

Construction Contract

For

Mercy Alliance, Inc.

Crystal Lake, Illinois

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CONSTRUCTION CONTRACT

For

MERCY ALLIANCE, INC.

Crystal Lake, Illinois

THIS AGREEMENT (the "Agreement"), made this 23rd day of January, 2004, by and between KIFERBAUM CONSTRUCTION CORPORATION, hereinafter called "Contractor", with its principal place of business at 790 Estate Drive, Deerfield, IL 60015 and MERCY ALLIANCE, INC., hereinafter called "Owner", with its principal place of business 1000 Mineral Point Avenue, Janesville, Wi, 53547-5003.

WITNESSETH:

Owner is the owner of the real estate legally described in Exhibit "A" attached hereto (the "Site").

Contractor and Owner, in consideration of the mutual covenants and agreements contained herein, hereby agree as follows:

Article 1. Scope of the Work

Contractor shall furnish, or cause to be furnished, all of the material and perform, or cause to be performed, all of the work necessary for construction work and at Owner's option, for certain design work at the site as set forth below (the "Work"). The Work includes the design and completion of certain site improvement work (the "Site Work") and an approximate seventy (70) bed hospital and multi-specialty physician clinic (the "Building Work", and collectively with the Site Work referred to as the "Work" and the project is referred to herein as the "Project"). Contractor's Work shall consist of the following:

A. **Contractor's Design Services.** At Owner's option, and to the extent determined by Owner, Contractor shall cause to be prepared the civil engineering drawings necessary for the Site Work and all of the mechanical, electrical, plumbing, and fire protection drawings and specifications for the design of the systems identified below necessary for the construction of the Building Work (collectively referred to as the "Contractor's Design Services"):

1. **Mechanical System.** Mechanical drawings consisting of plans showing single line layouts with approximate sizing of major duct and piping systems, plans showing sizes and outline of central heating, cooling and ventilation equipment and riser diagrams showing distribution system.

2. **Electrical System.** Electrical drawings consisting of plans showing sizes and outline of fixed equipment; riser diagrams for construction, showing arrangements of feeders, sub-feeders, bus ducts, load centers, and branch circuit panels, typical lighting layout, and typical electrical plan layout showing switches, and outlets.

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3. Plumbing System. Plumbing drawings showing the completed plumbing system.
4. Fire Protection System. Fire protection drawings showing the completed fire protection system.
5. Such Work within the same general scope as may be designated by Owner.

The above referenced design documents (the "Contractor's Design Documents") shall be prepared in accordance with the preliminary architectural plans (the "Preliminary Plans") attached hereto as part of Exhibit "B" and made a part hereof, the "Owner's Design Documents" (defined below) and Applicable Laws. The Contractor shall not be responsible for any design services except those outlined above.

B. Construction Services. Contractor shall furnish, or cause to be furnished, all of the material and labor necessary for the Work in accordance with the Contract Documents and all Work shall be performed in accordance with all Applicable Laws.

C. Other Design Work. The Owner has entered into a separate contract with Hammel, Green and Abrahamson, Inc. (the "Architect") for the design of the hospital and clinic and other separate contracts for all other design work, including but not limited to structural engineering and landscape design work (the "Owner's Design Work"). All architectural services shall be rendered by the Architect. The Architect will have direct supervision of the architectural work and the Contractor shall have no liability relating to the errors and omissions of the Architect or Owner's other design professionals and Contractor shall be entitled to rely upon all such design work as having been prepared in accordance with all applicable building and zoning codes and all other laws and regulations in effect as of the date hereof ("Applicable Laws"). The design documents caused to be prepared by Owner (the "Owner's Design Documents") shall be prepared in accordance with the Preliminary Plans. If anything contained in the Contract Documents is inconsistent with this Agreement, the document with the most specific provision or information shall govern.

Upon completion of the Preliminary (Scope) Design Documents, Contractor and Owner shall establish a target guaranteed maximum price ("GMP") for each of the following: (i) the Site Work (the "Site Work Target GMP") and (ii) the Building Work (the "Building Target GMP"), which target maximum prices shall be set forth on Exhibit D attached hereto. The Owner and Contractor agree to cause their respective design work (i.e. the Owner's Design Documents and the Contractor's Design Documents") to be prepared with scope and budget controls that are consistent with and in reasonable conformance with the Site Work Target GMP and Building Target GMP and each will advise the other when either party becomes aware that either target GMP may be exceeded. Contractor and Owner shall each submit to the other its design documents for approval. Both parties agree that they will promptly review and approve, or disapprove (with specifically stated reasons therefor) the applicable design documents, and that they will not withhold their approval except for matters which in their reasonable opinion are warranted. Each party shall reasonably address the other's reasonable objections and make requested changes. When Contractor's Design Documents and Owner's Design

