SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K
ANNUAL REPORT
PURSUANT TO SECTION 13 OR 15(D)
OF THE SECURITIES EXCHANGE ACT OF 1934

| FOR THE FISCAL YEAR ENDED | COMMISSION FILE NUMBER |
|---|---|
| DECEMBER 31, 1997 | 0-23490 |

VIVUS, INC.
(EXACT NAME OF REGISTRANT AS SPECIFIED IN ITS CHARTER)

| DELAWARE | 94-3136179 |
|---|---|
| (STATE OR OTHER JURISDICTION OF INCORPORATION OR ORGANIZATION) | (I.R.S. EMPLOYER IDENTIFICATION NUMBER) |

605 EAST FAIRCHILD DRIVE, MOUNTAIN VIEW, CALIFORNIA 94043
(ADDRESS OF PRINCIPAL EXECUTIVE OFFICES AND ZIP CODE)

(650) 934-5200
(REGISTRANT'S TELEPHONE NUMBER, INCLUDING AREA CODE)

SECURITIES REGISTERED PURSUANT TO 12(B) OF THE ACT:
NONE

SECURITIES REGISTERED PURSUANT TO SECTION 12(G) OF THE ACT:
COMMON STOCK, $.001 PAR VALUE PREFERRED SHARE PURCHASE RIGHTS

Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes [X] No [ ]

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of Registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. [ ]

As of February 27, 1998, the aggregate market value of the voting stock held by non-affiliates of the Registrant was $350,150,127 (based upon the closing sales price of such stock as reported by The Nasdaq Stock Market on such date). Shares of Common Stock held by each officer, director, and holder of 5 percent or more of the outstanding Common Stock on that date have been excluded in that such persons may be deemed to be affiliates. This determination of affiliate status is not necessarily a conclusive determination for other purposes.

As of February 27, 1998, the number of outstanding shares of the Registrant's Common Stock was 31,721,292.

DOCUMENTS INCORPORATED BY REFERENCE

Certain information required by Items 6, 7 and 8 of Form 10-K is incorporated by reference from the Registrant's annual report to security holders furnished pursuant to Rule 14a-3 (the "Annual Report"). Certain information required by Items 10, 11, 12 and 13 of Form 10-K is incorporated by reference from the Registrant's proxy statement for the 1998 Annual Stockholders' Meeting (the "Proxy Statement"), which will be filed with the Securities and Exchange Commission within 120 days after the close of the Registrant's fiscal year ended December 31, 1997.

This Form 10-K contains forward looking statements that involve risks and uncertainties. The Company's actual results may differ significantly from the results discussed in the forward looking statements. Factors that might cause such differences include, but are not limited to, the risk factors described beginning on page 15, in addition to the other information contained in this Form 10-K.

## PART I

### ITEM 1. BUSINESS

#### OVERVIEW

VIVUS, Inc. ("VIVUS" or the "Company") is a leader in the development of advanced therapeutic systems for the treatment of erectile dysfunction. Erectile dysfunction, commonly referred to as impotence, is the inability to achieve and maintain an erection of sufficient rigidity for sexual intercourse. The Company's transurethral system for erection is a minimally invasive, easy to use system that delivers pharmacologic agents topically to the urethral lining. In November 1996, the Company obtained marketing clearance by the U.S. Food and Drug Administration (the "FDA") to manufacture and market its first product, MUSE(R) (alprostadil). The Company commenced product shipments to wholesalers in December 1996 and commercially introduced MUSE (alprostadil) in the United States through its direct sales force beginning in January 1997. Furthermore, the Company received FDA clearance in December 1996 for ACTIS(R), an adjustable elastomeric venous flow control device designed for those patients who suffer from veno-occlusive dysfunction (commonly referred to as venous leak syndrome). The Company commenced commercial sales of ACTIS in the United States through its direct sales force in July 1997. ACTIS is currently being studied for adjunctive use with MUSE (alprostadil); however, there can be no assurance that such studies will be completed and if completed that such studies will demonstrate that adjunctive use of ACTIS with MUSE (alprostadil) is a safe and effective treatment for erectile dysfunction.

The Company has entered into international marketing agreements with Astra AB ("Astra") and Janssen Pharmaceutica International ("Janssen") under which Astra and Janssen will purchase MUSE (alprostadil) for resale in various international markets. In November 1997, the Company obtained regulatory marketing clearance by the Medicines Control Agency ("MCA") to market MUSE (alprostadil) in the United Kingdom. The Company began selling MUSE (alprostadil) to Astra in the fourth quarter of 1997. Astra began selling MUSE (alprostadil) in the United Kingdom in February 1998. In addition, applications for regulatory approval to market MUSE (alprostadil) have been submitted in several other countries, including China, Australia, Canada and Mexico. These applications will be subject to rigorous approval processes, and there can be no assurance such approval will be granted in a timely manner, if at all.

The Company has limited experience in manufacturing and selling MUSE (alprostadil) in commercial quantities. Since the commercial launch of MUSE (alprostadil) in January 1997, the Company has experienced product shortages due to higher than expected demand and difficulties encountered in scaling up production of MUSE (alprostadil). The Company leased 90,000 square feet of space in New Jersey in which it has constructed additional manufacturing and testing facilities. The Company has filed for regulatory authorization of this facility with both the FDA and MCA. In March 1998, the MCA authorized the Company to begin commercial production and shipment of MUSE (alprostadil) from its new facility. In addition, the Company has negotiated a long-term lease for a site in Ireland for construction of a European manufacturing operation. Until the Company receives the required approvals for its new New Jersey facility, domestic and certain international markets will need to be supplied from its current facility at Paco Pharmaceutical Services, Inc. ("Paco"). There can be no assurance that such approvals will be granted in a timely manner, if at all. If international sales increase as anticipated, product available for the domestic market will be reduced and gross margins will be adversely impacted. If the Company encounters further difficulties with its current manufacturing facility or delays in regulatory approvals of its new manufacturing facility, capacity constraints could continue for an extended period of time, which would have a material adverse effect on the Company's business, financial condition and results of operations.

The Company anticipates an operating loss in the first quarter of 1998 primarily due to the impact of the continued capacity constraints, allocation of product to international markets which results in a lower gross margin, higher costs of goods sold as the Company ramps up its new manufacturing facility, and higher marketing and sales costs related to the Company's direct to consumer marketing campaign.

