

**SECURITIES IN LIEU OF RETENTION AGREEMENT
(SINGLE PROJECT FORM)**

Request for Qualifications Number _____

ASU Project Number _____

OWNER

ARIZONA BOARD OF REGENTS

for and on behalf of

ARIZONA STATE UNIVERSITY

CONTRACTOR

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SECURITIES IN LIEU OF RETENTION AGREEMENT

Date: _____

Parties:

Contractor: _____

Owner: Arizona Board of Regents for and on behalf of Arizona State University

ASU Project Number: _____

Defined Terms:

“Initial Trustee”: The Bank of New York Trust Company, N.A.

“Initial Trust Subaccount”: _____

“Construction Contract Documents”: **[INSERT TITLE AND DATE OF CONSTRUCTION CONTRACT]** _____, between Contractor and Owner, and the other related construction contract documents referred to therein relating to the above ASU Project Number.

“Contract Amount” (for purposes of determining fee in Section 15, below): _____

“Delivery Date”: Each day on which Contractor delivers an application for payment under the Construction Contract Documents.

Background:

- A. Contractor and Owner have entered into the Construction Contract Documents.
- B. The Construction Contract Documents provide for retention as required pursuant to Arizona Board of Regents Policy 3-804.G.
- C. In lieu of the retention provided for in the Construction Contract Documents and ABOR Policy 3-804.G, at the request of Contractor, the Owner is willing to accept a delivery and transfer to the Trustee of securities of the types and in the amounts provided in this Agreement and subject to the terms and conditions of this Agreement.
- D. Contractor desires to enter into the securities in lieu of retention arrangement described in this Agreement.

Contractor and Owner hereby agree as follows:

- 1. Terms. All capitalized terms used in this Agreement but not defined in this Agreement shall have the meanings given to such terms in the Construction Contract Documents.

2. This Agreement is One of the Construction Contract Documents. Owner and Contractor agree that this Agreement will be one of Construction Contract Documents but shall have the lowest level of precedence among Construction Contract Documents in the event of a conflict between this Agreement and any other Construction Contract Document, and, accordingly, in the event of any such conflict, the terms of the other Construction Contract Documents shall control.

3. Nature of Arrangement.

(a) Legal Requirement. This Agreement and the Qualified Securities (defined in Section 5 below) delivered by Contractor to Trustee are pursuant to a mandate in Arizona law requiring Owner to allow Contractor to deliver to Owner securities to be held by Owner in lieu of Owner holding retention under the Construction Contract Documents and applicable law. Owner is entering into this Agreement only because Owner is required by applicable law to do so.

(b) Substitute for Retention. The intent and agreement of Owner and Contractor is that (i) the Qualified Securities are delivered by Contractor as a substitute for and in replacement of retention under the Construction Contract Documents, and (ii) for all purposes of all law (including, without limitation, Article 9 of the Uniform Commercial Code as in effect in the State of Arizona and the Bankruptcy Code of the United States) the Qualified Securities and Proceeds (defined in Section 5 below) shall be retention owned by Owner (subject to the terms and provisions of this Agreement) and withheld by Owner from payments by Owner to Contractor under the Construction Contract Documents.

4. Contractor Delivery of Qualified Securities. On or before each Delivery Date, Contractor shall deliver Qualified Securities in the manner provided in Section 6. The amount of Qualified Securities required to be delivered shall be as set forth in Section 8(b). From time to time Contractor may be required to deliver additional Qualified Securities pursuant to Section 8.

5. Nature of Qualified Securities and Proceeds. All securities delivered pursuant to this Agreement shall be United States government debt securities (not including U.S. government agency debt securities and not including debt securities that are only guaranteed by the U.S. government) acceptable to the Treasurer of Arizona State University. Each security must be a book entry security and must have a maturity date no more than ninety (90) days from the date of delivery to the Trustee. At the time it is delivered, each security must be held in Contractor's name and no other person or legal entity shall have any right, title or interest in or to any of the Qualified Securities. The securities complying with this Section 5 are referred to as "Qualified Securities". The Qualified Securities and all proceeds thereof (including, without limitation, interest or other earnings or accruals thereon; proceeds of sale, payment or redemption thereof; and reinvestment in Qualified Securities and Qualified Money Market Funds (defined in Section 11 below)), are referred to herein as "Qualified Securities and Proceeds".

