MEMORANDUM

To: Construction Law Students
From: Harper Heckman
Date: October 25, 2011
RE: Faber College Contract Review

We represent Faber College, a private liberal arts college in the North Carolina Piedmont. The College has recently decided to build a new 400 bed dormitory complex on its campus. The College has elected to construct the project on a “design-build” basis and has selected Delta Construction Company as its design-builder. Delta’s counsel has prepared the attached contract for the project and presented it to Faber College for its review and comment. Faber has asked us to review the contract and advise it of any necessary revisions.

Please prepare a business letter of 3-5 single spaced pages to Vernon Wormer, Dean of Facilities for Faber, wherein you discuss the contract additions, deletions or modifications that you feel should be made to the contract in order to better protect Faber’s interests on the project. In so doing, please identify specifically what contractual provisions need to be added, deleted or revised and why and in what respects they should be changed. As space permits, please also include any additional commentary you would like to make regarding any other aspects of the contract that you feel merit discussion. This assignment will be due at the beginning of class on November 8, 2011. In completing the assignment, you are to work alone and independently, but you may use your text book, assigned readings, and class notes. No other materials may be utilized. Should you have any questions about this assignment, please do not hesitate to email me.
DESIGN/BUILD CONTRACT

THIS AGREEMENT, is made and entered into as of the _____ day of October, 2011, by and between Faber College (hereinafter referred to sometimes as "Faber" and sometimes as "Owner"), Alamance County, North Carolina and DELTA CONSTRUCTION CO., (hereinafter referred to as "Delta"), having a principal place of business at 7700 Second Avenue, Suite 100, Irving, Texas 75063.

WHEREAS, Faber desires to retain the services of Delta to perform the design and construction of a student housing facility (the "Project") designed to contain 400 beds and to be located on approximately 8.5 acres of land on the campus of Faber College in Alamance County, North Carolina, said Project to be owned by Faber;

NOW THEREFORE, for and in CONSIDERATION of the premises and the mutual covenants and agreements set forth herein, Delta and Faber hereby agree as follows:

SECTION I. CONSTRUCTION

A. Subject to and in accordance with the terms and provisions of this Agreement, Delta shall design and construct for Faber on the campus of Faber College in Alamance County, North Carolina, a university housing facility accommodating 400 students. The Project will include six three-story residential buildings plus a two-story community center that will house the University’s Campus Security offices as well as multi-purpose rooms, a great room and a full kitchen. The exterior amenities will include a volleyball court, basketball court, and surface parking. All of the above are hereinafter collectively referred to as the "Improvements," that are described in the drawings and specifications ("Drawings and Specifications"), prepared by the architectural firm (the "Architect") selected by Delta and the other Contract Documents.

B. The term "Contract Documents" when used herein shall mean this Agreement, the Drawings and Specifications, Delta’s Proposal dated August 15, 2011, and all change orders or addenda issued with respect thereto. Delta shall provide and furnish all materials, supplies, apparatus, appliances, equipment, fixtures, tools, implements and all other facilities (hereinafter collectively referred to as "Materials"), and all labor, supervision, architectural and engineering services transportation, utilities, storage and all other services (hereinafter collectively referred to as "Services") as and when required for or in connection with the design and construction of, or for inclusion or incorporation in the Improvements, such design and construction of the Improvements and the furnishing of the Materials and Services being referred to as the "Work."

SECTION II. TIME FOR PERFORMANCE

A. The Work to be performed under this Agreement shall be commenced upon issuance of all applicable permits or as mutually agreed to by the parties, and shall be Substantially Completed not later than 365 days thereafter (hereinafter referred to as the "Scheduled Completion Date" or "Substantial Completion Date"). If, however, Delta
is delayed in the performance of the Work by any act or omission of Faber, or by an employee, agent, representative or separate contractor of Faber or by changes ordered in the Work, or by delays in transportation, emergency, bad weather or by any other causes which Delta could not control (collectively referred to herein as “Excusable Delay”), then the Scheduled Completion Date shall be extended for a period equal to the length of such delay.

B. Should Faber direct that the Work be accelerated by means of overtime, additional crews or additional shifts or resequencing of the Work, Delta agrees to perform same on the basis of reimbursement of direct cost (i.e., overtime pay, additional crew, shift or equipment cost, subcontractor payments and such other items of cost) plus a fee of thirty percent (30%) of such cost.

C. If Delta fails to achieve Substantial Completion on or before the Scheduled Completion Date and such failure is not the result of an Excusable Delay, Delta shall be penalized $1,000 per day for each and every day, starting the day after such Scheduled Substantial Completion Date until the date Substantial Completion is achieved.