In connection with post-approval inspections of the Company's New Jersey manufacturing facility at Paco, the FDA issued to the Company FDA Form 483s and a Warning Letter, which detailed specific areas where the FDA observed that the Company's operations were not in full compliance with some areas of the current Good Manufacturing Practices (cGMP) requirements. On November 19, 1997, after taking corrective action and providing the FDA with a written response to the FDA observations, the Company received a letter from the FDA affirming that the Company's facility at Paco is in substantial compliance with cGMP requirements. Failure to maintain satisfactory cGMP compliance would have a material adverse effect on the Company's ability to continue to market and distribute its products and, in the most serious cases, could result in the issuance of additional Warning Letters, seizure or recall of products, civil fines or closure of the Company's manufacturing facility until cGMP compliance is achieved.

Because of the production capacity constraints, the Company did not initiate significant MUSE advertising programs throughout 1997 and experienced declining demand for MUSE (alprostadil) in late 1997. In anticipation of receiving regulatory approvals of its new manufacturing facility and because of available inventories at the wholesale level, the Company launched its first domestic direct-to-consumer advertising campaign in January 1998. This campaign includes major television, newspaper and magazine placements. In February 1998, the FDA notified the Company that it objected to, among other things, the prominence and balance of side effect information relative to efficacy information in certain written materials and the Company's television advertisements. The Company is no longer utilizing the prior written materials and has modified its written materials in response to the FDA's comments. If the FDA does not believe the modified written materials respond to its concerns then further modifications will be required resulting in additional cost and delay prior to the Company resuming its written advertising. The Company has ceased running its television advertisements and requested a meeting with the FDA to discuss necessary changes to the Company's television advertisements. If the Company and the FDA cannot reach a prompt resolution regarding the necessary changes to the Company's television advertisements, this could result in additional cost and delay, and may prevent broadcast advertising on major networks. Cost and delay associated with the FDA's objections to the Company's direct-to-consumer advertising materials could have a negative effect upon the Company's domestic sales and marketing efforts. There can be no assurance that the Company's domestic sales and marketing efforts will be successful at increasing the demand for MUSE (alprostadil). In addition, there can be no assurance that the Company's capacity constraints will not prevent the Company from supplying any increased demand.

The Company has sought and will continue to seek pharmacologic agents suitable for transurethral delivery for which significant safety data already exists. The Company believes that such agents may progress more rapidly through clinical development and the regulatory process than agents without preexisting safety data. The Company expects to begin a Phase III multi-center trial in 1998 for its second product candidate, a combination of alprostadil and prazosin delivered via the Company's transurethral system for erection. The Company has several other product candidates in preclinical development.

Based on a published study of more than 1,200 men in Massachusetts, the Company estimates that more than 30 percent of males in the United States between the ages of 40 and 70 suffer from moderate to complete erectile dysfunction. The Company believes that similar rates of erectile dysfunction prevail outside the United States. An estimate from the National Institutes of Health ("NIH") Consensus Statement on Impotence (1992) suggests that the number of men in the United States with erectile dysfunction may be 10 to 20 million. The rate of erectile dysfunction increases significantly with age. In addition to the Company's transurethral system for erection, the primary medical therapies currently used to treat erectile dysfunction are needle injection of pharmacologic agents into the penis, vacuum constriction devices, penile implants and oral medications. Despite the detrimental effect erectile dysfunction may have on a couple's quality of life, the Company believes that, due in part to the limitations of available therapies, less than 10 percent of men

suffering from erectile dysfunction received medical treatment prior to the introduction of MUSE (alprostadil).

BACKGROUND

Erectile dysfunction results from (i) an inadequate supply of blood to the penis, (ii) a failure to relax the smooth muscle tissue in the penis so it can become engorged with blood, or (iii) a failure to retain blood in the penis. Blood is carried to the penis in two large arteries that terminate in a maze of blood vessels contained in the three erectile bodies of the penis, the corpus spongiosum, which surrounds the urethra, and two corpora cavernosa. Smooth muscle tissue surrounds each individual blood vessel in the erectile bodies. When the penis is flaccid, the smooth muscle tissue is in a contracted state, which constricts the blood vessels resulting in reduced blood flow. During stimulation, a signal is sent to nerve endings in the penis that causes the smooth muscle tissue to relax. This relaxation allows the blood vessels to expand, and, as arterial blood fills the erectile bodies, the penis becomes engorged with blood and erect. As the erectile bodies expand, the venous outflow of blood is restricted so that the erection can be maintained.

CAUSES OF ERECTILE DYSFUNCTION

Historically, psychological factors were considered the primary cause of erectile dysfunction. It is now widely understood that a substantial majority of all cases have a physiological cause. The Company believes that its therapeutic treatments of erectile dysfunction can be effective, whether the cause is psychological or physiological. The primary physiological causes of erectile dysfunction fall into the following general categories:

Vascular Diseases. Atherosclerosis, hypertension and other diseases can impede or obstruct the flow of blood to the penis.

Neurological Diseases. Multiple sclerosis, Parkinson's disease and other diseases can interrupt nerve impulses to the penis.

Diabetes. Diabetes mellitus can alter both nerve function and vascular flow, inhibiting the ability to achieve an erection.

Prescription Drugs. Certain antihypertensive and cardiac medications, as well as a number of other prescription drugs, can affect nerve function in the penis by altering neurotransmitter levels.

Spinal Injury. Injury to the spinal column can interrupt nerve impulses from the spinal cord to the penis.

Pelvic Surgery. Radical prostatectomies, cystoprostatectomies and colectomies may traumatize or cut nerves or blood vessels to the penis.

Other Causes. Hormonal imbalance, renal failure and dialysis, and drug and substance abuse (particularly smoking) can also impair the neurovascular system and cause erectile dysfunction.

MARKET SIZE

Based on a published study of more than 1,200 men in Massachusetts, the Company estimates that over 30 percent of males in the United States between the ages of 40 to 70 suffer from moderate to complete erectile dysfunction. The Company believes that similar rates prevail outside the United States. An estimate from the NIH Consensus Statement on Impotence (1992) suggests that the number of men in the United States with erectile dysfunction may be 10 to 20 million men. The rate of erectile dysfunction increases significantly with age.

