEST)

CENTER:

THE CENTER FOR THE ARTS,
a Colorado non-profit corporation

By: 

Name: Edwin B Schmidt

Title: President of the Board

EXHIBIT "A"

Scope of Work/Change Order

THIS SCOPE OF WORK/CHANGE ORDER is made and entered into this 19th day of May, 2017, with an effective date of May 19, 2017 (the "**Effective Date**"), by and between the **TOWN OF CRESTED BUTTE, COLORADO** (the "**Town**"), a Colorado home rule municipal corporation with an address of 507 Maroon Avenue P.O. Box 39, Crested Butte, Colorado 81224 and **THE CENTER FOR THE ARTS** (the "**Center**"; together with the Town, collectively sometimes the "**parties**", individually each a "**party**"), a Colorado non-profit corporation with an address of P.O. Box 1819, Crested Butte, Colorado 81224.

This Scope of Work/Change Order is incorporated into that certain Construction Agreement entered into by and between the Center and the Town and dated May 19, 2017.

1. Project Description:

Construction of 38,340 gross square foot building project referred to as the Crested Butte Center for the Arts including adjacent site work on Town of Crested Butte property in Lots 17-32, Block 51; Lots 1-16 and 32, Block 50: and Lots 1 and 32, block 49. The project shall be constructed in three distinct phases:

- A. Phase 1 - Construction of a new 30,673 sf theatre, administration, rehearsal and performance facility
- B. Phase 2 – Renovation of the existing 6,850 sf building
- C. Phase 3 – Construction of new 817 sf Alpine Glow outdoor stage
- D. Construction of sidewalks, drive lanes and parking areas associated with each phase
- E. Re-alignment of utilities and infrastructure on the site including electric, gas, water, sewer, telecommunications, drainage and irrigation systems associated with each phase
- F. Playground and recreational facility construction and renovation
- G. Landscaping of site associated with each phase.

2. Scope of Work

- A. Plans and Specifications – The work shall be constructed consistent with the plans and resolutions approved by the Board of Zoning and Architectural Review on August 31, 2016 and plans subsequently approved through Town permitting processes related to the project.
- B. Complete design of project including architectural, civil, mechanical, electrical and structural engineering as necessary for complete code compliant facility.
- C. Project Estimate – The estimated cost for all phases of construction of the project is fifteen million, three hundred thousand dollars (\$15,300,000). The estimate for Phase 1 is thirteen million, seven hundred and twenty-six thousand, three hundred and thirty dollars (\$13,726,330).

- D. Project Schedule – The project shall commence upon issuance of Final Notice to Proceed by Town Manager. Phase 1 shall be substantially complete within 18 months. Phase 2 shall commence only upon completion and final payment of all expenses associated with Phase 1, issuance of requisite building permits and establishment of operating reserves in accordance with Town Resolutions.
 - E. Materials – All materials incorporated into the project shall be compliant with BOZAR approved plans dated August 26, 2016 and as subsequently amended through Town permitting process.
 - F. The Project scope of work shall include all material testing and inspections as necessary to assure that the materials used on the site are consistent with plans and specifications.
 - G. Permits – The Project shall acquire all required permits including but not limited to building, plumbing, electric, access permits, right of way permits, and storm water discharge permits.
 - H. Assumptions – That financing will be available, construction will not be unreasonably delayed by acts of God or availability of materials.
 - I. Other – The project shall coordinate and communicate with the Town on all activities and issues relative to the Project and schedule weekly meeting.
3. Authorized Representative(s) -
- A. Center for the Arts - Ed Schmidt - Board President
 - B. General Contractor – Crockett Farnell - Black Dragon Development LLC
 - C. Town of Crested Butte – Michael Yerman
4. Center and General Contractor Responsibilities:
- A. Site maintenance including worksite office, fencing, site security, public safety, emergency access, cleanliness, refuse storage and removal, re-cycling and snow removal within the construction zone,
 - B. Sanitation facilities for workers and park users south of the construction zone,
 - C. All activities relative to use of the site by the public during phased construction including use of the current Center building.
 - D. Coordination of all contractors, sub-contractors, and suppliers including bonding, insurance, payment, and lien waivers,
 - E. All deliveries, staging of materials and the security thereof,
 - F. All utility payments used in construction of the project
 - G. Traffic control,
 - H. Site clean-up and off site debris and mud tracking,
 - I. Acquisition of LEED compliance certificate and
 - J. Illegal Alien Compliance
 - K. Facilitation of weekly coordination meetings with appropriate Town personnel including Parks, Utility and Building Departments
 - L. Coordination of utility construction as necessary to ensure avoidance of service outages to the public
 - M. Advance scheduling and coordination of Town personnel performing in kind services in support of the project

