

# AGREEMENT BETWEEN OWNER AND WALLACE E. CUNNINGHAM, INC.

## AGREEMENT

made as of the 2nd day of February in the year of Two Thousand and 15.

**BETWEEN** the Owner:

Jeffrey Epstein  
\_\_\_\_\_  
\_\_\_\_\_

and Wallace E. Cunningham Inc. (WCI):

**1111 West Arbor Drive  
San Diego, CA 92103**

For the following Project:

**Scope of project to be determined.**

The Owner and WCI agree as set forth below.

## TERMS AND CONDITIONS OF AGREEMENT BETWEEN OWNER AND WCI

### ARTICLE 1

#### WCI RESPONSIBILITIES

##### 1.1 WCI'S SERVICES

**1.1.1** WCI's services consist of those services performed by WCI, WCI's employees and WCI's consultants as enumerated in Articles 2 and 3 of this Agreement and any other services included in Article 12. Wallace Cunningham shall be the project designer and shall perform the services enumerated in Article 2.2. Guy West shall be the architect of record and shall oversee WCI's services as enumerated in Articles 2 and 3.

**1.1.2** WCI's services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Work.

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1.1.3 The services covered by the Agreement are subject to the time limitations contained in Subparagraph 11.5.1.

## ARTICLE 2

### SCOPE OF WCI'S BASIC SERVICES

#### 2.1 DEFINITION

2.1.1 WCI's Basic Services consist of those described under the three phases identified below, and any other services identified in Article 12.

#### 2.2 DESIGN PHASE

2.2.1 WCI shall review with the Owner alternative approaches to design and construction of the Project.

2.2.2 Based on the mutually agreed upon program, schedule and construction budget requirements, WCI shall prepare, for approval by the Owner, Design Documents consisting of drawings and other documents appropriate for the Project. See Exhibit 'A' for specific scope of work.

#### 2.3 CONSTRUCTION DOCUMENTS PHASE

2.3.1 Based on the approved Design Documents, WCI shall prepare, for approval by the Owner, Construction Documents consisting of Drawings and Specifications setting forth in detail the requirements for the construction of the Project.

2.3.2 WCI shall assist the Owner in connection with the Owner's responsibility for filing documents required for the approval of governmental authorities having jurisdiction over the Project.

2.3.3 Unless provided in Article 12, WCI, following the Owner's approval of the Construction Documents, shall assist the Owner in obtaining bids or negotiated proposals and assist in awarding and preparing contracts for construction.

#### 2.4 CONSTRUCTION PHASE

2.4.1 WCI's responsibility to provide Basic Services for the Construction Phase under this Agreement commences with the award of the Contract for Construction and terminates at the earlier of issuance to the Owner of the final Certificate for Payment or 60 days after the date of Substantial Completion of the Work.

2.4.2 WCI shall provide administration of the Contract for Construction as set forth below and described in Exhibit 'A,' current as of the date of this Agreement.

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**2.4.3** Duties, responsibilities and limitations of authority of WCI shall not be restricted, modified or extended without written agreement of the Owner and WCI with consent of the Contractor, which consent shall not be unreasonably withheld.

**2.4.4** WCI shall be a representative of and shall advise and consult with the Owner (1) during construction until final payment to the Contractor is due and (2) as an Additional Service at the Owner's direction from time to time during the correction period described in the Contract for Construction.

**2.4.5** WCI shall visit the site on a regular basis and as required to become generally familiar with the progress and quality of the Work completed and to determine in general if the Work is being performed in accordance with the Contract Documents. However, WCI shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of on-site observations, WCI shall keep the Owner informed of the progress and quality of the Work, and shall endeavor to guard the Owner against defects and deficiencies in the Work. The Owner may agree to more extensive site representation with WCI as Additional Services described in Paragraph 3.2.

**2.4.6** WCI shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility under the Contract for Construction. WCI shall not be responsible for the Contractor's schedules or failure to carry out the Work in accordance with the Contract Documents. WCI shall not have control over or charge of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

**2.4.7** WCI shall at all times have access to the Work wherever it is in preparation or progress.

**2.4.8** Based on WCI's observations and evaluations of the Contractor's Applications for Payment, WCI shall review and certify the amounts due the Contractor.