CURRENT THERAPIES

In addition to the Company's first product, MUSE (alprostadil), the primary physiological therapies currently utilized for the treatment of erectile dysfunction are:

Needle Injection Therapy. This form of treatment involves the needle injection of pharmacologic agents directly into the penis. These agents are generally vasoactive compounds such as alprostadil alone or in combination with phentolamine and papaverine. This form of treatment requires a prescription from a physician and instruction on self-injection. Side effects may include pain associated with injection, local pain and aching, priapism (persistent prolonged erections), fibrosis (build-up of scar tissue) and bleeding.

Vacuum Constriction Devices. This form of treatment involves the use of a mechanical system that creates a vacuum around the penis, causing the erectile bodies to fill with blood. A constriction band is then placed around the base of the penis to impede blood drainage and maintain the erection. Vacuum constriction devices are large, mechanical devices that can be unwieldy and somewhat difficult to use. In addition, the erection may not seem natural since only the part of the penis beyond the constriction band is rigid, and the penis can become cold and discolored due to the constriction of blood flow. Complications encountered by some users of vacuum constriction devices include pain and difficulty ejaculating.

Penile Implants. This therapy involves the surgical implantation of a semi-rigid, rigid or inflatable device into the penile structure to mechanically simulate an erection. In addition to the risks associated with surgical procedures, there is a significant rate of complication with implants such as infection and mechanical failure of the device. This may necessitate a second surgical procedure to remove or reposition the device. In addition, due to the scarring associated with the implant procedure, the patient may no longer be a viable candidate for less radical therapies.

Oral Medications. In March 1998, Pfizer Inc. received marketing approval from the FDA for its oral treatment for erectile dysfunction, Viagra. Commercial introduction of this new competitive product could have a material adverse effect on the Company's business, financial condition and results of operations. Before the approval of Viagra, yohimbine had been the primary oral medication currently prescribed in the United States for the treatment of erectile dysfunction. While easily administered, yohimbine must be taken multiple times daily and may cause irritability, sweating, nausea and possibly hypertension. See "Business -- Competition".

THE VIVUS SOLUTION

VIVUS is addressing the significant market opportunity for erectile dysfunction therapy with its transurethral system for erection. The Company's transurethral system for erection represents a unique approach to treating erectile dysfunction and is based on the discovery that the urethra, although an excretory duct, can absorb certain pharmacologic agents into the surrounding erectile tissues. This results in enhanced blood flow to the penis. The Company believes that MUSE (alprostadil), introduced in the United States in 1997, is a leading treatment and has contributed to the increase in the number of men who seek and receive treatment for erectile dysfunction. The Company's transurethral system for erection is designed to overcome the limitations of other available therapies through its unique product attributes which include:

Ease of Administration. The Company's transurethral system for erection is easy to use with minimal instruction, unlike needle injection therapy that requires precise injection into a corpus cavernosum.

Minimally-invasive. The Company's transurethral system for erection utilizes urethral delivery, permitting topical application to the urethral lining.

Discreet. The Company's transurethral system for erection utilizes a small, easily carried, single-use disposable applicator that can be discreetly applied and is easily integrated into the normal sexual life of the patient. Administration takes less than a minute.

Quality of Erection. The Company's transurethral system for erection therapy mimics the normal vasoactive process, producing an erection that is more natural than those resulting from needle injection therapy, vacuum constriction devices or penile implants.

THE TRANSURETHRAL SYSTEM FOR ERECTION

Administration. Administration of the transurethral system for erection is an easy and painless procedure. The end of the applicator is less than half the diameter of a man's urine stream and is inserted approximately three centimeters into the urethra. To use the transurethral system for erection, a patient urinates, shakes the penis to remove excess urine, inserts the transurethral system for erection into the urethra, releases the medication and then massages the penis between the hands for 10 seconds to distribute the medication.

The application process takes less than a minute. Once administered, the pharmacologic agent dissolves in the small amount of urine that remains in the urethra. The pharmacologic agent is absorbed by the urethral mucosa and moves across the adjacent tissue and into the erectile bodies. When successful, an erection is produced within 15 minutes of administration and lasts approximately 30-60 minutes. Many patients experience transient penile pain and/or local aching after administration and during intercourse.

Initial Pharmacologic Agent. Alprostadil is the first pharmacologic agent used in the transurethral system for erection. Alprostadil is the generic name for the synthetic version of prostaglandin E1, a naturally occurring vasodilator present throughout the body and at high levels in seminal fluid.

Other Pharmacologic Agents. The Company is also engaged in the evaluation and development of additional pharmacologic agents to treat erectile dysfunction either alone or in combination with other agents. One such agent is prazosin, a generic alpha-receptor blocker. The Company expects to begin a Phase III multi-center trial in 1998 for its second product candidate, a combination of alprostadil and prazosin delivered via the Company's transurethral system for erection. The Company has several other product candidates in preclinical development.

THE VIVUS STRATEGY

The Company's objective is to become the global leader in the development and commercialization of innovative therapies for erectile dysfunction. The Company is pursuing this objective with the following strategies:

Focus on Clinical Development and Regulatory Review. The Company has sought and plans to continue to seek additional pharmacologic agents suitable for transurethral delivery for which significant safety data already exists. The Company believes that such agents may progress more rapidly through the clinical development and regulatory process than agents without preexisting safety data.

Expand the Market. The Company is seeking to increase the number of men receiving treatment for erectile dysfunction by developing safe, effective, discreet, easy to use, minimally-invasive products and by heightening physician and consumer awareness of erectile dysfunction through education.

Maintain Proprietary Technology. The Company has sought and will continue to seek a strong proprietary position for the Company's transurethral system for erection by pursuing patent protection in the United States and key international countries.

Develop Novel Pharmacologic Agents. The Company is engaged in the research and development of and may seek to license novel pharmacologic agents that may provide an enhanced therapeutic benefit in the treatment of erectile dysfunction, either alone or in combination with other agents.