6. Trust Subaccount. Owner will from time to time designate, by notice to Contractor, a trust subaccount ("Trust Subaccount") into which the Qualified Securities shall be transferred and the bank or trust company that will act as trustee ("Trustee") with respect to the Trust Subaccount. The Initial Trustee is designated above. The Initial Trust Subaccount to which Qualified Securities will be transferred is also designated above. Owner may change the Trustee

and the Trust Subaccount by written notice to Contractor. The Trust Subaccount will only contain the Qualified Securities and Proceeds. All Qualified Securities shall be transferred into the name of the Trustee as trustee for Owner. While in the Trust Subaccount, all Qualified Securities and Proceeds will be held in the name of Trustee as trustee for Owner. Contractor further agrees that:

(a) Owner Sole Beneficiary. The Trust Subaccount is a subaccount within an Owner trust account with Trustee and Owner is the sole beneficiary of the Trust Account, the Trust Subaccount and of the trust relationship with Trustee. Therefore, the Qualified Securities delivered to the Trustee, and the Qualified Securities and Proceeds held in the Trust Subaccount are and will be held in trust (the “Trust”) by Trustee solely for the benefit of Owner. Under the Trust Agreement the Trustee will be the legal owner of the Trust Subaccount and the Qualified Securities and Proceeds, and the Owner will be the beneficial owner of the Trust Subaccount and the Qualified Securities and Proceeds. Any Qualified Securities and Proceeds delivered to Owner under this Agreement will be owned legally and beneficially by Owner.

(b) Contractor not a Beneficiary or Owner. Contractor is not a beneficiary of the Trust Subaccount and Contractor has no right, title or interest in or to the Trust Subaccount or any property in the Trust Subaccount (including, without limitation, the Qualified Securities and Proceeds in the Trust Subaccount). Upon delivery of Qualified Securities by Contractor to Trustee as trustee for Owner, Contractor will cease to be the owner of the Qualified Securities, Contractor will not be the owner of the Trust Subaccount or the Qualified Securities and Proceeds, and Contractor will have no right, title or interest in and to the Qualified Securities or in the Trust Subaccount or the Qualified Securities and Proceeds, regardless of whether the Qualified Securities and Proceeds are held by Trustee or by Owner. The Qualified Securities and Proceeds shall be “retention” as such term is used in the Construction Contract Documents and shall be subject to all provisions relating to “retention” in the Construction Contract Documents. If Qualified Securities and Proceeds are transferred from the Trustee to Owner as provided in this Agreement, Owner will be the legal and beneficial owner of the Qualified Securities and Proceeds, Owner shall have the right to use, apply, expend and/or retain the Qualified Securities and Proceeds in the manner applicable to retention under the Construction Contract Documents, and Contractor will have no right, title or interest in or to the Qualified Securities and Proceeds held by Owner. Contractor’s only rights in respect of the Qualified Securities and Proceeds will be its rights as to retention under the Construction Contract Documents and its rights under Section 16 of this Agreement.

(c) Absolute Transfer. Each delivery of Qualified Securities to the Trustee is an absolute transfer of legal and beneficial ownership and not merely the granting of a security interest or a conditional transfer. Each delivery of Qualified Securities by Contractor to the Trustee will be a transfer of legal ownership of the Qualified Securities by Contractor to the Trustee for the exclusive benefit of Owner. Each delivery of Qualified Securities by Contractor to the Trustee shall be a transfer of beneficial ownership of the Qualified Securities by Contractor to the Owner.

(d) Transfer and Assignment. Contractor does hereby transfer and assign to Trustee as trustee for Owner all Qualified Securities from time to time delivered to Trustee under this

Agreement. The transfer of Qualified Securities shall be effective for the Qualified Securities delivered upon each delivery of Qualified Securities to the Trustee.

(e) No Duty to Monitor. Anything in this Agreement or the other Construction Contract Documents to the contrary notwithstanding, Owner will not have any duty to monitor the value of Qualified Securities and Proceeds or to monitor the status or maturity of the Qualified Securities and Proceeds. Contractor will bear the entire risk of changes in Market Value (defined in Section 8(b) below) of Qualified Securities and Proceeds and all other risks with respect to the Qualified Securities and Proceeds. Owner will have no obligation for and will have no obligation to take any action in respect of any changes in Market Value of Qualified Securities and Proceeds, in respect of any changes in the status of the issuer of Qualified Securities and Proceeds, or in respect of any other events relating to any Qualified Securities and Proceeds.