Documents have been approved by Contractor and Owner by affixing thereon the signature or initials of an authorized officer or employee of each of said respective parties, the Contractor's Design Documents and Owner's Design Documents shall be deemed to be made a part hereof. Upon Owner's reasonable request, Contractor shall make minor modifications to any documents delivered by Contractor and identify areas of possible cost savings or time savings in order to reduce the Site Work Target GMP or the Building Target GMP. Upon Owner's approval of the Contractor's Design Documents and finalization of the Owner's Design Documents for the particular phase, Contractor shall, within thirty (30) days of each separate approval date, guarantee and establish a lump sum price for the relevant phase of the Work (such price being hereinafter referred to as the "Site Work Price" and "Building Price", as the case may be, or in general as a "Phase Price") and Exhibit D attached hereto shall be amended accordingly. In addition, Exhibit D will be amended to set forth the date for substantial completion of the particular phase of the Work (i.e. the Site Work or the Building Work) and to identify all appropriate "Contract Documents". This Agreement and all Change Orders issued after the execution of this Agreement and all exhibits attached hereto from time to time are referred to herein as the Contract Documents. In the event the Site Work Price or Building Price exceeds the Site Work Target GMP or Building Target GMP, and Owner requests that the Project be redesigned for value engineering purposes, then the Contractor and Owner agree to work in good faith to redesign the particular phase until the Work for that phase can be completed for an amount equal to or less than the relevant Target GMP. Neither Contractor nor Owner will not act in an unreasonable, arbitrary or capricious manner with respect to withholding its approval of any documents delivered to the other. Upon the relevant Phase Price being determined and Contractor obtaining all necessary permits for each phase of the Work, Contractor shall commence the applicable phase of the Work.

Article 2. Time of Completion

The Work shall be substantially completed, in conformance with the Contract Documents (as such shall be amended from time to time in accordance with the terms of Article 1 hereof) and a detailed schedule for each phase shall be approved by Owner and Contractor as Exhibit "E" (individually or collectively, as the context dictates, referred to as the "Contract Time"). If Contractor is delayed at any time in the progress of the Work by any act or neglect of Owner, or by any employee of Owner, or by any separate contractor employed by Owner, or by changes ordered in the Work, or by labor disputes, weather, fire, unusual delay in transportation, fuel, material, or labor shortages or unavailability, unavoidable casualties or any causes beyond Contractor's control, then the Contract Time shall be extended by a period equal to such delay. Such delay shall hereinafter be referred to as "excused delay". All claims for extension of time shall be made, in writing, to Owner no more than twenty (20) days after the occurrence of the delay; otherwise they shall be waived. In the case of a continuing cause of delay, only one (1) claim is necessary.

Article 3. Contract Sum

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The Site Work Price and Building Work Price referred to above shall be the aggregate of (i) the sum of the cost of all work to be performed under all Subcontracts entered into by the Contractor for the Site Work and Building Work and the costs associated with the Contractor's insurance and general conditions, (as per Exhibit "G" attached) (ii) a payment to Contractor equal to four and eight tenths percent (4.8%) of the sum of the amounts specified at subsection (i) above for Contractor's overhead; and (iii) a fee to Contractor equal to three and two tenths percent (3.2%) of the aggregate of the amounts described in (i) and (ii) above (collectively referred to as the "Contract Sum", which amounts will be set forth in Exhibit "D", as revised from time to time in accordance with the terms of Article 1. Owner shall pay the Contract Sum in current funds. The Contract Sum shall become a guaranteed lump sum price for the Work as provided for at Article 1 subject to further modification only for Change Orders as provided for in Article 6, for additional costs arising out of excused delays and for such other reasons as may be expressly set forth herein. All other costs of the Project in excess of the Contract Sum shall be borne by the Contractor.

Article 4. Payment for Design Services and Construction Services and the Contract Sum

A. **Payments for Contractor's Design Services.** Owner shall pay Contractor for Contractor's Design Services within twenty-one (21) days of Contractor's invoice on a monthly progress payment basis. The total cost for the Contractor's Design Services shall be \$_____ and such amount shall not be included in the Contract Sum.