Achieve Broad Distribution. The Company is initially marketing and selling its products through a direct sales force in the United States, and through distribution, co-promotion or license agreements with corporate partners in foreign markets. In May 1996, the Company completed an international marketing agreement with Astra AB (Astra) whereby Astra will purchase the Company's products for resale in Europe, South America, Central America, Australia and New Zealand. In January 1997, the Company

signed an international marketing agreement with Janssen, a subsidiary of Johnson & Johnson, whereby Janssen will purchase the Company's products for resale in China, multiple Pacific Rim countries (excluding Japan), Canada, Mexico and South Africa. In October 1997, the Company signed an international marketing agreement, amending the earlier agreement with Janssen, that expanded Janssen's territories to include the Middle East, Russia, the Indian sub-continent, and Africa.

MANUFACTURING AND RAW MATERIALS

The Company has limited experience in manufacturing and selling MUSE (alprostadil) in commercial quantities. Since the commercial launch of MUSE (alprostadil) in January 1997, the Company has experienced product shortages due to higher than expected demand and difficulties encountered in scaling up production of MUSE (alprostadil). The Company leased 90,000 square feet of space in New Jersey in which it has constructed additional manufacturing and testing facilities. The Company has filed for regulatory authorization of this facility with both the FDA and MCA. In March 1998, the MCA authorized the Company to begin commercial production and shipment of MUSE (alprostadil) from its new facility. In addition, the Company has negotiated a long-term lease for a site in Ireland for construction of a European manufacturing operation. Until the Company receives the required approvals for its new New Jersey facility, domestic and certain international markets will need to be supplied from its current facility at Paco. There can be no assurance that such approvals will be granted in a timely manner, if at all. If international sales increase as anticipated, product available for the domestic market will be reduced and gross margins will be adversely impacted. If the Company encounters further difficulties with its current manufacturing facility or delays in regulatory approvals of its new manufacturing facility, capacity constraints could continue for an extended period of time, which would have a material adverse effect on the Company's business, financial condition and results of operations.

The Company obtains its supply of alprostadil from two sources. The first is Spolana Chemical Works a.s. in Neratovice, Czech Republic ("Spolana") pursuant to a supply agreement that was executed in May 1997. In January 1996, the Company entered into an alprostadil supply agreement with CHINOIN Pharmaceutical and Chemical Works Co., Ltd. ("Chinoin"). Chinoin is the Hungarian subsidiary of the French pharmaceutical company Sanofi Winthrop. Alprostadil, a generic drug, is extremely difficult to manufacture and is only available to the Company from a limited number of other suppliers, none of which currently produce it in commercial quantities. The Company is seeking additional sources of alprostadil. In addition, the Company relies on a single injection molding company, The Kipp Group ("Kipp"), for its supply of plastic applicator components. In turn, Kipp obtains its supply of resin, a key ingredient of the applicator, from a single source, Huntsman Corporation. The Company also relies on a single source, E-Beam Services, Inc. ("E-Beam"), for sterilization of its product. There can be no assurance that the Company will be able to identify and qualify additional sources of alprostadil and plastic components and an additional sterilization facility. The Company is required to receive FDA approval for suppliers. The FDA may require additional clinical trials or other studies prior to accepting a new supplier. Unless the Company secures and qualifies additional sources of alprostadil and plastic components and an additional sterilization facility, it will be entirely dependent upon the existing suppliers and E-Beam. If interruptions in these supplies or services were to occur for any reason, including a decision by existing suppliers and/or E-Beam to discontinue manufacturing or services, political unrest, labor disputes or a failure of existing suppliers and/or E-Beam to follow applicable regulations, the development and commercial marketing of MUSE (alprostadil) and other potential products could be delayed or prevented. An interruption in sterilization services or the Company's supply of alprostadil or plastic components would have a material adverse effect on the Company's business, financial condition and results of operations.

The formulation, filling and packaging of MUSE (alprostadil) is performed at Paco at its facility in Lakewood, New Jersey. In April 1995, Paco was acquired by The West Company. In June 1995, the Company completed construction of its approximately 6,000 square feet of dedicated manufacturing and testing space within Paco's facility. This space is dedicated to manufacturing and testing activities for the Company. Until the Company further develops its in-house manufacturing capability, it will be substantially dependent upon Paco for the manufacture of its products. There can be no assurance that the Company's

reliance on Paco will not result in problems with product supply. Interruptions in the availability of MUSE (alprostadil) and other potential products could have a material adverse effect on the Company's business, financial condition and results of operations.

The Company obtains the necessary raw materials and components for the manufacture of MUSE (alprostadil), as well as certain services, such as testing and sterilization, from third parties. The Company currently contracts with suppliers and service providers, including foreign manufacturers, that are required to comply with strict standards established by the Company. Certain suppliers and service providers are required by the Federal Food, Drug, and Cosmetic Act, as amended, and by FDA regulations to follow cGMP requirements and are subject to routine periodic inspections by the FDA and certain state and foreign regulatory agencies for compliance with cGMP and other applicable regulations. Certain of the Company's suppliers were inspected for cGMP compliance as part of the approval process. However, upon routine re-inspection of these facilities, there can be no assurance that the FDA will find the manufacturing process or facilities to be in compliance with cGMP and other regulations. A routine re-inspection of Chinoin, one of the Company's two sources of alprostadil, resulted in the issuance of an FDA Form 483 which set forth areas where Chinoin was not in compliance with cGMP requirements. Failure to achieve satisfactory cGMP compliance as confirmed by routine inspections could have a material adverse effect on the Company's ability to continue to manufacture and distribute its products and, in the most serious case, result in the issuance of a regulatory Warning Letter or seizure or recall of products, injunction and/or civil fines.

In connection with post-approval inspections of the Company's New Jersey manufacturing facility at Paco, the FDA issued the Company FDA Form 483s and a Warning Letter, which detailed specific areas where the FDA observed that the Company's operations were not in full compliance with some areas of cGMP requirements. On November 19, 1997, after taking corrective action and providing the FDA with a written response to the FDA observations, the Company received a letter from the FDA affirming that the Company's facility at Paco is in substantial compliance with cGMP requirements. Failure to maintain satisfactory cGMP compliance would have a material adverse effect on the Company's ability to continue to market and distribute its products and, in the most serious cases, could result in the issuance of additional Warning Letters, seizure or recall of products, civil fines or closure of the Company's manufacturing facility until cGMP compliance is achieved.