7. Representation and Warranty of Contractor. By making and upon each delivery of Qualified Securities to the Trustee, Contractor represents and warrants to Owner and also to and for the benefit of Trustee that Contractor is the sole owner of all Qualified Securities at the time of delivery to the Trustee, that the Qualified Securities are transferred free and clear of all claims, liens and encumbrances, that other than Trustee and Owner, no other individual or legal entity has any right, title or interest in or to any of the delivered Qualified Securities, and that Contractor is authorized under the laws of the state of its organization and by all necessary corporate action having been taken to enter into this Agreement, to perform its obligations under this Agreement and to transfer or cause to be transferred the Qualified Securities to the Trustee.

8. Amount of Qualified Securities; Additional Qualified Securities.

(a) Reports. Owner will transmit to Contractor by the tenth (10th) business day of each calendar month a copy of each monthly report (the "Monthly Report") setting forth the Qualified Securities and Proceeds held in the Trust Subaccount and the Market Value of the Qualified Securities and Proceeds. If in the interim Contractor needs information about the Trust Subaccount or the Qualified Securities and Proceeds, Contractor will contact Owner and Owner will promptly obtain the requested information and respond to Contractor.

(b) Contractor Maintenance of Minimum Required Amount of Qualified Securities and Proceeds. At all times the Qualified Securities and Proceeds in the Trust Subaccount shall have a market value as determined by the Trustee in accordance with the Trustee's normal practices ("Market Value") equal to one hundred five percent (105%) of the amount of retention that would have been withheld from payments to Contractor and held by Owner from time to time under the Construction Contract Documents, as such amount of retention is increased, decreased or applied from time to time pursuant to the Construction Contract Documents (the "Retention Amount"). Accordingly, (i) on each Delivery Date, Contractor shall deliver to Trustee Qualified Securities such that after such delivery the Market Value of Qualified Securities and Proceeds in the Trust Subaccount shall be at least one hundred five percent (105%) of the Retention Amount after giving effect to any application for payment delivered or intended to be delivered on or about the Delivery Date and (ii) if at any time the Market Value of the Qualified Securities and Securities held in the Trust Subaccount and shown in a Monthly Report is less than one hundred five percent (105%) of the Retention Amount, Contractor shall

deliver to Trustee sufficient additional Qualified Securities to cure the deficiency within five (5) business days after the earliest of (A) notice from Owner of the deficiency, (B) an increase in the Retention Amount (including, without limitation by reason of adjustments in the Retention Amount required or permitted pursuant to the Construction Contract Documents), (C) receipt of a Monthly Report showing the deficiency, regardless of whether or not Owner makes a demand on Contractor to make up the deficiency and regardless of whether Contractor submits an application for payment, and (D) Contractor otherwise becoming aware of the existence of such deficiency.

9. Right of Owner to Deduct. If at any time that Owner is obligated to make a payment to Contractor under the Construction Contract Documents: (i) information regarding the current Market Value of the Qualified Securities held in the Trust Subaccount is not available due to circumstances beyond the reasonable control of Owner, (ii) Contractor is obligated to deposit Qualified Securities or additional Qualified Securities with Trustee but has failed to do so, or (iii) for any reason the Market Value of the Qualified Securities and Securities in the Trust Subaccount is not equal to or greater than one hundred five percent (105%) of the Retention Amount after giving effect to all payments requested by Contractor, then Owner shall be entitled to withhold an amount of retention from the payment pursuant to the Construction Contract Documents so that the sum of the amount so retained by Owner and the Market Value of Qualified Securities and Proceeds held in the Trust Subaccount as shown in the most recent Monthly Report received by Owner is equal to one hundred five percent (105%) of the Retention Amount after the payment is made. The foregoing shall not limit any other rights and remedies of Owner pursuant to the Construction Contract Documents or applicable law.