5. Inspection Plan – Inspections will be conducted consistent with the Town’s routine inspection schedule and Sections 104.4, Section 110, and Chapter 17 of the 2015 IBC. Additional inspections will be determined by the Town. Intermediate inspections to facilitate phased construction of the project will be allowed. The Town reserves the right to charge for excessive inspections or re-inspection consistent with the Town’s fee schedule.

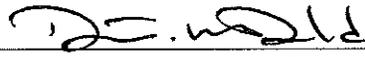
6. Acceptance Plan – The Project, through the Project Architect, shall issue “Certificate of Substantial Completion” and “Certificate of Final Completion” for each Phase consistent with procedures enumerated in the terms and conditions of Construction Agreement. The Town shall issue “Temporary Certificate of Occupancy” and “Final Certificates of Occupancy” for each Phase as appropriate.

7. Approved General Contractor Agreement.

IN WITNESS WHEREOF, this Scope of Work/Change Order is entered into by the parties’ authorized representatives as of the Effective Date.

TOWN:

TOWN OF CRESTED BUTTE, COLORADO,
a Colorado home rule municipal corporation

By: 
Name: DARA MACDONALD
Title: Town Manager

By: 
Lynelle Stanford, Town Clerk

(ATTEST)

CENTER:

THE CENTER FOR THE ARTS,
a Colorado non-profit corporation

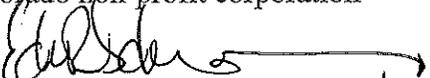
By: 
Name: Edwin B. Schmidt
Title: President of the Board

EXHIBIT "B"

Insurance Requirements

1. General Insurance Provisions.

During the term of the Agreement, without interruption, and for products and completed operations coverage notwithstanding final acceptance of the Work by the Town, the Center shall provide, pay for, and maintain in full force and effect the insurance outlined herein for coverages at not less than the prescribed minimum limits of liability, covering the Center's activities, those of any and all sub-subcontractors, or anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable. If the Work involves or is anticipated to involve hazardous operations including, but not limited to lead, pollution or asbestos liability, special insurance must be implemented for same, and the Center will be responsible for the premium. All insurance shall be provided by financially responsible insurance carriers authorized to do business in the State of Colorado and rated by A.M. Best Rating Service as A-, IX or better. Before starting the Work, the Center shall furnish the Town (1) ISO ACORD binders and a certificate of insurance from the Center's insurance carriers certified by a duly authorized representative of its insurer that at least the minimum coverages required herein are in effect and specifying that the liability coverages are written on an occurrence form and that the coverages shall not be canceled, non-renewed, or materially changed by endorsement or through issuance of another policy or policies of insurance without thirty (30) days prior written notice to the Town, (2) evidence which has been directly provided by the insurers, setting forth the policy limits, the date of inception, and information concerning the Additional Insureds concerning the coverages listed below. The Town has the right, but not the duty to receive copies of all insurance policies upon request. Failure of the Town to demand such certificate or other evidence of full compliance with these insurance requirements or failure of the Town to identify a deficiency from evidence provided shall not be construed as a waiver of the Center's obligation to maintain such insurance. The acceptance of delivery by the Town of any certificate of insurance delivered by the Center evidencing the required coverages and limits does not constitute approval or agreement by the Town that the insurance requirements have been met or that the insurance policies shown in the certificates of insurance are in compliance with the requirements of this Agreement. The Town must be provided updated renewal certificates and required endorsements as appropriate. Failure of the Town to request renewal certificates or endorsements does not relieve the Center from the obligation to maintain such insurances as required herein. The Town shall have the right, but not the obligation, to prohibit the Center or any sub-subcontractor from entering the Property until such certificates or other evidence that insurance has been placed in complete compliance with these requirements is received and approved by the Town. Any failure by the Center or its agent to procure the coverages required herein shall be considered a material breach of the Center's obligations under this Agreement, and the Town expressly reserves the right to seek remedy against the Center and its agent for all costs and expenses incurred as a result of the breach. If upon presentation of a claim against the Town, the the Town or the Town Indemnites, the Center fails to abide by the indemnification requirements set forth herein and/or the Center's insurers fail or refuse to provide a defense and full, unconditional indemnity in accordance with the terms and conditions as provided herein, the Town shall have all remedies available herein. In addition, the Center's failure to maintain the