B. **Construction Services - Progress Payments of the Contract Sum.** Owner shall make monthly payments on account of this Agreement within fifteen (15) business days after receipt of Application for Payment, as set forth in Exhibit "F", by Contractor, as follows:

1. Until fifty percent (50%) of each of the three phases of the Work is completed, Owner shall make payments on account to the Contractor equal to ninety percent (90%) of the aggregate value of the respective phase of Work completed, based upon the value of labor, services and materials incorporated in that phase of the Work and of materials stored at the site up to the last day of the preceding month, less the aggregate amount of previous payments made by Owner to Contractor.
2. After fifty percent (50%) of the Work for the applicable phase is completed, Owner shall make payments on account to Contractor equal to ninety-five percent (95%) of the aggregate value of labor, services and materials incorporated in that portion of the Work and of materials stored at the site up to the last day of the preceding month, less the aggregate amount of previous payments made by Owner to Contractor.

3. Along with each Application for Payment to Owner or contemporaneous with payment, Contractor shall deliver its general lien waiver and further lien waivers from all "major" Subcontractors on the project waiving liens for Work for which payment was requested by Contractor and paid for by Owner on the preceding Application for Payment. Major Subcontractors shall mean those Subcontractors and material suppliers having contracts with Contractor in respect to the project contemplated hereby in excess of \$25,000.00.

C. Final Payment. Full payment of the Site Work Price and the Building Price ("Final Payment(s)") shall be due and payable separately at such times as each of the phases of the Work are substantially complete and this Agreement substantially performed. Issuance of a temporary certificate of occupancy (with respect to the Building Work only), I.D.P.H approval (with respect to the Building Work only), and the issuance by Architect of its Certificate of Substantial Completion shall be deemed to be conclusive evidence that the Work is substantially complete in the event of a dispute. If there should remain minor items to be completed, Contractor and Owner shall list such items and Contractor shall deliver, in writing, its unconditional promise to complete said items within a reasonable time thereafter. Owner may retain a sum equal to one hundred fifty percent (150%) of the estimated cost of completing any unfinished item, provided that said unfinished items are listed separately and the estimated cost of completing each item is likewise listed separately. Thereafter, Owner shall pay to Contractor monthly, on the 10th day of each month, the amount retained for incomplete items as each of said items is completed.

In the event any payment by Owner to Contractor is due, and is not paid by Owner to Contractor on such due date, Owner shall pay interest on said unpaid amount (upon receipt of invoice) from and after its due date, to and including the date of payment, at the rate of four percent (4%) per annum over the prime rate of interest charged to its largest commercial corporate borrowers by Harris Bank of Chicago (or similar institutions if said Bank shall cease to exist or to publish such a prime rate) from the date when the same is due hereunder until the same shall be paid, but if such rate shall exceed the highest rate allowed by law, such rate shall be reduced to the highest rate allowed by law.

Contractor's request for Final Payment for a particular phase (less sums withheld for incomplete items) shall be accompanied by the following instruments:

1. Contractor's affidavit that all payrolls and bills for materials and equipment, and other indebtedness connected with the Work for which Owner has paid Contractor prior to the time of application have been paid or otherwise satisfied, and
2. Consent of surety, if any, to final payment.
3. Final lien waivers.

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Article 5. (For Future Use)

Article 6. Changes in the Work

Owner, without invalidating this Agreement, may order changes in the Work within the general scope of this Agreement, consisting of additions, deletions or other revisions, with the Contract Sum and Contract Time being adjusted accordingly. All such changes in the Work shall be authorized by a Change Order and shall be executed under the applicable conditions of the Contract Documents.

A Change Order is a written order to Contractor signed by Owner issued after the execution of the Agreement authorizing a change in the Work or an adjustment in the Contract Sum or Contract Time. A Change Order shall be signed by Contractor and Owner if there is an adjustment in the Contract Sum or Contract Time. The Contract Sum and Contract Time may be changed only by a Change Order.

The cost or credit to Owner resulting from a change in the Work shall be determined in one or more of the following ways:

- A. By mutual acceptance of a lump sum properly itemized;
- B. By unit prices stated in the Contract Documents or subsequently agreed upon; or
- C. By cost and a mutually acceptable fixed or percentage fee.

If none of the methods set forth above is agreed upon, Contractor, provided it received a Change Order, shall promptly proceed with the Work involved. The cost of such Work shall then be determined on the basis of Contractor's reasonable expenditures and savings, including, in the case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, Contractor shall keep and present an itemized accounting, together with appropriate supporting data. The amount of credit to be allowed by Contractor to Owner for any deletion or change which results in a net decrease in cost will be the amount of the actual net decrease in the cost of the Work. When both additions and credits are involved in any one change, the allowance for Contractor's general conditions/insurance and overhead/fee shall be figured on the basis of net increase, if any.