10. Management of Trust Account and Trust Subaccount. Owner shall have the sole and exclusive right to give direction to Trustee concerning all Qualified Securities delivered by Contractor to Trustee and all Qualified Securities and Proceeds in the Trust Subaccount. All Qualified Securities and Proceeds will be held in the Trust Subaccount until such time as Owner gives directions to the Trustee. Owner may be required to direct Trustee to release Qualified Securities and Proceeds to Contractor in accordance with Section 16. Owner may use, apply, expend or retain the Qualified Securities and Proceeds in the same manner as Owner is permitted to use, apply, expend and retain retention under the Construction Contract Documents. Accordingly, if and to the extent Owner has the right to use or apply retention pursuant to the Construction Contract Documents, Owner will have the right to direct Trustee to do either or both of the following: (i) to sell some or all of the Qualified Securities and Proceeds and deliver the proceeds of such sale to Owner, and (ii) to deliver some or all of the Qualified Securities and Proceeds to Owner. This right is unconditional and Owner will not be required to make any certification to Trustee or Contractor and Owner will not be required to notify or to obtain consent or approval by Contractor before directing Trustee to take these actions; provided that if the Owner so desires, Contractor will sign such consents, authorizations and other documents as the Owner or Trustee may reasonably request from time to time with respect to such actions. Any Qualified Securities and Proceeds delivered to Owner will be held and may be used, applied, expended or retained by Owner as retention under the Construction Contract Documents. Owner will use reasonable efforts to advise Contractor after the actions are taken.

11. Investment and Re-Investment. Owner will direct the Trustee to (i) invest any cash proceeds of Qualified Securities temporarily pending reinvestment in Qualified Money Market

Funds (defined below) and (ii) as quickly as reasonably practicable to reinvest proceeds of Qualified Securities in new Qualified Securities of type and with a term selected by Owner. Contractor hereby approves the investment and reinvestment in Qualified Securities and in Qualified Money Market Funds and also hereby approves all such investment and reinvestment of Qualified Securities and Proceeds decisions by Trustee and Owner. No further authorization, approval or direction by Contractor shall be required for such investments or reinvestments; provided that if Owner so desires, Contractor agrees to sign any consents, authorizations and other documents the Owner or Trustee may reasonably request from time to time with respect to such investments and reinvestments. Neither Owner nor Trustee will have any obligation to assure continuous investment and continuous interest earnings or to maximize interest earned. Owner and Trustee shall have no liability or obligation to Contractor with respect to the investment or reinvestment of Qualified Securities and Proceeds. All risk of loss relating to, and other consequences of, the investment or reinvestment of Qualified Securities and Proceeds in Qualified Securities and Qualified Money Market Funds is on Contractor. As used herein, “Qualified Money Market Funds” means readily redeemable “money market mutual funds” approved by Owner and that maintain an investment policy limiting investments primarily to United States Government debt securities (not including U.S. Government agency debt securities and not including debt securities that are only guaranteed by the U.S. Government) and having total assets of at least \$1 billion, including, without limitation, those for which the Trustee or an affiliate performs services for a fee, whether as a custodian, transfer agent, investment advisor or otherwise.

12. Replacement Trustee. If at any time a Trustee ceases to be the trustee with respect to the Trust or any Trust Account or Trust Subaccount, Owner will have the right to select a replacement Trustee and to arrange for the transfer of Qualified Securities and Proceeds to a Trust Subaccount with the replacement Trustee selected by Owner. Owner will have the right to change the Trustee upon Owner’s absolute and sole discretion at any time and from time to time. Contractor will have no right to advance notice of, or right of consent or approval of, any such action. Contractor hereby approves any such transfer as determined by Owner. Notwithstanding any change in the Trustee, this Agreement will continue in full force and effect. Any release given by Owner to a terminating Trustee will also be binding upon Contractor. Owner will promptly give Contractor notice of the replacement Trustee and new directions for depositing Qualified Securities with the replacement Trustee in the replacement Trust Subaccount. Each replacement Trustee and replacement Trust Subaccount shall be the Trustee and the Trust Subaccount under this Agreement. Contractor agrees to cooperate with Owner in connection with any change in the Trustee and/or transfer of Qualified Securities and Proceeds, including, without limitation, if Owner so desires, the execution and delivery of such consents, confirmations, and other documents as Owner may reasonably request.