**2.4.9** WCI's certification for payment shall constitute a representation to the Owner, based on WCI's observations at the site as provided in Subparagraph 2.4.5 and on the data comprising the Contractor's Application for Payment, that the Work, to the best of WCI's knowledge, information and belief, has progressed to the point indicated and that quality of the Work is in accordance with the Contract Documents. The issuance of a Certificate for Payment shall not be a representation that WCI has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

**2.4.10** WCI shall have authority to reject Work which does not conform to the Contract Documents and will have authority to require additional inspection or testing of the Work whenever, in WCI's reasonable opinion, it is necessary or advisable for the implementation of the intent of the Contract Documents.

**2.4.11** WCI shall review and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. WCI's action shall be taken with such reasonable promptness as to cause no delay. WCI's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

**2.4.12** Contractor shall prepare a schedule of submittals for review prior to start of construction. All submittals shall be reviewed and stamped by the Contractor prior to submittal to WCI. This requirement shall be made a part of the General Conditions of the Contract for Construction.

**2.4.13** WCI shall prepare Change Orders and Construction Change Directives, with supporting documentation and data, if authorized or confirmed in writing by the Owner. WCI may authorize minor changes in the Work not involving an adjustment in the Contract Sum or an extension of the Contract Time which are not inconsistent with the intention of the Contract Documents.

**2.4.14** WCI shall conduct inspections to determine the dates of Substantial Completion and final completion and shall issue a final Certificate of Payment.

**2.4.15** WCI shall interpret and decide matters concerning performance of the Owner and Contractor under the requirements of the Contract Documents upon written request of either the Owner or Contractor. WCI's response to such requests shall be made with reasonable promptness and within any time limits agreed upon. When making such interpretations and initial decision, WCI shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, and shall not be liable for results of interpretations or decisions so rendered in good faith.

### **ARTICLE 3**

#### **ADDITIONAL SERVICES**

**3.1** Additional Services shall be provided if authorized and confirmed in writing by the Owner or if included in Article 12, and they shall be paid for by the Owner as provided in this Agreement. Such Additional Services shall include, in addition to those described in Paragraphs 3.2 and 3.3, itemized cost estimates, financial feasibility studies, planning surveys, environmental studies, measured drawings of existing conditions, coordination of separate contractors or independent consultants, coordination of construction or project managers, quantity surveys, interior design, inventories of materials or equipment, preparation of record drawings, and any other services not otherwise included in this Agreement under Basic Services or not customarily furnished in accordance with generally accepted design practices.

**3.2** If more extensive representation at the site than is described in Exhibit 'A' is required, such additional project representation shall be provided and paid for as set forth in Articles 11 and 12.

**3.3** As an Additional Service in connection with Owner directed Change Orders and/or Construction Change Directives, WCI shall prepare Drawings, Specifications and other documentation and data,

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evaluate Contractor's proposals, and provide any other services made necessary by such Change Orders and Construction Change Directives. Additional services shall be authorized per Article 3.1 and compensated per Article 11.3.

#### **ARTICLE 4**

##### **OWNER'S RESPONSIBILITIES**

**4.1** The Owner shall provide full information, including a program, which shall set forth the Owner's objectives, schedule, constraints, budget with reasonable contingencies, and criteria.

**4.2** The Owner shall furnish surveys describing physical characteristics, legal limitations, and utility locations for the site of the Project, a written legal description of the site and the services of Geotechnical Engineers or other consultants when such services are requested by WCI and agreed to by the Owner.

**4.3** The Owner shall furnish structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, various inspections and reports required by law or the Contract Documents.

**4.4** The Owner shall furnish all legal, accounting and insurance counseling services as may be necessary at any time for the Project, including auditing services the Owner may require to verify the Contractor's Applications for Payment or to ascertain how or for what purposes the Contractor has used the money paid by the Owner.

**4.5** The foregoing services, information, surveys and reports shall be furnished at the Owner's expense, and WCI shall be entitled to rely upon the accuracy and completeness thereof.

**4.6** Prompt written notice shall be given by the Owner to WCI if the Owner becomes aware of any fault or defect in the Project or nonconformance with the Contract Documents.

**4.7** The proposed text of certificates or certifications requested of WCI or the Owner's consultants shall be submitted to WCI for review and approval at least fourteen (14) days prior to execution.

#### **ARTICLE 5**

##### **CONSTRUCTION COST**

###### **5.1 DEFINITION**

**5.1.1** The Construction Cost shall be the total cost or estimated cost to the Owner of all elements of the Project designed or specified by WCI and the consultants listed in Exhibit "B."