If unit prices are stated in the Contract Documents or subsequently agreed upon, and if the quantities originally contemplated are so changed in a proposed Change Order that application of the agreed unit prices to the quantities of Work proposed will create a hardship on Contractor or Owner, the applicable unit prices shall be equitably adjusted to prevent such hardship.

Article 7. Correction of Work

If during the period of construction the Work is found to be defective or not in accordance with the Contract Documents, Contractor shall correct it with reasonable promptness after receipt of written notice from Owner to do so unless Owner has previously given Contractor written acceptance of such condition. Owner shall give such notice promptly after discovery of the condition.

All such defective or nonconforming Work shall be corrected or removed from the site, if necessary, and the Work shall be corrected to comply with the Contract Documents without cost to Owner. Contractor shall bear the cost of making good all Work of separate contractors destroyed or damaged by such removal or correction.

If Contractor does not remove such defective or nonconforming Work within a reasonable time, Owner may remove it and store the materials or equipment at the expense of Contractor. If Contractor does not pay the cost of such removal and storage within ten (10) days thereafter, Owner may, upon ten (10) additional days written notice, sell such Work at auction or at private sale and shall account for the net proceeds thereof, after deducting all costs that should have been borne by Contractor. If such proceeds of sale do not cover all costs which Contractor should have borne, the difference shall be charged to Contractor and an appropriate Change Order shall be issued. If payments then or thereafter due Contractor are not sufficient to cover such amount, Contractor shall pay the difference to Owner.

Contractor guarantees the Work for a period of one (1) year only after the date the Work is substantially complete or for such longer period of time as may be prescribed by the terms of any applicable special guarantee required by the Contract Documents. Any guarantee Work shall be done in accordance with the requirements above as to correction, repair or replacement of Work during the construction period. Owner shall be required to perform routine and appropriate regular maintenance during the guarantee period. To the extent products, equipment, systems or materials incorporated in the Work are specified and purchased by the Owner, they shall be covered exclusively by the warranty of the manufacturer.

Article 8. Insurance

A. Contractor's Liability Insurance. Contractor shall purchase and maintain such insurance as will protect it from claims set forth below which may arise out of or result from Contractor's operations under this Agreement, whether such operations be by Contractor, by any Subcontractor, or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

1. Claims under workmen's compensation, disability benefits, and other similar employee benefit acts;

2. Claims for damages arising out of bodily injury, occupational sickness or disease, or death of its employees;
3. Claims for damages arising out of bodily injury, sickness or disease, or death of any person other than its employees;
4. Claims for damages insured by usual personal injury liability coverage which are sustained by (i) any person as a result of an offense directly or indirectly related to the employment of such person by Contractor, or (ii) any other person;
5. Claims for damages arising out of injury to or destruction of tangible property, and
6. Claims for damages because of bodily injury or property damage arising out of the ownership, maintenance or use of motor vehicles.

The insurance required by Subparagraphs (A) (3), (A) (4), (A) (5) and (A) (6) of this Article 8 shall be written for limits of liability of not less than One Million & NO/100 Dollars (\$1,000,000.00) each occurrence with a general aggregate limit of Two Million & NO/100 Dollars (\$2,000,000.00). The insurance required by Subparagraphs (A) (1) and (A) (2) of this Article 8 shall be written for limits required by law. Said insurance shall include contractual liability insurance as applicable to Contractor's obligations to indemnify Owner as required by Subparagraph (P) of Article 9. In addition to the foregoing, Contractor shall maintain a general liability umbrella of Ten Million & NO/100 Dollars (\$10,000,000.00).

B. Owner's Liability Insurance. Owner shall be responsible for purchasing and maintaining such other insurance as will protect it against claims which may arise from operations under this Agreement.

C. Property Insurance. Contractor shall purchase and maintain until the date the Work is substantially complete All Risk Builder's Risk insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall include the interests of Contractor, Owner, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils normally insured against in an All Risk Builder's Risk policy.

Contractor shall purchase and maintain such steam boiler and machinery insurance as may be required by the Contract Documents or by law. This insurance shall include the interests of Contractor, Owner, Subcontractors and Sub-subcontractors in the Work.

Any insured loss is to be adjusted with Contractor and made payable to Contractor, as trustee for the insureds as their interests may appear.

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If Owner requests, in writing, that insurance for special hazards be included in the property insurance policy, Contractor shall, if possible include such insurance and the cost thereof shall be charged to Owner by appropriate Change Order.

Contractor and Owner waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance provided under Paragraphs (C) and (D) of Article 8, except such rights as they may have to the proceeds of such insurance.