13. Contractor Additional Agreements. Contractor agrees for the benefit of Owner and for the benefit of Trustee:

(a) No Contract with Trustee and No Third Party Beneficiary Rights Against Trustee. Owner has and will have a contractual relationship with Trustee. Contractor has and will have no contractual or other legal relationship with Trustee in respect of this Agreement, the other Construction Contract Documents, the Trust Subaccount or the Qualified Securities and

Proceeds. Contractor has and will have no third party beneficiary rights under or in respect of Owner's agreement with Trustee.

(b) Rights Against Owner Only. In the event Owner breaches any obligation pursuant to this Agreement, Contractor's rights shall be solely against Owner, and Contractor shall not have any rights against Trustee or in or to the Trust Subaccount or Qualified Securities and Proceeds held by the Trustee. Contractor shall not communicate with Trustee other than as may be necessary to deliver Qualified Securities to Trustee or as directed by Owner.

(c) Owner Directions. The Trustee will follow Owner's directions regardless of any directions, claims or other actions by Contractor.

(d) No Contractor Approval Required. No confirmation, consent or approval by Contractor is required in respect of Owner directions to Trustee and Trustee actions relating to the Trust Subaccount and Qualified Securities and Proceeds, provided that Contractor shall give such confirmations, consents and approvals as are reasonably requested by Owner.

(e) No Trustee Obligation to Contractor and No Contractor Rights Against Trustee. Trustee has no duty or obligation to Contractor to determine or to assure that Owner's directions and Trustee's actions are consistent with this Agreement and the other Construction Contract Documents. Trustee has no obligations to Contractor under or in respect of this Agreement, the other Construction Contract Documents, the Trust Subaccount and the Qualified Securities and Proceeds. Contractor has no rights against Trustee in respect of this Agreement, the other Construction Contract Documents, the Trust Subaccount or Qualified Securities and Proceeds or in respect of acts and omissions of Trustee relating to the Trust Subaccount and the Qualified Securities and Proceeds. Trustee has no duty or obligation to Contractor to keep itself informed of Owner's acts or omissions in respect of this Agreement, the other Construction Contract Documents (including, without limitation, Owner's compliance or non-compliance with this Agreement and the other Construction Contract Documents), the Trust Subaccount and the Qualified Securities and Proceeds. Trustee has no duty or obligation to Contractor to take any action or to not take any action in respect of any Owner acts or omissions, regardless of any notices from or claims by Contractor.

(f) No Claims Against Trustee. Contractor agrees that it will not make any claim against or demand on Trustee. Contractor hereby releases and forever discharges Trustee from any and all present and future claims Contractor might have or hereafter might have against Trustee in respect of this Agreement, the other Construction Contract Documents, the Trust Subaccount and the Qualified Securities and Proceeds, whether now known or unknown and whether now existing or hereafter arising, including, without limitation, any claims based on the Trustee's breach of its agreement with Owner relating to the Trust Account, the Trust Subaccount and the Qualified Securities and Proceeds.

(g) No Attempted Grants or Transfers to Third Parties. So long as any Qualified Securities and Proceeds are in the Trust Subaccount or held by Owner, Contractor shall not attempt to grant or transfer to any third party any right, title or interest in or to the Trust Subaccount or the Qualified Securities and Proceeds.

(h) Indemnity. Contractor will indemnify and hold harmless and, if elected by the indemnified party, defend Trustee, Owner, the Arizona Board of Regents, the State of Arizona and Arizona State University and their respective directors, trustees, officers and employees from and against any and all claims, demands, losses, damages, costs and expenses (including, without limitation, reasonable attorneys' and paralegals' fees and litigation expenses) arising in respect of any and all claims and any other actions against Trustee, Owner or any of their respective directors, trustees, officers and employees (i) made by Contractor or by anyone else claiming in right of Contractor in respect of this Agreement, the other Construction Contract Documents, the Trust Subaccount or Qualified Securities and Proceeds, and /or (ii) made by third parties that based on some alleged act or omission of Contractor the third parties making the claim or taking the action have some right, title or interest in or to the Trust Subaccount or Qualified Securities and Proceeds, except that as to each indemnified party this indemnity shall not cover claims, demands, losses, damages, costs and expenses to the extent arising from negligence of the indemnified party, and further except that as to Owner and its directors, trustees, officers and employees, this indemnity shall not cover claims, demands, losses, damages, costs and expenses to the extent arising from a breach by Owner or its directors, trustees, officers and employees of this Agreement.