required insurance may result in termination of this Agreement at the Town's sole and absolute option. If any of the coverages are required to remain in force after final payment, an additional certificate evidencing continuation of such coverage shall be submitted to the town on issuance of a certificate of occupancy. All coverages required of the Center shall be primary and non-contributory over any insurance or self-insurance program carried by the Town. By requiring insurance, the Town does not represent that coverage and limits shall necessarily be adequate to protect the Center or the Town. Insurance affected or procured by the Center shall not reduce or limit the Center's contractual obligation to indemnify and defend Town for claims or suits which result from or are connected with the Center's performance of this Agreement. The Center and the Town agree to fully cooperate, participate and comply with all reasonable requirements and recommendations of the insurers and insurance brokers issuing or arranging for issuance of the policies required herein, in all areas of safety, insurance program administration, claim reporting and investigating and audit procedures. If the Center has any deductibles or self-insured retentions under any of the following required coverages (which deductibles and/or self-insured retentions exceed any specific deductible or self-insured retention maximum set forth herein, such deductibles and/or self-insured retentions shall subject to the prior written approval of the Town), the Center must identify on the certificate of insurance the nature and amount of such deductibles or self-insured retentions and provide satisfactory evidence of financial responsibility for such obligations. All deductibles or self-insured retentions shall be the Center's sole responsibility. The Center shall cause all sub-subcontract agreements to include the indemnification and insurance procurement obligation set forth herein (excepting umbrella, builder's risk and pollution liability coverages) so as to ensure that the Town and the Town Indemnitees shall have the same protection from sub-subcontractors of any tier as is afforded by the Center. The Center shall promptly notify the Town of any and all accidents, occurrences or incidents resulting in injury to the Center's employees, employees of any sub-subcontractor, to any third parties or the property of another. The Center shall submit to the Town a written report of such accidents, occurrences or incidents and shall likewise submit to the Town all reports furnished to the Center's insurance company, including but not limited to the C-2 or similar Report of Employer Accident and Injury. The Center hereby expressly agrees to comply with all applicable Federal and State rules, laws and regulations including but not limited to OSHA and the Industrial Code of the State in which the Property is located. Certificates, notices of cancellation, or changes, etc. are to be sent by the Center directly to the Town as follows:

Town of Crested Butte
507 Maroon Avenue
P.O. Box 39
Crested Butte, CO 81224
Attn: Town Manager

2. **Liability Insurance.**

The Center shall maintain commercial general liability insurance covering all operations by or on behalf of the Center on an occurrence basis against claims for personal injury (including bodily injury and death) and property damage (including loss of use). Such insurance shall have the following minimum limits (and apply on a per Project basis) and coverages:

Minimum limits:

- (a) combined limit for bodily injury, personal injury and property damage of at least \$1,000.00 per occurrence;
- (b) combined limit for bodily injury, personal injury and property damage of at least \$2,000,000 general aggregate with dedicated limits per property or Project Site, which dedicated limits per Property or Project site must be evidenced on the certificate; and
- (c) products and completed operations aggregate.