If required, in writing, by any party in interest, Contractor, as trustee, shall, upon the occurrence of an insured loss, give bond for the proper performance of its duties. Contractor shall deposit in a separate account any money so received and it shall distribute it in accordance with such agreement as the parties in interest may reach. If, after such loss, no other special agreement is made, replacement of damaged Work shall be covered by an appropriate Change Order.

Contractor, as trustee, shall have power to adjust and settle any loss with the insurers. Priority in distribution shall be given so as to reimburse Contractor for Work for which payment had not been made by Owner as of the date of loss.

D. **Loss of Use Insurance.** Owner, at its option, may purchase and maintain such insurance as will insure it against loss of use of its property due to fire or other hazards, however caused, and shall look only to such insurance in respect to such loss. Owner hereby releases Contractor from all claims for loss or damage to its business or property, lost profits, and indirect or consequential damages.

E. **Owner-Contractor Protective Liability Insurance.** In lieu of providing Owner with the insurance specified at Section 8.A., Contractor may purchase Owner-Contractor Protective insurance from the Contractor's usual sources as primary coverage for the Owner's vicarious liability for construction operations under the Agreement. In such case the Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate limits required for Contractor's Liability Insurance under Section 8.A.

F. **Professional Liability.** [to be discussed].

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Article 9. Miscellaneous Provisions

A. **Supervision and Construction Procedure.** Contractor shall supervise and direct the Work and shall be solely responsible for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under this Agreement.

B. **Labor and Materials.** Unless otherwise specifically noted, Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, transportation, and other facilities and services necessary for the proper execution and completion of the Work. All materials shall be new unless otherwise specified. Owner shall not

hire any non-union contractors or subcontractors to perform work at the Site until Contractor has completed the Work.

C. **Discipline of Employees.** Contractor shall, at all times, enforce strict discipline and good order among its employees, and shall not knowingly employ on the Work any unfit person or anyone not skilled in the task assigned to him.

D. **Surveys and Easements.** Owner shall furnish all boundary and topographical surveys (showing the location of all existing improvements, building, set back lines and easements), unless otherwise specified, and shall furnish all easements necessary for access to the site, including easements for installation and maintenance of utilities.

E. **Taxes.** Contractor shall pay all sales, consumer, use and other similar taxes required by law. If the Project is exempt from state sales tax, Owner shall provide Contractor with reasonably satisfactory evidence of such prior to the commencement of the Work.

F. **Permits and Fees.** Unless otherwise provided in the Contract Documents, Contractor shall secure and pay for all building permits, and all governmental building fees and licenses (except environmental permits, impact fees, annexation fees, tap-on fees, recapture charges or municipal donations) necessary for the proper execution and completion of the Work which are applicable at the date of this Agreement.

G. **Concealed Conditions.** If in the performance of the Work the Contractor finds latent or concealed conditions or soil conditions which materially differ from the conditions the Contractor reasonably anticipated, or normally encountered, then the Contract Sum and/or the Contract Time shall be equitably adjusted by Change Order within a reasonable time after the conditions are first observed.

Contractor represents that it has no knowledge whether the site of the Work is located in an area that has been or may be designated as a flood plain, flood way and/or wetlands. Owner acknowledges and agrees that in the event that the Work is delayed, disrupted or suspended as a result of any action of any public authority because the site of the Work is found to be in or on a flood plain, flood way or wetlands, then the Contract Time shall be extended for the period of disruption, delay or suspension. Contractor shall be reimbursed by Owner for any costs, damages or losses, including loss of anticipated profit which arise as a result of any delay, disruption or suspension mentioned above.

Owner represents and warrants that to the best of its knowledge the Owner, is not in violation of any Federal, state or local environmental law, statute or ordinance, and that the Site is free from any hazardous materials that would trigger response or remedial action under any existing environmental laws, or any existing common law theory based on a nuisance or strict liability.

H. **Notices.** Contractor shall comply with all Applicable Laws. If Contractor observes that any of the Contract Documents are at variance any Applicable Laws, it shall promptly notify Owner, in writing, and any necessary changes shall be made by appropriate modification. If

Contractor performs any Work actually knowing it to be contrary to such Applicable Laws, and without such notice to Owner, it shall assume full responsibility therefore and shall bear all costs attributable thereto, provided however, to the extent of any changes in, or adoption of new laws, ordinances or regulations, after the date of this Agreement, Owner shall be responsible for all costs attributable thereto.