As to the Trustee and its directors, trustees, officers and employees, Contractor's indemnification obligation shall include, without limitation, claims, losses, damages, costs and expenses incurred by Trustee or its directors, trustees, officers or employees in any claim, litigation or other proceeding relating to this Agreement, the Qualified Securities or the Trust Subaccount in which it, him or her is named as party but in which no damages or other relief is claimed from it, him or her, regardless of whether the claim, litigation or other proceeding is commenced by Contractor, someone claiming in right of Contractor, some third party or Owner.

14. Costs and Expenses. Contractor will reimburse Owner Parties (defined below) for any and all costs and expenses (including, without limitation, attorneys' fees, paralegals' fees, litigation costs and costs of preparing for litigation) incurred (a) in enforcing the obligations of Contractor under this Agreement, (b) in enforcing the rights of Owner under this Agreement and in or to the Trust Subaccount and the Qualified Securities and Proceeds, (c) in enforcing the terms and conditions of this Agreement, and/or (d) in defending against any claims of any third parties that the third parties have some right, title or interest in or to the Trust Subaccount or Qualified Securities and Proceeds.. "Owner Parties" means Owner, the Arizona Board of Regents, the State of Arizona, Arizona State University and their respective regents, directors, trustees, officers and employees.

15. Fees. Contractor will reimburse Owner for all costs, fees and expenses paid by Owner to Trustee in respect of this Agreement, the Qualified Securities and Proceeds, the Trust Subaccount and transactions in Qualified Securities and Proceeds. Contractor acknowledges that such costs, fees and expenses payable by Owner to Trustee will include, without limitation, a transaction fee when Qualified Securities and Qualified Money Market Funds are purchased and when they mature, are sold or otherwise transferred into or out of the Trust Subaccount. The Trustee's current fees are shown on Attachment 1. These fees are subject to change in amount and in the types of fees by agreement between Owner and Trustee, and such changes shall not require notice to or approval by Contractor. Owner will advise Contractor of each fee change promptly after the change is made. There will be no refund of any Trustee fees paid by

Contractor if this Agreement or the security in lieu of retention arrangement under this Agreement is terminated early.

16. Sole Rights of Contractor. The only rights of Contractor in respect of this Agreement and Qualified Securities and Proceeds will be:

(a) Appropriate Retention Payment Amount. Contractor will have the right under this Section 16 at each time retention would be paid to Contractor under the Construction Contract Documents to have the Appropriate Retention Payment Amount (defined below) delivered to Contractor. At its election, Owner may deliver the Appropriate Retention Payment Amount in Qualified Securities and Proceeds or in money. At the time for Owner to deliver all remaining retention after issuance of the Certificate of Final Completion for the Project under the Construction Contract Documents, Owner will be deemed to have satisfied Owner's obligation to deliver retention and all of Owner's obligations to Contractor under this Agreement relating to Qualified Securities and Proceeds by delivering to Contractor the then Qualified Securities and Proceeds, if any, held under this Agreement (regardless of the then Market Value of Qualified Securities and Proceeds) after Owner uses, applies, expends and retains such amounts of Qualified Securities and Proceeds as Owner is entitled to do for retention under the Construction Contract Documents. As used herein, "Appropriate Retention Payment Amount" means the Market Value, if any, of Qualified Securities and Proceeds held in the Trust Subaccount or held by Owner that is in excess of 105% of the then amount that Owner is entitled to hold as retention under the Construction Contract Documents, all as determined by Owner.

(b) Interest. The Contractor has the right to all interest and any other income or profits earned on Qualified Securities and Proceeds. Interest and other income and profits will be held by Trustee or delivered to Owner as part of the Qualified Securities and Proceeds and will be paid to Contractor only upon distribution of Qualified Securities and Proceeds as provided above.

(c) Owner Obligations Under This Agreement and the Other Construction Contract Documents. The Contractor has the right to have Owner perform its obligations under this Agreement and the other Construction Contract Documents.