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**5.1.2** The Construction Cost shall include the cost at current market rates of labor and materials furnished by the Owner and equipment designed, specified, selected or specially provided for by WCI, plus a reasonable allowance for the Contractor's overhead and profit. In addition, a reasonable allowance for contingencies shall be included for market conditions at the time of bidding and for changes in the Work during construction.

**5.1.3** Construction Cost does not include the compensation of WCI and the Owner's consultants, the costs of the land, rights-of-way, financing or other costs that are the responsibility of the Owner as provided in Article 4.

## **5.2 RESPONSIBILITY FOR CONSTRUCTION COST**

**5.2.1** It is recognized that neither WCI nor the Owner has control over the cost of labor, materials or equipment, over the Contractor's methods of determining bid prices, or over competitive bidding market or negotiating conditions. Accordingly, WCI cannot and does not warrant or represent that bids or negotiated prices will not vary from any estimate of Construction Cost or evaluation prepared or agreed to by WCI.

**5.2.2** No fixed limit of Construction Cost shall be established as a condition of this Agreement by the furnishing, proposal or establishment of a project budget, unless a fixed limit has been agreed upon in writing and signed by the parties hereto. WCI shall endeavor to design a project that meets the Owner's programmatic requirements and meets the Owner's budget for the Construction Cost. Fixed limits, if any, shall be increased in the amount of an increase in the Contract Sum occurring after execution of the Contract for Construction.

## **ARTICLE 6**

### **USE OF WCI'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS**

**6.1** The Drawings, Specifications and other documents prepared by WCI for this Project are instruments of WCI's service for use solely with respect to this Project, and WCI shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights, including the copyright. The Owner shall be permitted to retain hard copies, including reproducible hard copies, of WCI's Drawings, Specifications and other documents for information and reference in connection with the Owner's use and occupancy of the Project. Models of the project shall be considered the property of WCI. WCI's original electronic Drawings, Specifications or other documents shall not be used by the Owner or others on other projects, for additions to this Project or for completion of this Project by others, unless WCI is adjudged to be in default under this Agreement, except by agreement in writing and with appropriate compensation to WCI.

**6.2** Submission or distribution of documents to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of WCI's reserved rights.

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## ARTICLE 7

### **DISPUTE RESOLUTION**

**7.1** Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to mediation. Such mediation, unless the parties agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the project is located. Agreements reached in the mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

## ARTICLE 8

### **TERMINATION, SUSPENSION OR ABANDONMENT**

**8.1** This agreement may be terminated by either party upon not less than seven (7) days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

**8.2** If the Project is suspended by the Owner for more than thirty (30) consecutive days, WCI shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, WCI's compensation shall be equitably adjusted to provide for expenses incurred in the interruption and resumption of WCI's services.

**8.3** This Agreement may be terminated by the Owner upon not less than seven (7) days' written notice to WCI in the event that the Project is permanently abandoned. If the Project is abandoned by the Owner for more than ninety (90) consecutive days, WCI may terminate this Agreement by giving written notice. In the event of permanent abandonment, WCI shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due.

**8.4** Failure of the Owner to make payments to WCI in accordance with this Agreement shall be considered substantial nonperformance and cause for termination.

**8.5** If the Owner fails to make payment when due to WCI for services and expenses, WCI may, upon seven (7) days' written notice to the Owner, suspend performance of services under this Agreement. Unless payment in full is received by WCI within seven (7) days of the date of the notice, the suspension will take effect without further notice. In the event of a suspension of services, WCI shall have no liability to the Owner for delay or damage caused by the Owner because of such suspension of services.

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**8.6** In the event of termination not the fault of WCI, WCI shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due.

## ARTICLE 9

### MISCELLANEOUS PROVISIONS

**9.1** Unless otherwise provided, this Agreement shall be governed by the laws of St. Thomas, British Virgin Islands.

**9.2** Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statute of limitations shall commence to run no later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion, or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion.

**9.3** The Owner and WCI waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, but only to the extent covered by property insurance during construction. The Owner and WCI each shall require similar waivers from their contractors, consultants and agents.

**9.4** The Owner and WCI, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither Owner nor WCI shall assign this Agreement without the written consent of the other.

**9.5** This Agreement represents the entire and integrated agreement between the Owner and WCI and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and WCI.

**9.6** In recognition of the relative risks and benefits of the Project to both the Owner and WCI, the risks have been allocated such that the Owner agrees, to the fullest extent permitted by law, to limit the liability of WCI to the Owner for any and all claims, losses, costs, damages of any nature whatsoever or expenses from any cause or causes, including attorneys' fees and costs and expert witness fees and costs, so that the total aggregate liability of WCI to the Owner shall not exceed the insurance limits available at the time of the claim. It is intended that this limitation apply to any and all liability or cause of action, however alleged or arising, unless otherwise prohibited by law.