Coverages:

- (a) Commercial general liability form (occurrence form)
- (b) Products and completed operations coverage notwithstanding final acceptance of the Work by the Town
- (c) Blanket contractual liability
- (d) Broad form property damage
- (e) Severability of interest
- (f) Underground explosion and collapse coverage
- (g) Completed operations
- (h) Personal injury
- (i) Incidental medical malpractice
- (j) Specific waiver of subrogation
- (k) Joint venture as named insured (where applicable)
- (l) Additional insured endorsement
- (m) A cross liability endorsement.

No portion of these limits may be satisfied through any form of self-insurance or self-insured retentions. Any deductibles greater than \$5,000.00 must be pre-approved. The Center agrees that the above limits, if required by the Town, will be revised to coincide with the Town's requirements. Coverage is to be issued on a form at least as broad as ISO Form CG0001 (2001) and must include the following terms and conditions:

- Comprehensive Form
- Premises/Operations Hazard- must cover all work to be performed by the Center and their subcontractors
- Contractual Liability written specifically for this contract
- Products/Completed Operations
- Broad Form Property Damage including completed operations
- Independent Owners
- Blanket Explosion, Collapse & Underground Property Damage Liability
- Employees as additional insureds
- Supplementary payments in addition to limit of liability
- Blanket Additional Insured Endorsement providing coverage for the Town and its electeds, officers, consultants, agents, employees, contractors, insurers and attorneys on a primary non-contributory basis.
- Additional Insured Endorsement CG 2010 11/85 or CG2010 10/01 in conjunction with CG2037 10/01. Coverage to include completed operations arising out of "your work"

- Any deductible clauses, exclusions or special endorsements must be approved by the Town prior to inclusion
- Insuring agreement to read "to pay on behalf of"
- Waiver of subrogation for the Town, its Town's electeds, officers, consultants, agents, employees, contractors, insurers and attorneys
- Severability of interests (cross liability)
- Coverage shall not include any exclusions unacceptable to the Town.

3. **Umbrella Excess Liability Insurance.**

The Center shall maintain umbrella/excess liability insurance on an occurrence basis in excess of the underlying insurance described herein which is at least as broad as each and every one of the underlying policies. The amounts of insurance required herein may be satisfied by the Center purchasing coverage for the limits specified or by any combination of underlying and umbrella limits, so long as the total amount of insurance is not less than each of the limits specified herein when added to the limit specified herein. Such insurance shall have the following minimum limits and coverages:

Minimum limits: \$2,000,000 combined single limit and aggregate limit

Coverages:

- (a) Additional insured endorsement
- (b) Pay on behalf of wording
- (c) Concurrency of effective dates with primary
- (d) Blanket contractual liability
- (e) Punitive damages coverages (where not prohibited by law)
- (f) Aggregates apply where applicable in Primary
- (g) Care, custody, and control-follow form primary
- (h) Drop down feature
- (i) Include Follow Form Waiver of Subrogation
- (j) Include Follow Form Additional Insured Primary/Non-Contributory basis
- (k) Follow Form Per Project Aggregate

4. **Center's Builder's Risk Insurance/Installation Floater.**

The Center shall furnish to The Town certificates of insurance and other required documentation evidencing the following coverage which shall provide for the interests of the Town to be named as loss payees and shall contain a provision requiring the insurance carriers to waive their rights of subrogation against all the Town Indemnities named in this Agreement.

Named Insured:	Town and Center
Limits of Liability:	Cost of the Work
Deductible:	\$5,000 per occurrence
Coverage Including:	i. Sixty (60) days' notice of cancellation, non-renewal or material policy change

- ii. "All Risk" of loss including flood, earthquake, and earth movement
- iii. Replacement cost valuation
- iv. Transit limit to off-site storage limit equal to \$250,000
- v. Agreed amount clause
- vi. Property in the insured's care, custody and control covered
- vii. Testing/processing shall be a covered peril
- viii. Electrical Injury/damage shall be covered peril
- ix. Waive rights of subrogation against the Town
- x. Coverage to apply until machinery/equipment, etc., has been installed and been accepted as satisfactory, coverage to apply after materials have become a physical part of realty
- xi. Errors, omissions or deficiency in design, workmanship or materials shall be considered a covered peril
- xii. Exclusion pertaining to property while it is on premises, owned, leased or operated by the insured shall be deleted
- xiii. Full theft coverage without exception
- xiv. Permission granted to complete and occupy
- xv. Eliminate underground exclusion
- xvi. Standard city wording or special cancellation clauses, when mandated