SALES AND MARKETING

Before commercially launching its first product, MUSE (alprostadil), in January 1997, the Company had no experience in the sale, marketing and distribution of pharmaceutical products. The Company is marketing and selling its products through a direct sales force in the United States. VIVUS currently employs approximately 75 sales representatives who call upon urologists and other specialists. Effective February 1998, the Company entered into a Sales Force Services Agreement with Innovex Inc. ("Innovex"). Pursuant to the Sales Force Services Agreement, Innovex will provide approximately 200 additional contract sales representatives, the substantial majority of whom will be calling upon primary care physicians. Accordingly, the Company's ability to increase sales will be highly dependent upon the efforts of Innovex. There can be no assurance that Innovex's sales efforts will be successful or that primary care physicians will recommend the use of MUSE (alprostadil).

Because of production capacity constraints experienced by VIVUS, the Company did not initiate significant MUSE advertising programs throughout 1997 and experienced declining demand for MUSE (alprostadil) in late 1997. In anticipation of receiving regulatory approvals of its new manufacturing facility and because of available inventories at the wholesale level, the Company launched its first domestic direct-to-consumer advertising campaign in January 1998. This campaign includes major television, newspaper and magazine placements. In February 1998, the FDA notified the Company that it objected to, among other things, the prominence and balance of side effect information relative to efficacy information in certain written materials and the Company's television advertisements. The Company is no longer utilizing the prior written materials and has modified its written materials in response to the FDA's comments. If the FDA does not believe the modified written materials respond to its concerns then further modifications would be required resulting in additional cost and delay prior to the Company resuming its written advertising. The Company has

ceased running its television advertisements and requested a meeting with the FDA to discuss necessary changes to the Company's television advertisements. If the Company and the FDA cannot reach a prompt resolution regarding the necessary changes to the Company's television advertisements, this could result in additional cost and delay, and may prevent broadcast advertising on major networks. Cost and delay associated with the FDA's objections to the Company's direct-to-consumer advertising materials could have a negative effect upon the Company's domestic sales and marketing efforts. There can be no assurance that the Company's domestic sales and marketing efforts will be successful. In addition, there can be no assurance that the Company's capacity restraints will not prevent the Company from supplying any increased demand.

The Company markets and sells its products in foreign markets through distribution, co-promotion or license agreements with corporate partners. To date, the Company has entered into international marketing agreements with Astra and Janssen. There can be no assurance that the Company will be able to successfully enter into additional agreements with corporate partners upon reasonable terms, if at all. To the extent that the Company enters into distribution, co-promotion or license agreements for the sale of its products, the Company will be dependent upon the efforts of third parties. There can be no assurance that such efforts will be successful.

In February 1996, the Company entered into a distribution agreement with CORD Logistics, Inc. ("CORD"), a wholly-owned subsidiary of Cardinal Health, Inc. Under this agreement, CORD warehouses the Company's finished goods, takes customer orders, picks, packs and ships its product, invoices customers and collects related receivables. The Company also has access to CORD information systems that support these functions. As a result of this distribution agreement with CORD, the Company is heavily dependent on CORD's efforts to fulfill orders and warehouse its products effectively. There can be no assurance such efforts will be successful.

In May 1996, the Company entered into an international marketing agreement with Astra to purchase the Company's products for resale in Europe, South America, Central America, Australia and New Zealand. As consideration for execution of the marketing agreement, Astra paid the Company $10 million in June 1996. In September 1996, the Company received a $10 million milestone payment from Astra upon filing an application for marketing authorization for MUSE (alprostadil) in the United Kingdom, and, in December 1997, received a $2 million milestone payment upon receiving approval of this application by the MCA. The Company will be paid up to an additional $8 million in the event certain other milestones are achieved. However, there can be no assurance that such milestones will be achieved. As a result of this marketing agreement with Astra, the Company is dependent on Astra's efforts to market, distribute and sell the Company's products effectively in the above mentioned markets. There can be no assurance that such efforts will be successful.

In July 1996, the Company entered into a distribution agreement with Alternate Site Distributors, Inc. ("ASD"), a subsidiary of Bergen Brunswig Corporation. ASD provides "direct-to-physician" distribution, telemarketing and customer service capabilities in support of the U.S. marketing and sales efforts. Pursuant to the terms of this agreement, ASD developed a customer service organization to respond to all the Company's sales representative and physician inquiries. A central feature of this customer service is a dedicated Company owned toll free number with an automated response menu covering various options. As a result of this distribution agreement with ASD, the Company is dependent on ASD's efforts to distribute, telemarket, and provide customer service effectively. There can be no assurance that such efforts will be successful.

In January 1997, the Company signed an international marketing agreement with Janssen, a subsidiary of Johnson & Johnson. Janssen will purchase the Company's products for resale in China, multiple Pacific Rim countries (excluding Japan), Canada, Mexico and South Africa. As consideration for execution of the international marketing agreement, Janssen paid the Company $5 million. In October 1997, the Company signed an international marketing agreement, amending the earlier agreement with Janssen, that expanded Janssen's territories to include the Middle East, Russia, the Indian sub-continent, and Africa. As consideration for execution of the expanded international territory marketing agreement, Janssen paid the Company $2 million. The Company will receive additional payments in the event certain other milestones are achieved. However, there can be no assurance that such milestones will be achieved. As a result of this distribution

agreement with Janssen, the Company is dependent on Janssen's efforts to distribute and sell the Company's products effectively in the above mentioned markets. There can be no assurance that such efforts will be successful.

CLINICAL STUDIES AND COMMERCIAL EXPERIENCE

In mid-1995, the Company completed its Phase III Confirmatory studies for MUSE (alprostadil) that were used as a basis for the New Drug Application ("NDA") submitted to the FDA in March 1996. MUSE (alprostadil) was cleared for marketing by the FDA in November 1996. During in-clinic titration, 66 percent of patients treated with MUSE (alprostadil) achieved an erection judged to be sufficient for intercourse and tolerated the treatment. Of patients successfully titrated, successful intercourse was reported by 64.9 percent of participants using MUSE (alprostadil) versus 18.6 percent receiving placebo. Of all active doses administered, 50.2 percent resulted in intercourse, compared to 10.4 percent of placebo doses. No increased risk of serious adverse events due to MUSE (alprostadil) was found, and there were no reports of priapism (persistent abnormal erection) or penile scarring. Eighty-eight (88) percent of patient couples that commenced the Phase III Confirmation Study completed it. The most common side effect reported was transient penile pain and less than one percent of participants discontinued use due to discomfort. In patients who responded to treatment with MUSE (alprostadil), there was a statistically significant improvement in the patient's perception of his emotional well-being and in his relationship with his partner compared to patients treated with placebo. From the partner's perspective, there also was a statistically significant improvement in her relationship with the patient compared to partners in the placebo group. The Company has continued open label Extended Maintenance studies for those patients electing to continue treatment.