**9.7** Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or WCI.

**9.8** It is intended by the parties to this Agreement that WCI's services in connection with the Project shall not subject WCI's individual employees, officers, or directors to any personal legal exposure for the risks associated with this Project. Therefore, and notwithstanding anything to the contrary

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contained herein, the Owner agrees that as the Owner's sole and exclusive remedy, any claim, demand, or suit shall be directed and/or asserted only against WCI, a California corporation, and not against any of WCI's individual employees, officers, or directors.

**9.9** WCI and WCI's consultants shall have no responsibility for the discovery, presence, handling, removal or disposal of or exposure of persons to hazardous materials in any form at the Project site, including, but not limited to, asbestos, asbestos products, polychlorinated biphenyl (PCB) or other toxic substances.

**9.10** WCI shall retain the right to photograph the Project for a minimum period of one (1) year after construction is complete and publish any part or the entire Project in perpetuity.

## ARTICLE 10

### PAYMENTS TO WCI

#### 10.1 DIRECT PERSONNEL EXPENSE

**10.1.1** Direct Personnel Expense is defined as the direct salaries of WCI's personnel engaged on the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

#### 10.2 REIMBURSABLE EXPENSES

**10.2.1** Reimbursable Expenses include expenses incurred by WCI in the interest of the Project for:

1. Expense of regional transportation in service of the Project;
2. Expense of transportation and living expenses in connection with out-of-town travel; air transportation shall be business class service or better;
3. Long-distance communications;
4. Fees paid for securing approval of authorities having jurisdiction over the Project;
5. Reproductions, including electronic plotting services;
6. Postage and handling of Design Drawings and Outline Specifications;
7. Expense of overtime work requiring higher than regular rates, if authorized by the Owner;
8. Professional quality renderings and models requested by the Owner;
9. Expenses of computer-aided modeling and animated walk-through when requested by the Owner.

#### 10.3 PAYMENTS ON ACCOUNT OF BASIC SERVICES

**10.3.1** An initial payment as set forth in Paragraph 11.1 is the minimum payment under this Agreement.

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**10.3.2** Subsequent payments for Basic Services shall be made monthly and, where applicable, shall be in proportion to services performed within each phase of service.

**10.3.3** If and to the extent that the time initially established in Subparagraph 11.5.1 of this Agreement is exceeded or extended through no fault of WCI, compensation for any services rendered during the additional period of time shall be computed in the manner set forth in Subparagraph 11.3.2.

**10.3.4** When compensation is based on a percentage of Construction Cost and any portions of the Project are deleted or otherwise not constructed, compensation for those portions of the Project shall be payable to the extent services are performed on those portions, in accordance with the schedule set forth in Subparagraph 11.2.2, based on (1) the lowest bona fide bid or negotiated proposal, or (2) if no such bid or proposal is received, the most recent preliminary estimate of Construction Cost or detailed estimate of Construction Cost for such portions of the Project.

**10.4 PAYMENT ON ACCOUNT OF ADDITIONAL SERVICES AND REIMBURSABLE EXPENSES**

**10.4.1** Payments on account of WCI's Additional Services and for Reimbursable Expenses shall be made monthly upon presentation of WCI's statement of services rendered or expenses incurred.

**10.5 PAYMENTS WITHHELD**

**10.5.1** No deductions shall be made from WCI's compensation on account of sums withheld from payments to contractors.

**ARTICLE 11**

**BASIS OF COMPENSATION**

The Owner shall compensate WCI as follows:

**11.1** AN INITIAL PAYMENT OF Fifteen Thousand Dollars (**\$15,000**) shall be made upon execution of this Agreement and shall be the minimum payment under this Agreement.