SECTION III. PERMITS AND LICENSES

A. Unless otherwise provided in the Contract Documents, Delta shall secure or cause to be secured and shall pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract.

B. Delta shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the work.

C. If Delta performs Work knowing it to be contrary to laws, statutes, ordinances, building codes and rules and regulations without notice to Faber, Delta shall assume full responsibility for such work and shall bear the attributable costs.

SECTION IV. CHANGES

From time to time, Faber may authorize changes in the Work, issue additional instructions, require additional Work or direct the omission of work previously ordered, and Delta shall proceed as directed. If the parties are unable to agree on the cost of any change, then in such event, the price shall be determined on the basis of actual direct cost of labor, material, design costs, subcontractor costs, general conditions and other costs incurred by Delta plus a fee of thirty percent (30%).
SECTION V. PAYMENTS

A. In consideration of the performance of the Work and all other obligations of Delta hereunder, Faber shall pay to Delta the “Contract Sum,” which shall consist of all costs actually incurred by Delta during the design or construction of the Project, plus Delta’s fee of 15% of said costs.

B. On or before the first day of each month during the performance of the Work, Delta shall submit to Faber for approval a request for payment ("Request for Payment"). Requests for Payment may include the cost of materials or equipment not incorporated in the Work, but delivered and suitably stored, whether at the site or at some other location.

C. Not later than the fifth day following Faber’s receipt of Delta’s Request for Payment, Faber shall make payment to Delta as invoiced.

SECTION VI. DESIGN RESPONSIBILITY

A. For the design phase of the Work, Delta shall utilize the services of a competent design professional as its design subcontractor to assure that the Work as designed will meet the minimum standards set forth by all applicable laws, ordinances and codes.

B. Design aesthetics, floor plans and amenities shall be submitted to Faber for its approval. Construction shall not be commenced prior to obtaining such approval, but if Faber does not reject such criteria within 5 days following Faber’s receipt of same, Faber’s approval shall be conclusively presumed.

C. Payment to the design professional subcontractor(s) for all phases of design services shall be on a lump sum basis such that the compensation for each such phase shall equal the following percentages of the total compensation payable for design services:

- Schematic Phase: twenty five percent (25%)
- Design Development Phase: twenty five percent (25%)
- Construction Documents Phase: fifty percent (50%)

D. The services to be provided by Delta's design professional subcontractor(s) shall include:

1. Preparation of all schematic and preliminary design documents for the Work consisting of drawings and other documents illustrating the scale and relationship of the Work with the project to facilitate communication between Delta and Faber.
2. Preparation of design development documents consisting of drawings and other documents to fix and describe the size and character of the Work as to structural, mechanical and electrical systems, and including materials and such other essentials as may be appropriate or required to enable Faber to establish final design criteria.

3. Preparation of all drawings and specifications setting forth the requirements for construction of the Work in detail sufficient to enable subcontractors and suppliers to bid their respective portions of the Work and to enable workmen of ordinary skill to construct the Work.

4. Inspection of the Project during construction to determine in general if the Work is being performed in accordance with the Contract Documents, to evaluate Delta’s pay applications and to determine when the Work is Substantially Complete.

5. Documentation of all changes in the Drawings and Specifications made during the course of the Work, and provision of a complete set of as-built drawings at the conclusion of the Work.

6. Interpreting and deciding matters concerning performance by or payment to Delta and its General Contractor under the Contract Documents.

E. All charges for the services set forth above are included in the Contract Price. Services other than those described herein shall constitute "Additional Services" and shall be handled as a change in the Contract under Section IV hereof. In the event any portions of the Project are deleted or otherwise not constructed, compensation for such portions of the Project shall be payable to the extent design services are performed on such portions, in accordance with the schedule set forth in Subparagraph C above. The making of revisions in drawings, specifications or other design documents when such revisions are required during construction or by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents shall be considered Additional Services.

F. Faber agrees to limit Delta's liability for any errors or omissions in the design of the project or the amounts paid to Architect under its agreement with Delta.

G. All Drawings and Specifications, schematic design and design development documents, or other similar or related documents included in the Contract Documents and furnished by Delta together with any copies thereof, are and shall remain the exclusive property of the Architect.
SECTION VII. GENERAL CONTRACTOR

Delta has retained as a Subcontractor to Delta the services of a competent General Contractor (hereinafter referred to as "General Contractor"), to perform the construction responsibilities of Delta under this Design-Build Agreement.