During 1997, the first year of commercial use of MUSE (alprostadil), the incidence of adverse side effects was consistent with that experienced in clinical trials.

The Company's ongoing clinical trials will evaluate the long-term safety of MUSE (alprostadil) for both the patient and his partner. Additional adverse side effects may arise during the course of ongoing clinical trials or during post-marketing surveilance. There can be no assurance that additional adverse side effects will not arise that result in the FDA requiring limitations on use or warnings that make the Company's products not commercially viable. Any additional adverse side effects could have a material adverse effect on the Company's business, financial condition and results of operations.

LICENSED PATENTS AND PROPRIETARY RIGHTS

The Company's policy is to aggressively maintain its patent position and to enforce all of its intellectual property rights.

The Company is the exclusive licensee of United States and Canadian patents originally filed in the name of Dr. Gene Voss. These patents claim methods of treating erectile dysfunction by the topical application of an ointment containing a vasodilator. There are also claims to methods of treatment involving the insertion of a catheter into the urethra to deliver vasodilators.

The Company is the exclusive licensee of patents and patent applications filed in the name of Dr. Nils Kock in numerous countries. Five United States patent applications are pending, and patents have been issued in Australia, Canada, Japan, New Zealand, Sweden, South Africa and Europe (Austria, Belgium, Germany, France, Great Britain, Ireland, Italy, Luxembourg, Netherlands, Sweden, Greece and Spain). Patent applications are pending in Denmark and Finland. The European patents claim compositions for the treatment of erectile dysfunction through the urethra of certain active substances including alpha-receptor blockers, vasoactive polypeptides, prostaglandins or nitroglycerin dispersed in a hydrophilic vehicle. A competitor has filed a patent opposition against this patent with the European Patent Office. The Company is vigorously defending this patent, however, an adverse decision could affect the Company's ability, based on its patent rights, to prevent potential competition in Europe. Failure to defend its patent position could have a material adverse effect on the Company's business, financial condition and results of operations.

The Company is the exclusive assignee of two United States patents and divisional patent applications from Alza Corporation ("Alza"), covering inventions of Dr. Virgil Place made while he was an employee of Alza. The patents and patent applications describe dosage forms for administering a therapeutic agent to the urethra, methods for treating erectile dysfunction and specific drug formulations that can be delivered transurethrally for the treatment of erectile dysfunction. Five additional divisional or continuation applications claiming subject matter disclosed but not claimed in the issued patents or applications were filed in the United States on June 7, 1995; one of these was re-filed October 28, 1997. All patents in force on June 8, 1995, or that will issue on an application filed before June 8, 1995, will automatically have a term that is the greater of twenty years from effective filing date or seventeen years from the date of patent grant. Patent applications filed on or after June 8, 1995 will be granted for a term which begins on the date the patent issues and ends twenty years from the date on which the application was filed in the United States or, if the application claims priority to an early United States application, twenty years from the earliest effective United States filing date. Foreign patents have been issued in South Africa and Australia and foreign applications are pending in Canada, Finland, Ireland, Mexico, Portugal, New Zealand, Japan, South Korea, Norway and Europe (Austria, Belgium, Switzerland, Germany, Denmark, Spain, France, United Kingdom, Italy, Luxembourg, Netherlands, Sweden and Greece).

The Company's license and assignment agreements for these patents and patent applications are royalty bearing and do not expire until the licensed patents expire. These license and assignment agreements provide that the Company may assume responsibility for the maintenance and prosecution of the patents and bring infringement actions.

In addition, the Company filed fifteen patent applications in the United States, forty patent applications in foreign jurisdictions, and two Patent Cooperation Treaty applications in 1997. Several of these applications further address the prevention, treatment and diagnosis of erectile dysfunction, while others are directed to prevention and/or treatment of other types of sexual dysfunction, including premature ejaculation in men, and female sexual dysfunction, generally. Other applications focus on prevention and/or treatment of other conditions, including incontinence, prostate disorders such as benign prostatic hyperplasia ("BPH"), and vascular disorders including peripheral vascular disease ("PVD").

The Company's success will depend in large part on the strength of its current and future patent position relating to the transurethral delivery of pharmacologic agents for the treatment of erectile dysfunction. The Company's patent position, like other pharmaceutical companies, is highly uncertain and involves complex legal and factual questions. Claims made under patent applications may be denied or significantly narrowed and the issued patents may not provide significant commercial protection to the Company. The Company could incur substantial costs in proceedings before the United States Patent and Trademark Office, including interference proceedings. These proceedings could also result in adverse decisions as to the priority of the Company's licensed or assigned inventions. There is no assurance that the Company's patents will not be successfully challenged or designed around by others.

The Company is presently involved in an opposition proceeding that was instigated by the Pharmedic Company against a European patent that is exclusively licensed to VIVUS. As a result of the opposition proceeding, certain claims in the European patent were held to be unpatentable by the Opposition Division of the European Patent Office ("EPO"). These claims all related to pharmaceutical compositions that include prostaglandin E1. The patentability of all other claims in the patent was confirmed (i.e., claims directed to the use of active agents in the treatment of erectile dysfunction by administration via the urethra to the corpora cavernosa, and a pharmaceutical composition claim for prazosin). The Company appealed the EPO's decision with respect to the pharmaceutical composition claims that were held unpatentable. The Pharmedic Company appealed the EPO's decision with respect to the claims that were held patentable, but has since withdrawn. Despite the withdrawal of the Pharmedic Company from the appeal process, the Company has continued with its own appeal in an attempt to reinstate the composition claims. The EPO Appeals Board must make its own finding whether the claims that were deemed unpatentable by the Opposition Division are indeed patentable before it can reverse the Opposition Division's decision. There can be no assurance that the appeal will be successful or that further challenges to the Company's European patent will not occur should the Company try to enforce the patent in the various European courts.