17. Grant of Security Interest. Contractor acknowledges and agrees that the transfer of the Qualified Securities is intended to be an outright transfer and not an assignment for security purposes of the Qualified Securities and the Qualified Securities and Proceeds. Notwithstanding the foregoing, Contractor hereby (a) grants Owner a security interest under Article 9 of the Uniform Commercial Code in all Qualified Securities and Proceeds (including, without limitation, proceeds) and Owner will have all rights of a secured creditor in the Qualified Securities and Proceeds and (b) acknowledges that Owner shall have sole and exclusive control of the Qualified Securities and Proceeds pursuant to this Agreement and Section 9-106 of the Uniform Commercial Code. Such security interest shall secure all of the obligations of Contractor under the Construction Contract Documents and upon any default by Contractor under the Construction Contract Documents may be used, applied, expended or retained by Owner in the same manner as retention under the Construction Contract Documents. All actions necessary and appropriate to perfect Owner's security interest will be taken, including, without limitation, Owner taking sole possession of the Qualified Securities and Proceeds through

possession by Trustee as trustee solely for the benefit of Owner. Contractor authorizes Owner to file and amend financing statements with respect to the Qualified Securities and Proceeds as Owner may deem appropriate. In addition, upon request by Owner Contractor agrees to deliver financing statements and amendments thereto in the form reasonably determined by Owner. Also, any other steps to protect the Qualified Securities and Proceeds from possible claims by Contractor's creditors will be taken by Contractor as determined and requested by Owner and its counsel. For purposes of Article 9 of the Uniform Commercial Code, the Trustee will be a trustee holding the Qualified Securities and Proceeds solely for the benefit of Owner.

18. Termination of Contractor Delivering Qualified Securities in Lieu of Retention. Contractor shall have the opportunity to continue to deliver Qualified Securities under this Agreement in lieu of Owner withholding retention under the Construction Contract Documents only so long as Contractor is in compliance with all terms and conditions of the Construction Contract Documents (including, without limitation, this Agreement) and is performing all of Contractor's obligations under the Construction Contract Documents (including, without limitation, this Agreement). At any time when Contractor has not fulfilled this requirement, Owner may elect to refuse to accept Qualified Securities in lieu of retention and may retain retention from payments to Contractor under the Construction Contract Documents.

19. Termination of this Agreement by Contractor Contractor will have the right upon sixty (60) days prior written notice to Owner to terminate this Agreement and the securities in lieu of retention arrangement under this Agreement provided that Contractor is in full compliance with all obligations of Contractor under the Construction Contract Documents (including, without limitation, this Agreement) and is in compliance with all the other terms and conditions of the Construction Contract Documents (including, without limitation, this Agreement). In such event:

(a) The Qualified Securities and Proceeds will continue to be retention held by Owner;

(b) Owner may elect (A) to have the Qualified Securities and Proceeds liquidated and the proceeds delivered to Owner, (B) to have the Qualified Securities and Proceeds delivered to Owner or (C) to have the Qualified Securities and Proceeds to be held in a different trust account of Owner with Trustee or another trustee;

(c) Owner will continue to hold the Qualified Securities and Proceeds or the proceeds thereof, with or without reinvestment at the election of the Owner, as the retention under the Construction Contract Documents;

(d) All risk of loss relating to, and other consequences of, investment in the Qualified Securities and Qualified Money Market Funds included in the Qualified Securities and Proceeds at termination of this Agreement will continue to be on Contractor;

(e) If there is a deficiency in retention held by Owner due to a risk of loss that is on Contractor, Contractor will make up the deficiency in retention upon request of Owner and/or, at Owner's option, Owner may withhold part or all of any such deficiency from amounts otherwise due to Contractor pursuant to the Contract Documents;

(f) Any interest or other income or profit on the Qualified Securities and Proceeds or any reinvestment thereof will be for the account of Owner; and

(g) Upon any reinvestment by Owner of the Qualified Securities and Proceeds, risk of loss relating to, and other consequences of, the reinvestment shall shift to Owner.

20. Miscellaneous.

(a) Assignment. Neither Contractor nor Owner may without the written consent of the other, assign, transfer, or sublet any portion or part of its rights under this Agreement or any of its respective obligations under this Agreement.

(b) Binding Nature. The provisions of this Agreement shall be binding upon the parties, their employees, agents, heirs, successors and assigns.

(c) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona, without giving effect to conflicts of law principles. No suit or action shall be commenced by any claimant other than in the Superior Court of the State of Arizona in Maricopa County, Arizona, and only after all contractual and administrative claims, controversies, dispute and disagreement resolution procedures have been fulfilled. If a dispute arises under this Agreement, the parties agree to exhaust all applicable administrative remedies provided for under Arizona Board of Regents Policy 3-809.