**11.2 BASIC COMPENSATION**

**11.2.1** FOR BASIC SERVICES, as described in Article 2, and any other services included in Article 12 as part of Basic Services, Basic Compensation shall be computed as follows:

**Compensation to WCI shall be on a Lump Sum basis. Monthly services shall be billed on a percentage of completion basis. Lump Sum fee shall be established upon completion of a detailed project program/scope of work.**

11.2.2 Progress payments for Basic Services in each phase shall total the following percentages of the total Basic Compensation payable:

Schematic Design Phase:	twenty percent	(20%)
Design Development Phase:	thirty percent	(20%)
Construction Documents Phase:	thirty percent	(40%)
Bidding/Negotiation Phase:	five percent	(05%)
Site Observation Phase:	fifteen percent	(15%)
Total Basic Compensation	one hundred percent	(100%)

### 11.3 COMPENSATION FOR ADDITIONAL SERVICES

11.3.1 FOR PROJECT REPRESENTATION BEYOND BASIC SERVICES, as described in Article 3, compensation shall be computed as follows:

**Additional Services shall be billed on an hourly basis at the following fixed rates:**

Design Principal	\$225.00
Project Manager	\$150.00
Project Architect	\$125.00
Draftsman	\$ 85.00
Clerical	\$ 50.00

11.3.2 FOR ADDITIONAL SERVICES OF WCI provided under Article 3 or identified in Article 12, compensation shall be computed as follows:

**Additional Services shall be billed on an hourly basis at the following fixed rates:**

Design Principal	\$225.00
Project Manager	\$150.00
Project Architect	\$125.00
Draftsman	\$ 85.00
Clerical	\$ 50.00

### 11.4 REIMBURSABLE EXPENSES

11.4.1 REIMBURSABLE EXPENSES, as described in Paragraph 10.2, and any other items included in Article 12, incurred by WCI, WCI's employees and consultants in the interest of the Project shall be billed at one.two times direct cost.

**11.5 ADDITIONAL PROVISIONS**

**11.5.1** IF THE BASIC SERVICES covered by this Agreement have not been completed within **thirty-six (36)** months of the date hereof, through no fault of WCI, extension of WCI's services beyond that time shall be compensated as provided in Subparagraphs 10.3.3 and 11.3.2.

**11.5.2** Payments are due and payable **upon receipt** of WCI's invoice. Amounts due **thirty (30)** days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time-to-time at the principal place of business of WCI.

**11.5.3** The rates and multiples set forth for Additional Services shall be annually adjusted in accordance with normal salary review practices of WCI.

**ARTICLE 12**

**OTHER CONDITIONS OR SERVICES**

**12.1** The Owner shall be responsible for entering into a separate contract for services with, but not limited to, the following consultants; Geotechnical Engineer, Land Surveyor, Civil Engineer, Structural Engineer, Mechanical and Plumbing Consultants, Electrical Consultant, Energy Consultant, Lighting Consultant, Environmental Consultant, and all others deemed necessary per Article 4. Refer to Exhibit 'B' for an outline of Primary and Secondary design consultants.

**12.2** The Owner shall be responsible for all costs related to fees, licenses and permits as required by any regulatory agency having jurisdiction over any portion or phase of the project.

**12.3** WCI shall provide coordination of their work with the work of all consultants outlined in Subparagraph 12.1.

This Agreement entered into as of the day and year first written above.

**OWNER**

**WCI**

\_\_\_\_\_  
Jeffrey Epstein

\_\_\_\_\_  
Guy West, Vice President

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## EXHIBIT 'A'

### SCOPE OF SERVICES OUTLINE

#### PRE-DESIGN SERVICES

- Programming with Owner
- Project Data Sheet/Code Analysis
- Space Schematics/Flow Diagrams

#### SITE DEVELOPMENT SERVICES

- Site plan of property including any future development
- Coordination with Geotechnical, Civil, Landscape, and Environmental Consultants

#### DESIGN SERVICES

- Design Drawings
  - Site Plan as required for new improvements only
  - Floor Plan(s)
  - Roof Plan(s)
  - Building Sections
  - Exterior Elevations
- Finish Material Investigation
- Design Study Model *See note below.*

#### CONSTRUCTION DOCUMENT PHASE

- Construction Documents as required to secure a combination building permit
- Materials Specifications
- Coordination with Primary and Secondary design consultants

#### CONSTRUCTION ADMINISTRATION SERVICES

- Project Administration
- Periodic Site Observation Visits
- Supplemental Design Documentation

*NOTE: Presentation wood models of the final design to be considered part of Additional Services.*

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**EXHIBIT 'B'**

**PRIMARY DESIGN CONSULTANTS**

Land Surveyor

Geotechnical Engineer

Civil Engineer

Structural Engineer

Mechanical / Plumbing Consultant

Electrical Consultant

Interior Designer

Landscape Designer

Energy Consultant

**SECONDARY DESIGN CONSULTANTS**

Environmental Consultant

Lighting Designer

Low Voltage Consultant

Security Consultant

- Audio / Visual Consultant
- Computer/Data

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