There can be no assurance that the Company's products do not or will not infringe on the patent or proprietary rights of others. The Company may be required to obtain additional licenses to the patents, patent applications or other proprietary rights of others. There can be no assurance that any such licenses would be made available on terms acceptable to the Company, if at all. If the Company does not obtain such licenses, it could encounter delays in product introductions while it attempts to design around such patents, or the development, manufacture or sale of products requiring such licenses could be precluded. The Company believes there will continue to be significant litigation in the pharmaceutical industry regarding patent and other intellectual property rights.

A former consultant to the Company had claimed that he was the inventor of certain technology disclosed in two of the Company's patents. The former consultant further claimed that the Company and certain of its officers and directors defrauded him by allegedly failing to inform him that it intended to use and patent this technology and by failing to compensate him for the technology in the manner allegedly promised. In May 1996, the Company filed a complaint for declaratory judgment against the former consultant in the United States District Court for the Northern District of California, which sought a declaration from the court that the former consultant was not an inventor of any of the technology. In September 1996, the consultant filed his counterclaim. In December 1997, the Company reached a settlement with the former consultant whereby the former consultant dismissed his claims against the Company and the Company's officers and directors involved in the lawsuit. In return, the Company paid the consultant $5.1 million. The Company recorded the settlement on its books in the fourth quarter of 1997 and paid the settlement on January 5, 1998.

In addition to its patent portfolio, the Company also relies on trade secrets and other unpatented proprietary technology. No assurance can be given that the Company can meaningfully protect its rights in such unpatented proprietary technology or that others will not independently develop substantially equivalent proprietary products and processes or otherwise gain access to the Company's proprietary technology. The Company seeks to protect its trade secrets and proprietary know-how, in part, with confidentiality agreements with employees and consultants. There can be no assurance that the agreements will not be breached, that the Company will have adequate remedies for any breach or that the Company's trade secrets will not otherwise become known or be independently developed by competitors. In addition, protracted and costly litigation may be necessary to enforce and determine the scope and validity of the Company's proprietary rights.

COMPETITION

Competition in the pharmaceutical and medical products industries is intense and characterized by extensive research efforts and rapid technological progress. Certain treatments for erectile dysfunction exist, such as needle injection therapy, vacuum constriction devices, penile implants and oral medications, and the manufacturers of these products will continue to improve these therapies. In July 1995, the FDA approved the use of alprostadil in The Upjohn Company's needle injection therapy product for erectile dysfunction. Previously, Upjohn had obtained approval in a number of European countries. In June 1997, Schwartz Pharma announced the FDA approval of their needle injection treatment for erectile dysfunction. Additional competitive therapies include an oral medication by Pfizer Inc., for which they received regulatory approval in the United States in March 1998 and have filed for regulatory approvals in Europe. Commercial introduction of Pfizer Inc.'s oral medication could have a material adverse affect on the Company's business, financial condition and results of operations. Other large pharmaceutical companies are also actively engaged in the development of therapies for the treatment of erectile dysfunction. These companies have substantially greater research and development capabilities as well as substantially greater marketing, financial and human resources than the Company. In addition, these companies have significantly greater experience than the Company in undertaking preclinical testing, human clinical trials and other regulatory approval procedures. There are also small companies, academic institutions, governmental agencies and other research organizations that are conducting research in the area of erectile dysfunction. For instance, Zonagen, Inc. and Pentech Pharmaceutical, Inc. have oral medications in Phase III clinical trials. These entities may also market commercial products either on their own or through collaborative efforts. For example, Zonagen, Inc. announced a worldwide marketing agreement with Schering-Plough in November 1997. The Company's competitors may develop technologies and products that are more effective than those currently marketed or

being developed by the Company. Such developments would render the Company's products less competitive or possibly obsolete. The Company is also competing with respect to marketing capabilities and manufacturing efficiency, areas in which it has limited experience.

GOVERNMENT REGULATION

The production and marketing of the Company's proposed products and its research and development activities are subject to regulation for safety, effectiveness and quality by numerous governmental authorities in the United States and other countries. In the United States, drug products are subject to rigorous FDA regulation. The Federal Food, Drug, and Cosmetic Act, as amended, the regulations promulgated thereunder, and other federal and state statutes and regulations, govern, among other things, the testing, manufacture, safety, effectiveness, labeling, storage, record keeping, advertising and promotion of the Company's products. Product development and approval within this regulatory framework takes a number of years to achieve and involves the expenditure of substantial resources.

The steps required before a pharmaceutical agent may be marketed in the United States include (i) preclinical laboratory tests, in vivo preclinical studies and formulation studies, (ii) the submission to the FDA of an Investigational New Drug ("IND") application for human clinical testing, which must become effective before human clinical trials commence, (iii) adequate and well-controlled human clinical trials to establish the safety and effectiveness of the drug, (iv) the submission of an NDA to the FDA, and (v) the FDA clearance for marketing of the NDA prior to any commercial sale or shipment of the drug. In addition to obtaining FDA approval for each product, each domestic drug manufacturing establishment must be registered with, and approved by, the FDA. Domestic and foreign manufacturing establishments are subject to biennial inspections by the FDA and must comply with cGMPs for both drugs and devices. To supply products for use in the United States, foreign manufacturing establishments must comply with cGMPs and are subject to periodic inspection by the FDA or by corresponding regulatory agencies in such countries under reciprocal agreements with the FDA. The Company's contract manufacturing and new manufacturing sites, both located in New Jersey, must also be licensed by the State of New Jersey and must comply with New Jersey's regulatory requirements.

Preclinical tests include laboratory evaluation of product chemistry and formulation, as well as animal studies to assess the potential safety and effectiveness of the product. Compounds must be adequately manufactured and preclinical safety tests must be conducted by laboratories that comply with FDA requirements. The results of the preclinical tests are submitted to the FDA as part of an IND and are reviewed by the FDA prior to the commencement of human clinical trials. There can be no assurance that submission of an IND will result in FDA authorization to commence clinical trials.

Clinical trials involve the administration of the investigational new drug to patients, under the supervision of a qualified clinical investigator. Clinical trials are conducted in accordance with Good Clinical Practices under protocols that detail the objectives of the study, the parameters to be used to monitor safety and the effectiveness criteria to be evaluated. Each protocol must be submitted to the FDA as part of the IND. Further, each clinical study must be conducted under the auspices of an independent Institutional Review Board ("IRB"). The IRB will consider, among other things, ethical factors, the safety of human subjects and the possible liability of the institution.