5. **Workers Compensation Insurance.**

The Center shall maintain workers' compensation and employer's liability insurance. Such insurance shall provide limits in accordance with the laws in the state in which the Property is located, but in no event less than \$500,000 on an occurrence basis with the following minimum limits and coverages:

Minimum limits:

- (a) Workers' compensation - statutory limit
- (b) Employer's liability:
 - (i) \$500,000 bodily injury for each accident
 - (ii) \$500,000 bodily injury by disease for each employee
 - (iii) \$500,000 bodily injury disease aggregate.

6. **Automobile Liability Insurance.**

The Center shall maintain business auto liability insurance covering liability arising out of any auto (including owned, hired and non-owned autos) used in the performance of the Work. Such insurance shall have the following minimum limits and coverages:

Minimum limits: \$1,000,000.00 combined single limit each accident on an occurrence basis.

Coverages:

- (a) Additional insured endorsement or the Town, its electeds, officers, directors, consultants, agents, employees, contractors, insurers and attorneys
- (b) Specific waiver of subrogation
- (c) Contractual liability
- (d) Contractual exclusion pertaining to operations performed within 50' of railroad must be eliminated
- (e) Additional Insured coverage for the Town, its electeds, officers, consultants, agents, employees, contractors, insurers and attorneys
- (f) All insurers must agree to waive their rights of subrogation against the Town, its elected, officers, consultants, agents, employees, contractors, insurers and attorneys.

7. **Pollution Liability Insurance.**

When remediation or abatement, or lead is included in the Work, the Center shall furnish evidence that it has provided pollution liability insurance covering all lead and pollution operations with limits each occurrence combined single limit for bodily injury, property damage and clean-up costs including completed operations, broad form contractual (including coverage for third party over claims), and independent contractors coverage, as provided for below. Completed operations coverage shall remain in effect for no less than five (5) years after completion of the Work. All insurers agree to waive their rights of subrogation against the Additional Insureds, the Town, its electeds, officers, consultants, agents, employees, contractors, insurers and attorneys.

The Town and the Additional Insureds shall be named as an additional insured and the policy shall have a retroactive date before the start of the Work. Such insurance shall have the following minimum limits of coverage, and include the following terms and conditions:

The limits of coverage shall not be less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate.

- Defense costs must be payable in addition to limit of liability
- Any deductibles, clauses, exclusions or special endorsements must be approved by The Town prior to inclusion.
- Coverage must include on-site, off-site and in-transit exposures.
- Policy to read "to pay on behalf of" (in lieu of indemnify).
- Must include loading and unloading coverages.
- Must be written on occurrence form.
- Policy to be submitted to the Town for review and approval.
- Additional Insured coverage for the Town, its electeds, officers, consultants, agents, employees, contractors, insurers and attorneys on a primary non-contributory basis.

8. **Waivers of Subrogation.**

The Town and the Center waive all rights against each other and any of their electeds, subcontractors, sub-subcontractors, their directors, officers, members, managers, employees,

agents, subsidiaries, affiliates, insurers and attorneys for damages caused by fire or other causes of loss to the extent covered by property insurance, or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Town as fiduciary. The Center, as appropriate, shall require all sub-subcontractors to provide similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

A loss insured under the Town's property insurance shall be adjusted by the Town as fiduciary and made payable to the Town as fiduciary for the insureds, as their interests may appear.