I. **Cash Allowance.** Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. These allowances, unless otherwise stated, shall cover the cost of the materials and equipment delivered and unloaded at the site and all applicable taxes, Contractor's handling costs on the site, labor and installation costs. Contractor's general conditions/insurance and overhead/fee and other expenses contemplated for the original allowance shall be included in the Contract Sum and not in the allowance. If the cost, when determined, is more than or less than the allowance, the Contract Sum shall be adjusted accordingly by Change Order which will include additional handling costs on the site, labor, installation costs, general conditions, insurance, overhead, fee and other expenses.

J. **Superintendent.** Contractor shall employ a competent superintendent who shall be in attendance at the Site at all reasonable times during the progress of the Work.

K. **Responsibility of Contractor.** Contractor shall be responsible to Owner for the acts and omissions of all of its employees and all Subcontractors, their agents and employees, and all other persons performing any of the Work under a contract with Contractor.

L. **Progress Schedule.** Contractor, after being awarded the Agreement, shall prepare and submit to Owner an estimated progress schedule for the Work. This schedule shall indicate the dates for starting and completion of various stages of construction and shall be revised as required by the conditions of the Work.

M. **Drawings and Specifications at Site.** Contractor shall maintain at the Site for Owner one (1) copy of all drawings, specifications, addenda, approved shop drawings, Change Orders and other modifications in good order and marked to record all changes made during construction. These materials shall be available to Owner. The drawings marked to record all changes made during construction shall be delivered to Owner upon completion of the Work and receipt of Payment.

N. **Use of Site.** Contractor shall confine operations at the Site to areas permitted by all Applicable Laws, permits and the Contract Documents and shall not unreasonably encumber the Site with any materials or equipment.

O. **Cutting and Patching.** Contractor shall do all cutting, fitting or patching of its Work that may be required to make the several parts of the Work fit together properly and shall not endanger any Work by cutting, excavating or otherwise altering the Work or any part of it.

P. **Cleaning Up.** Contractor, at all times, shall keep the Site reasonably free from accumulation of waste materials or rubbish caused by its operations. At the completion of the Work, Contractor shall remove all its waste materials and rubbish from and about the project as well as all of its tools, construction equipment, machinery and surplus materials, and shall clean all glass surfaces and leave the building "broom clean", or its equivalent, except as otherwise specified. If Contractor fails to clean up, Owner may do so and the cost thereof shall be charged to Contractor.

Q. **Indemnification.** Contractor shall indemnify and hold harmless Owner and its employees, from and against all claims, damages, losses and reasonable expenses, including reasonable attorneys' fees (unless caused in whole or in part by a party indemnified hereunder or any of its contractors or agents), arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is (i) attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself); and (ii) caused by any negligent act or omission of Contractor, any Subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable. The indemnification obligations under this Subparagraph shall not be limited in any way by a limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts. Owner shall notify Contractor of any claim under this indemnity in such time as to avoid prejudice to Contractor and Contractor shall have the right to defend with its own counsel, provided such is reasonably acceptable to Owner. Such indemnification shall not include, nor shall the Contractor be liable for, indirect, special or consequential costs, expenses or damages.

R. **Written Notice.** Written notice shall be deemed to have been deemed duly served on the first business day following receipt if delivered in person, by messenger or by nationally recognized overnight courier for next business day delivery or by facsimile transmission to the individual or member of the firm or to an officer of the corporation for whom it was intended, or, if delivered at or sent by registered or certified mail three (3) business days after being deposited in the United States mail, postage prepaid, to the last business address known to the party who gives the notice,

If to Owner: David E. Kurtz
Mercy Alliance
1000 Mineral Point Avenue
Janesville, WI 54547-5003
608-756-6173

If to Contractor: Mr. Jacob Kiferbaum
Kiferbaum Construction Corporation
790 Estate Drive
Deerfield, IL 60015
Fax: (847) 914-9650

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or at such other address as the parties may hereafter designate by written notice to the other.

S. Claims for Damages. Should either party to this Agreement suffer injury or damage to persons or property because of any act or omission of the other party or of any of its employees, agents or others for whose acts it is legally liable, claim shall be made, in writing, to such other party within a reasonable time after the first observance of such injury or damage.

T. Royalties and Patents. Contractor shall pay all royalties and license fees. It shall defend all suits or claims for infringement of any patent rights relating to equipment or materials incorporated in the Work and shall save Owner harmless from loss on account thereof, except that Owner shall be responsible for all such loss when a particular design process or the product of a particular manufacturer or manufacturers is specified by Owner, but if Contractor has actual knowledge that the design, process or product specified is an infringement of a patent, it shall be responsible for such loss unless it promptly gives such information to Owner.