SECTION VIII. INDEMNIFICATION

Except as hereinafter set forth, Delta shall indemnify and hold harmless Faber, its agents, servants and employees from and against claims, damages, losses and expenses, including but not limited to, attorneys’ fees arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property but only to the extent caused by its negligent acts or omissions. Notwithstanding the foregoing or anything else to the contrary appearing herein, it is understood and agreed that the obligations of Delta under this Paragraph shall not extend to liability for the errors or omissions of the Architect, the General Contractor, and the agents and employees of any of either, it being understood that Faber shall look solely to the Architect, the General Contractor and their insurers in the event of any loss, injury or damage.

SECTION IX. SUBSTANTIAL COMPLETION

A. Substantial Completion is the stage in the progress of the Work when the Work is sufficiently complete in accordance with the Contract Documents so Faber can occupy the Work for its intended use.

B. When Delta considers that the Work, is substantially complete, Delta shall prepare and submit to the Architect a list of items to be completed or corrected (sometimes referred to hereafter as the "punch list"). Delta shall proceed promptly to complete and correct items on the punch list. Upon receipt of Delta's punch list, the Architect will make an inspection to determine whether the Work is substantially complete. If the Architect's inspection discloses any item on Delta's punch list which is not substantially in accordance with the requirements of the Contract Documents, Delta shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by Faber or add such item to the punch list. When the Work or designated portion thereof is substantially complete, Delta shall prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall transfer responsibilities of Delta for security, maintenance, heat, utilities, damage to the Work and insurance to Faber, and shall fix the time within which Delta shall finish all items on the punch list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work unless otherwise provided in the Certificate of Substantial Completion; or in the alternative, on the date that Faber beneficially occupies the Work or portion thereof, whichever is earlier.
SECTION X. FINAL COMPLETION AND FINAL PAYMENT

A. Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, upon acceptance by the Architect, Faber shall promptly issue final payment to Delta. Final payment shall not become due, however, until Delta submits to Faber an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which Faber or Faber's property might be responsible or encumbered have been paid or will be paid or otherwise satisfied out of the final payment.

B. Acceptance of final payment by Delta, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified in writing by that payee as unsettled at the time of final Application for Payment.

C. The making of final payment shall constitute a waiver of Claims by Faber except those arising from:

1. Liens, security interests or encumbrances arising out of the Contract and unsettled;
2. Terms of special warranties required by the Contract Documents.

SECTION XI. CLAIMS AND DISPUTES

A. Definition

A "Claim" is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between Faber and Delta arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

B. Time Limits on Claims

Claims by either party must be made within 3 months after occurrence of the event giving rise to such claim or within 3 months after the Claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice.
C. Continuing Contract Performance

Pending final resolution of a Claim of less than $100,000 unless otherwise agreed in writing, Delta shall proceed diligently with performance of the Contract and Faber shall continue to make payments in accordance with the Contract Documents. Notwithstanding the foregoing, Delta shall not be required to continue performance in the event of Faber's unexcused failure to timely pay to Delta all sums of money to which it may be entitled under the Contract Documents.

E. Claims for Concealed or Unknown Conditions

If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ from those indicated in the Contract Documents; or (2) unknown physical conditions of an unusual nature which differ from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, and cause an increase in Delta's cost of, or time required for performance of any part of the Work, an equitable adjustment in the Contract Sum or Contract Time, or both shall be granted Delta.

F. Injury or Damage to Person or Property

If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, of any of the other party's employees or agents, or of others for whose acts such other party is legally liable, written notice of such injury or damage, whether or not insured, shall be given to the other party within thirty (30) days after observance. The notice shall provide sufficient detail to enable the other party to investigate the matter. If a Claim for additional costs or time related to this claim is to be asserted, it shall be filed as provided herein.

G. Mutual Waiver of Consequential Damages

Delta and Faber waive all claims for incidental, special, indirect and/or consequential damages or losses, (hereinafter collectively referred to as "consequential damages"), arising out of or relating to the Contract against each other, the Architect or General Contractor. This mutual waiver of consequential damages or losses includes damages incurred by Faber for loss of use, loss of income, loss of financing, rental expense, loss of management or employee productivity or of the services of such persons, relocation expenses, loss of profits and loss of business and reputation and all other incidental, special, indirect and/or consequential damages or losses which could have been claimed by Faber against Delta or its Architect or General Contractor, arising out of or in any way connected with the Project. This mutual waiver of consequential damages or losses includes damages incurred by Delta and its subcontractors for home office and home office personnel expense, loss of profits other that the anticipated profits arising directly from this project, loss of financing, damage to business or reputation, loss of bonding capacity, labor inefficiencies, stacking of trades, dilution of superintendence and related impact claims, and all other consequential damages or losses which could have
been claimed by Delta, its Architect or General Contractor against Faber in connection with the Project.