9. **Risk of Loss.**

The Center shall bear all risks of any loss or destruction of or damage to (1) the Work, (2) any materials or supplies incorporated or to be incorporated therein, and (3) any equipment, tools, or other property, until the final completion of the Work and its final acceptance by the Town. The Center assumes and shall ensure that all the Centers and all employees of the Center and all subcontractors assume the risk of loss or destruction of or damage to any property of such parties (including personal property, construction machinery, equipment, scaffolding, or temporary or portable buildings) whether owned, hired, rented, borrowed, or otherwise, used at any time in the connection with the performance of the Work. The Center waives and shall ensure that all subcontractors waive all rights of recovery against the Town for any such loss, disappearance, destruction of or damage to any property of such parties. The Center and any subcontractors shall cause their respective property insurers to waive all rights of subrogation against the Town.

9. **Insurance Policy Requirements.**

Policies written on a surplus lines or non-admitted basis are not acceptable. The Town shall have the right to reject any proposed carrier and to insist that the policy(ies) at issue be written by another/other carrier(s). Each insurance policy required hereunder shall provide that it may not be cancelled or substantially modified without thirty (30) days prior written notice to the Town. The Center shall require all insurance policies in any way related to the Work and secured and maintained by the Center to include clauses stating that each underwriter shall waive all rights of recovery, under subrogation or otherwise, against the Town, and all tiers of the Centers, engaged by any of them. To the extent applicable, the amounts and types of insurance shall conform to the terms, conditions and coverages of Insurance Service Office (ISO) policies, forms and endorsements. The Center shall, by specific endorsement to its commercial general liability policies, umbrella/excess liability policies, and automobile liability policies (as applicable), (1) provide that defense costs are not to be considered as damages so as to erode the policy limits required herein, (2) cause the coverage afforded thereunder to include blanket written contractual liability covering all indemnity agreements set forth in this Agreement, and

(3) cause the coverage afforded to the Additional Insureds thereunder to be primary to and not contribute with any other valid and collectible insurance available to the Additional Insureds. The Center shall, by specific endorsement to its umbrella/excess liability policy, cause the coverage afforded to the Additional Insureds thereunder to be the first tier umbrella/excess coverage above the primary coverage afforded to the Additional Insureds under the commercial general liability insurance required hereunder and not contribute with or excess to any other valid and collectible insurance available to the Additional Insureds whether provided on a primary or excess basis. Further evidence is required that such policies include follow form "per project" aggregate.

10. **Additional Insureds.**

The policy or policies providing insurance as required, with the exception of professional liability (if applicable) and workers' compensation, shall defend and include the Town and its electeds, officers, directors, consultants, agents, employees, contractors, insurers and attorneys, on a primary, and non-contributory basis for work performed under or incidental to this Agreement. The form of the additional insured endorsements shall be on a form at least as broad as ISO Form CG2010 11/85 or a combination of CG2010 10/01 and CG2037 10/01 and shall not include any exclusions that limit the scope of coverage beyond that provided to the named insured. This requirement applies to all policies under which the above parties are required to be named as additional insureds. The additional insured coverages shall include completed operations coverage for the Additional Insureds for a period of not less than twenty-four (24) months after completion of the applicable Project. If the Additional Insured has other insurance applicable to the loss, it shall be on an excess or contingent basis. The amount of the Center's insurance shall not be reduced by the existence of such other insurance. If any insurance required here is to be issued or renewed on a claims-made form (which requires prior written approval by the Town) as opposed to the occurrence form, the retroactive date for coverage shall be no later than the commencement date of the Work and shall state that in the event of cancellation or non-renewal, the discovery period for insurance claims (tail coverage) shall be at least thirty-six (36) months.

10. **Adjustment of Losses.**

Any loss insured under the policies required herein shall be adjusted by the Center and the Town, as their interests may appear, and made payable to the Town as trustee for the insureds as their interests may appear, subject to the requirements of any applicable mortgagee clause. The Town, as trustee, shall have the power to adjust and settle any loss with the insurers unless one of the parties in interest objects in writing within five (5) days after the loss to the Town's exercise of this power. If such objection is made, an arbitrator mutually acceptable to the parties in interest and the Town shall be chosen promptly. The Town, as trustee, shall in such case make settlement with the insurers in accordance with the directions of such arbitrator. If distribution of the insurance proceeds by arbitration is required, the arbitrators shall direct such distribution.