U. Termination of Agreement by Contractor. In the event (i) the Work is stopped by any public authority, or through the act, omission, or inaction of Owner, without the fault of Contractor, (ii) Owner fails to pay Contractor any payment after it is due, (iii) Owner breaches any of its other obligations under the Agreement, (iv) a voluntary or involuntary petition shall be filed by Owner under any law having for its purpose the adjudication of Owner as bankrupt, (v) a receiver is appointed for the property of Owner by reason of the insolvency of Owner, (vi) any department of the State or Federal government, or any officer thereof, duly authorized, shall take possession of the business or property of Owner by reason of the insolvency of Owner, (vii) Owner makes an assignment for the benefit of its creditors, such shall be deemed to be a default by Owner. In the event of a default by Owner, Contractor may cease all or any portion of the Work and Owner shall be responsible for all increased costs arising out of such delay and such delay shall extend the Contract Time. Further, in any such event and irrespective of whether or not Contractor ceases all or any portion of the Work, after thirty (30) days written notice to Owner and failure of Owner to remove the default or cure such default, Contractor may terminate this Agreement, remove any materials, equipment, and tools from the Site, and recover from Owner payment for all Work executed, any loss sustained by Contractor, Contractor's reasonable profit and such other damages as Contractor may sustain by reason of Owner's default and the termination of the Agreement and all amounts set forth in Section 9.2 below.

V. Termination of Agreement by Owner. If Contractor is adjudged a bankrupt, or if it makes a general assignment for the benefit of its creditors, or if a receiver is appointed on account of its insolvency, or if it persistently or repeatedly refuses or fails, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if it fails to make uncontested payment to Subcontractors or for materials or labor, or persistently disregards Applicable Laws or otherwise is guilty of a substantial violation of a provision of the Contract Documents, then Owner may, without prejudice to any right or remedy

and after giving Contractor and its surety, if any, thirty (30) days written notice (and failure of Contractor to cure or commence to cure with all due diligence such matter within such thirty (30) day period), terminate the employment of Contractor and take possession of the Site and of all materials, equipment, tools, construction equipment and machinery thereon owned by Contractor and may finish the Work by whatever method it may deem expedient. In such case, Contractor shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Sum exceeds the cost of finishing the Work, such excess shall be paid to Contractor. If such cost exceeds such unpaid balance of the Contract Sum, Contractor shall pay the difference to Owner.

W. Inspection. Owner and its representative shall, at their sole risk, and at reasonable times, have access to the Work whenever it is in preparation or progress, and Contractor shall permit and facilitate inspection of the Work by Owner, its agents, and public authorities concerned with such Work. Owner shall hold Contractor harmless from any injury sustained by Owner or any of its employers or agents during such inspections.

X. Financing. Contractor shall comply with all reasonable compliance requests from Owner's lender, however, consent or approval must not require Contractor to subordinate its lien rights; must not materially increase the scope of Contractor's obligations under this Agreement; must not decrease the scope of Contractor's rights under this Agreement and must be consistent with lending practices typical of institutional lenders for commercial real estate development in the metropolitan Chicago area.

Y. Consequential Damages. Except as expressly provided for in Section 9, the Owner and Contractor agree to waive all claims against the other for all consequential damages that may arise out of or relate to this Agreement. The Owner agrees to waive damages including, but not limited to the Owner's loss of use of the Property, all rental expenses incurred, loss of services of employees, or loss of reputation. Except as expressly provided for in Section 9, the Contractor agrees to waive damages including but not limited to the loss of business, loss of financing, principal office overhead and profits, loss of profits not related to this Project, or loss of reputation. The provisions of this Paragraph shall govern the termination of this Agreement and shall survive such termination.

JK 00619

Z. Payment in the Event of Termination.

1. At any time, Owner may terminate this Agreement for its convenience. If Owner terminates this Agreement for its convenience and neither it, nor any of its affiliates proceeds with the Project for any reason and the Project is abandoned, Owner shall pay the following termination fee to Contractor: (i) all of Contractor's actual out-of-pocket expenses through the date of termination, including, but not limited to, amounts expended by Contractor for general conditions, insurance and overhead; and (ii) a termination fee as liquidated damages, and not as a penalty, as the parties acknowledge that the Contractor's damages will be difficult or impossible to ascertain, equal to one percent (1%) of the estimated cost of the Work as set forth in the Owner's application for a certificate of need

("CON")(as designated in the Owner's Illinois Health Facilities Planning Board CON application, Section N, Project Costs and Sources of Funds, line items for site preparation, off-site work and new construction contracts). It will be deemed that Owner has terminated this Agreement for convenience if Owner obtains a CON and prior to Contractor commencing the Work, Owner allows it to expire. Notwithstanding anything contained above, Owner will not owe any amounts to Contractor under either this Subsection Z.1 or Subsection Z.2 below if Owner does not obtain a CON.