J. Force Majeure

In the event of an increase in the price of equipment, materials, energy; or of the non-availability of material, equipment or energy, any of which may occur during the performance of the Contract through no fault of Delta, the Contract Sum and/or the Time of Completion shall be equitably adjusted or the specification shall be changed to provide a less expensive alternate material requirement method or item of equipment, as the parties may agree.

K. Resolution of Claims and Disputes

1. Faber will review Claims and take one or more of the following preliminary actions within ten days of receipt of a Claim: (a) request additional supporting data from the Claimant, (b) submit a schedule to Delta indicating when Faber expects to take action, (c) reject the Claim in whole or in part, stating reasons for rejection, (d) approve the Claim, or (e) suggest a compromise.

2. If a Claim has been resolved, Delta will prepare appropriate documentation.

3. If a Claim has not been resolved, the party making the Claim shall, within ten days after Faber’s preliminary response, take one or more of the following actions: (a) submit additional supporting data requested by Faber, (b) modify the initial Claim, or (c) notify Faber that the initial Claim stands.

4. If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by Faber, the aggrieved party may submit the Claim to mediation or arbitration, as hereinafter provided.

SECTION XII. MEDIATION & ARBITRATION
INTENTIONALLY OMITTED FROM ASSIGNMENT

SECTION XIII. EXCLUSIVE WARRANTY

Delta warrants to Faber that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work for a period of one (1) year following the date of Substantial Completion will be free from defects in materials or workmanship not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements may be considered defective. Delta's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by Delta, improper or insufficient maintenance, improper operation, or wear and tear. Delta shall not under any circumstances be liable to Faber or
any third parties for any special, indirect or consequential damages as a result of any breach hereof by Delta, or anyone for whom Delta is responsible, it being Delta's sole responsibility to repair or replace any Work found to be defective. THE ABOVE AND FOREGOING WARRANTY IS DELTA'S SOLE OBLIGATION AND IS IN LIEU OF ANY OTHER WARRANTIES EITHER EXPRESSED OR IMPLIED.

SECTION XIV. USE OF THE SITE

Delta shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents, and shall not unreasonably encumber the site with materials or equipment.

SECTION XV. TERMINATION

A. If Delta shall fail to commence the Work in accordance with the provisions of this Agreement or fail to diligently prosecute the Work to completion thereof in a diligent, efficient and, workmanlike manner and in accordance with the provisions of the Contract Documents; fail to use an adequate amount or quality of personnel or equipment to complete the Work without undue delay; fail to perform any of its obligations under the Contract Documents; or fail to make payments to its Subcontractors in accordance with the Subcontract Agreements or to make payments to vendors or laborers and Delta's default is not otherwise excused under the provisions of this Agreement; then Faber shall have the right, if Delta shall not cure any such default after fourteen (14) days' written notice thereof (or, if such default is of such a nature as to be incapable of cure within such period) shall not commence action to cure said default within such period and thereafter diligently and continuously pursue such action to complete such cure promptly, to terminate this Agreement upon fourteen (14) days' written notice, take possession of and use all or any part of Delta's materials, equipment supplies and other property of every kind used by Delta in the performance of the Work and to use such property in the completion of the Work, and complete the Work in any manner it deems desirable, including engaging the services of other parties there for. If after exercising any such remedy the cost to Faber of the performance of the balance of the Work is in excess of that part of the Contract Sum that has not theretofore been paid to Delta hereunder, Delta shall be liable for and shall reimburse Faber for such excess.

B. If Faber fails to make any payments to Delta as required hereunder or otherwise causes a material breach that causes Delta damages that are not paid through a Change Order, Delta shall have the right to give Faber a written notice thereof, stating the nature of the default complained of; and if Faber does not cure such default, except in the case of unexcused non-payment by Faber to Delta, may within fourteen (14) days after receipt of such notice, have the right to terminate this Agreement by giving Faber written notice thereof at any time thereafter while such default remains uncured. If terminated by Delta, payment shall be made to Delta for all Work executed and for any proven loss sustained upon any materials, equipment, tools, construction equipment and machinery, and reasonable demobilization costs, a reasonable profit on such work and the profits Delta would have earned but for Faber's breach. In the case of unexcused failure of payment by Faber, Delta shall have the right to suspend Work at the end of three (3) days
following written notice to Faber and to terminate upon thirty (30) days notice if the Work is suspended for a period of sixty (60) consecutive days or more from causes not the fault of Delta. If Work is suspended by Delta due to Faber’s failure to pay Delta in accordance with this Agreement, if Faber pays Delta all sums accrued to that date before the termination of the Contract by Delta, then in such case, Delta shall resume Work and Faber shall issue a Change Order equitably adjusting the Contract Time and Contract Sum in amounts commensurate with the suspension.