(d) Severability. If any provision or any part of a provision of this Agreement shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to applicable laws by any authority having jurisdiction, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of this Agreement, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

(e) No Waiver. The failure of either Contractor or Owner to insist, in any one or more instances, on the performance or timely performance of any of the obligations required by this Agreement shall not be construed as a waiver or relinquishment of such obligation or right with respect to any other performance or obligation.

(f) Headings. The headings used in this Agreement are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

(g) Notice. Whenever this Agreement requires that notice be provided to the other party, notice will be given as provided in the other Construction Contract Documents.

(h) No Construction Against Drafting Party. Each party acknowledges that it has had an opportunity to review this Agreement and the other Construction Contract Documents with counsel, and such documents shall not be construed against any party that is determined to have been the drafter of the documents.

(i) Nondiscrimination. The parties agree to comply with all applicable state and federal laws, rules, regulations and executive orders governing equal employment opportunity,

immigration, nondiscrimination, including the Americans with Disabilities Act, and affirmative action.

(j) Conflict of Interest. This Agreement is subject to Section 38-511, Arizona Revised Statutes. This Agreement may be canceled if any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of Owner is an employee, consultant, or agent of any other party to this Agreement.

(k) Arbitration. Notice is provided of Sections 12-1518 and 12-133, Arizona Revised Statutes.

(l) Contractor's Records. To the extent required by Section 35-214, Arizona Revised Statutes, Contractor agrees to retain all records relating to this Agreement. Contractor agrees to make those records available at all reasonable times for inspection and audit by Owner or the Auditor General of the State of Arizona during the term of this Agreement and for a period of five (5) years after the completion of this Agreement. The records shall be provided at Arizona State University, Tempe, Arizona, or another location designated by Owner upon reasonable notice to the contractor.

(m) Failure of Legislature to appropriate. If Owner's performance under this Agreement depends upon the appropriation of funds by the Arizona Legislature, and if the Legislature fails to appropriate the funds necessary for performance, then Owner may provide written notice of this to Contractor and cancel this Agreement without further obligation of Owner. Appropriation is a legislative act and is beyond the control of Owner.

(n) Continued Effect of the Provisions of this Agreement. Regardless of the termination or expiration of this Agreement, all obligations of Contractor to indemnify, hold harmless and defend Owner, Trustee and others in this Agreement and all obligations of Contractor to reimburse Owner shall remain in effect and shall continue in effect without termination. Regardless of the termination or expiration of this Agreement, all other provisions of this Agreement shall remain in effect and shall continue in effect without termination to determine the rights and obligations of Owner, Contractor and Trustee in respect of Qualified Securities and Proceeds, the Trust Subaccount, and acts, omissions and events occurring prior to such termination or expiration.

21. Trustee Third Party Beneficiary Rights Under This Agreement. Trustee is not a party to this Agreement and shall have no obligations or liabilities under or in respect of this Agreement. However, Owner and Contractor agree that Trustee is a third party beneficiary of this Agreement as to the rights and obligations of Owner and Contractor and the rights of Trustee in Sections 6, 7, 10, 11, 12, and 13 of this Agreement. Trustee will have the right to enforce its third party beneficiary rights against Owner and Contractor and will have the right to do so without Owner or Contractor joining in Trustee's action.

CONTRACTOR:

OWNER:

ARIZONA BOARD OF REGENTS

For and on behalf
ARIZONA STATE UNIVERSITY

(Signature)

(Signature)

(Printed Name & Title)

(Printed Name & Title)

Date Signed: _____

Date Signed: _____

OWNER PROJECT MANAGER

Approval by Owner's Capital Program Management Group project manager:

(Signature)

(Printed Name)

Attachment 1

Trustee's Trust Subaccount Fees as of the Date of This Agreement

Annual Administration Fee for the Trust Subaccount: \$175.00

Transaction Fee* \$ 25.00

*A transaction fee each time any Qualified Securities or Qualified Money Market Funds are deposited in the Trust Subaccount, delivered out of the Trust Subaccount, purchased, matured, sold or are otherwise transferred into or out of the Trust Subaccount.