2. If Owner terminates this Agreement for convenience or any other reason, except for Contractor's material breach and failure to cure pursuant to Section 9.V hereof, and Owner, or its affiliate, proceeds with the Project at any time thereafter, Owner shall pay the following termination fee to Contractor: (i) all of Contractor's actual out-of-pocket expenses through the date of termination, including, but not limited to, amounts expended by Contractor for general conditions, insurance and overhead; and (ii) a termination fee as liquidated damages, and not as a penalty, as the parties acknowledge that the Contractor's damages will be difficult or impossible to ascertain, equal to five percent (5%) of the estimated cost of the Work as set forth in the Owner's application for a CON (as designated in the Owner's Illinois Health Facilities Planning Board CON application, Section N, Project Costs and Sources of Funds, line items for site preparation, off-site work and new construction contracts). The above amounts are intended to be the parties' good faith estimate of the value of Contractor's consulting services rendered through the date of termination and Contractor's estimated damages, including, but not limited to, lost profits and lost opportunity costs.

Article 10. Titles

Titles of articles are used in this Agreement solely for the convenience of those examining it and are not to be resorted to as aids in its construction or interpretation.

Article 11. Successors

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

Article 12. Law Governing

This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois. The parties hereto irrevocably agree that all actions or proceedings in any way, manner or respect arising out of or from or related to this Agreement shall be litigated only in courts having situs in Illinois. All costs and reasonable attorneys' fees incurred by the prevailing party in enforcing this Agreement shall be paid to the prevailing party by the other party to this Agreement.

Article 13. Financing Contingency

JK 00620

Prior to [Date], and prior to Contractor being required to commence the Work, Owner shall provide to Contractor reasonably satisfactory evidence indicating that firm financing is available to pay for all costs of the project of which the improvements contemplated hereunder are a part (with all pre-construction and pre-disbursement contingencies satisfied), said financing to provide payment to Contractor under and according to the terms of this Agreement. Further, Owner agrees to refrain from taking any action which might directly or indirectly void or constitute a default under any loan agreements in connection with the project and agrees that all agreements made in connection with such financing are deemed made for the benefit of Contractor. Owner shall be responsible for all costs arising out of delays in securing financing.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

KIFERBAUM CONSTRUCTION CORPORATION (Contractor)

BY:

ITS:

MERCY HEALTH SYSTEM

BY:

ITS:

EXHIBIT "A"

LEGAL DESCRIPTION

The North 1464.54 feet of the West 580.14 feet of the Southeast Quarter of Section 10 (exception therefrom that part taken for State Route 31 and Three Oaks Road), all in Township 43 North, Range 8 East of the Third Principal Meridian in McHenry County, Illinois.

The Parcel contains approximately 16.71 acres.

EXHIBIT "B"

The Contract Documents for this project are as follows:

Drawings A200, A200A thru A200D, A201A thur A201D,
A202A thru A202D, A203C, A203D, A204C, A204D,
A205C, A205D, A210, A220, A230, A250, A400, C300,
C400, C500, and Site Plan by Hammel, Green,
and Abrahamson, Inc. (Dated 5/22/03)

EXHIBIT "D"

This _____ day of _____, 2003, Mercy Alliance, Inc. and Kiferbaum Construction Corporation in accordance with Article 1 of the Construction Contract hereby amend the Agreement as follows:

1. Building Target GMP is \$ [To be Determined].
2. The Site Work GMP is \$ [To Be Determined].
3. The Building Price is \$ [To Be Determined]
4. The Site Work Price is \$ [To Be Determined]
5. The Contract Sum is \$ [To Be Determined]
6. The Construction Documents which form the basis for the Building Price are:

_____.
7. The Construction Documents which form the basis for the Site Work Price are: [To Be Determined].

Mercy Alliance, Inc.

Kiferbaum Construction Corporation

By: _____

By: _____

Its: _____

Its: _____

EXHIBIT "E"
MILESTONE SCHEDULE

EXHIBIT "F"

**APPLICATION FOR PAYMENT FORM
(CONTRACTOR'S SWORN STATEMENT)**

Proposals/mercy crystal lake/contract/mercy contract.1.23.04

JK 00626

EH0239_00514

JK 00628

Eh0239_00516