C. Faber may, if Delta neglects to prosecute the Work properly or to perform any provision of the Contract Documents, or otherwise does, or omits to do, anything whereby safety or proper construction may be endangered or whereby damage or injury may result to person or property, after fourteen (14) days' written notice to Delta, without prejudice to any other remedy Faber may have, make good all work, material, omissions or deficiencies, and may deduct the cost therefore from the amount included in the Contract Sum due or which may thereafter become due Delta, but no action taken by Faber hereunder shall affect any of the other rights or remedies of Faber granted by this Agreement or by law or relieve Delta from any consequences or liabilities arising from such acts or omissions.

D. It is recognized that if Delta is adjudged a bankrupt, or makes a general assignment for the benefit of creditors, or if a receiver is appointed for the benefit of its creditors, or if a receiver is appointed on account of its insolvency, such could impair or frustrate Delta's performance of this Agreement. Accordingly, it is agreed that upon the occurrence of any such event, Faber shall be entitled to request of Delta or its successor in interest adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within fourteen (14) days of delivery of the request shall entitle Faber to terminate this Agreement and to the accompanying rights set forth above. In all events pending receipt of adequate assurance of performance and actual performance in accordance therewith, Faber shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis the cost of which will be back charged against the Contract Sum hereof.

SECTION XVI. WAIVER

No consent or waiver, express or implied, by either party to this Agreement to or of any breach or default by the other in the performance of any obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default by such party hereunder. Failure on the part of any party hereto to complain of any act or failure to act of the other party or to declare the other party in default hereunder, irrespective of how long such failure continues, shall not constitute a waiver of the rights of such party hereunder. Inspection by, payment by, or tentative approval or acceptance by Faber or the failure of Faber to perform any inspection hereunder, shall not constitute a final acceptance of the Work or any part thereof and shall not release Delta or any of its obligations hereunder.
SECTION XVII. CONFLICTS

In case of conflicts between the provisions of this Agreement, any ancillary documents executed contemporaneously herewith or prior hereto, or any other of the Contract Documents, the provisions of this Agreement (including all exhibits) shall prevail. In the case of conflicts between the Drawings and Specifications, the Specifications shall prevail.

SECTION XVIII. REPRESENTATIVES

A. Faber has designated Vernon Wormer to be "Faber's Representative" with full authority to execute any and all instruments requiring Faber's signature and to act on behalf of Faber with respect to all matters arising out of this Agreement.

B. Delta has designated Eric Stratton to be "Delta's Representative" with full authority to execute any and all instruments requiring Delta's signature and to act on behalf of Delta with respect to all matters arising out of this Agreement.

C. Either party may change its Representative by notifying the other party in writing.

SECTION XIX. NONDISCRIMINATION

Delta agrees that in the performance of its work under this Agreement it will not violate any applicable laws or regulations prohibiting discrimination in employment.

SECTION XX. CONSTRUCTION OF TERMS

Unless the context clearly intends the contrary, words singular or plural in number shall be deemed to include the other and pronouns having a masculine or feminine gender shall be deemed to include the other. The term "person" shall be deemed to include an individual, corporation, partnership, trust, unincorporated organization, government and governmental agency or subdivision, as the context shall require.

SECTION XXI. CAPTIONS

The captions used for the Sections in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of the intent of this Agreement or any Section hereof.

SECTION XXII. SEVERABILITY CLAUSE

In the event any portion or provision of this Agreement is held by a court of competent jurisdiction or in an arbitration proceeding to be void, in violation of public policy or unenforceable as a matter of law, such ruling shall not effect the validity or
enforceability of the remainder of the Agreement that is not void, in violation of public policy or unenforceable.

SECTION XXIII. ENTIRE AGREEMENT

The Contract Documents constitute the entire agreement between the parties hereto with respect to the matters covered thereby. All prior negotiations, representations and agreements with respect thereto not incorporated in such Contract Documents are hereby canceled. This Agreement can be modified or amended only by a document duly executed on behalf of the parties hereto.

IN WITNESS WHEREOF, this Agreement is hereby executed as of the date first above set forth.

FABER COLLEGE
[Owner]

[Signature]
Vernon Wormer, Dean of Facilities
Faber College

DELTA CONSTRUCTION CO.
[Developer]

[Signature]
Eric Stratton, President
of Delta Construction Co.