Clinical trials are typically conducted in three sequential phases, but the phases may overlap. In Phase I, the initial introduction of the drug into healthy subjects, the drug is tested for safety, dosage tolerance, absorption, distribution, metabolism, excretion and pharmacodynamics (clinical pharmacology). Phase II involves studies in a limited patient population to (i) determine the effectiveness of the drug for specific, targeted indications, (ii) determine dosage tolerance and optimal dosage and (iii) identify possible adverse effects and safety risks. When a compound is found to be effective and to have an acceptable safety profile in Phase II evaluations, Phase III trials are undertaken to further evaluate clinical effectiveness and to further test for safety within an expanded patient population at geographically dispersed clinical study sites. There can be no assurance that Phase I, Phase II or Phase III testing will be completed within any specific time period, if at all, with respect to any of the Company's products subject to such testing. Furthermore, the Company or

the FDA may suspend clinical trials at any time if it is believed that the patients are being exposed to an unacceptable health risk.

The results of the pharmaceutical development, preclinical studies and clinical studies are submitted to the FDA in the form of an NDA for approval of the marketing and commercial shipment of the drug. The Company submitted an NDA for MUSE (alprostadil) in March 1996, and the FDA approved the NDA in November 1996. Although MUSE (alprostadil) received FDA approval, the testing and approval process for the Company's other potential products will require substantial time and effort, and there can be no assurance that any approval will be granted on a timely basis, if at all. The FDA may deny an NDA if applicable regulatory criteria are not satisfied, require additional testing or information, or require postmarketing testing and surveillance to monitor the safety of the Company's products if they do not view the NDA as containing adequate evidence of the safety and effectiveness of the drug. Notwithstanding the submission of such data, the FDA may ultimately decide that the application does not satisfy its regulatory criteria for approval. Moreover, if regulatory approval of a drug is granted, such approval may entail limitations on the indicated uses for which it may be marketed. In addition, after regulatory approval is obtained, the Company's products are subject to continual review. Manufacturing, labeling and promotional activities are continually regulated by the FDA, and the Company must also report certain adverse events involving its drugs to the FDA under regulations issued by the Agency. Previously unidentified adverse events or an increased frequency of adverse events that occur post-approval could result in labeling modifications of approved products, which could adversely effect future marketing of a drug. Finally, approvals may be withdrawn if compliance with regulatory standards is not maintained or if problems occur following initial marketing.

Among the conditions for an NDA approval is the requirement that the prospective manufacturer's quality control and manufacturing procedures conform to cGMPs. In complying with standards set forth in these regulations, manufacturers must continue to expend time, money and effort in the area of production and quality control to ensure full technical compliance.

The Company and certain of its suppliers and service providers are subject to routine periodic inspections by the FDA and certain state and foreign regulatory agencies for compliance with cGMP and other applicable regulations. Certain of the Company's suppliers and service providers were inspected for cGMP compliance as part of the approval process. However, upon routine re-inspection of these facilities, there can be no assurance that the FDA will find the manufacturing process or facilities to be in compliance with cGMP and other regulations. A routine re-inspection of Chinoin, one of the Company's two sources of alprostadil, resulted in the issuance of an FDA Form 483 which set forth areas where Chinoin was not in compliance with cGMP requirements. Failure to achieve satisfactory cGMP compliance as confirmed by routine regulatory inspections could have a material adverse effect on the Company's ability to continue to manufacture and distribute its products and, in the most serious cases, result in the issuance of a regulatory Warning Letter or seizure or recall of products, injunction and/or civil fines.

In connection with post-approval inspections of the Company's New Jersey manufacturing facility at Paco, the FDA issued the Company FDA Form 483s and a Warning Letter, which detailed specific areas where the FDA observed that the Company's operations were not in full compliance with some areas of cGMP requirements. On November 19, 1997, after taking corrective action and providing the FDA a written response to the FDA observations, the Company received a letter from the FDA affirming that the Company's facility at Paco is in substantial compliance with cGMP requirements. Failure to maintain satisfactory cGMP compliance could have a material adverse effect on the Company's ability to continue to market and distribute its products and, in the most serious cases, could result in the issuance of additional Warning Letters, seizure or recall of products, civil fines or closure of the Company's manufacturing facility until cGMP compliance is achieved.

For clinical investigation and marketing in Europe, the Company is also subject to foreign regulatory requirements governing human clinical trials and marketing approval for drugs. The requirements governing the conduct of clinical trials, product licensing, pricing and reimbursement vary widely for European countries both within and outside the European Union ("EU"). The Company's approach to the European regulatory process involved the identification of respected clinical investigators in the member states of the EU and other

European countries to conduct clinical studies. The Company designed these studies to meet FDA, EU and other European countries' standards. Within the EU, while marketing authorizations must be supported by clinical trial data of a type and extent set out by EU directives and guidelines, the approval process for the commencement of clinical trials is just beginning to be harmonized by EU law, and still varies from country to country. The system for obtaining marketing authorizations within the EU changed on January 1, 1995. The new EU registration system is a dual one in which certain products, such as biotechnology and high-technology products and those containing new active substances, have access to a central regulatory system that provides registration throughout the entire EU. Other products will be registered by national authorities in individual EU member states, operating on a principle of mutual recognition. As far as possible, the Company's studies were designed to develop a regulatory package sufficient for multi-country approval in the European markets without the need to duplicate studies for individual country approvals. In November 1997, the Company obtained regulatory marketing clearance by the MCA to market MUSE (alprostadil) in the United Kingdom. In addition, applications for regulatory approval to market MUSE (alprostadil) have been submitted in several other European countries, including Sweden, Norway and Switzerland. These applications will be subject to rigorous approval processes, and there can be no assurance such approval will be granted in a timely manner, if at all.

Outside the United States and Europe, the Company's ability to market a product is contingent upon receiving a marketing authorization from the appropriate regulatory authority. Applications for regulatory approval have been filed in several other countries, including China, Australia, Canada and Mexico. These foreign regulatory approval processes include all of the risks associated with FDA approval previously discussed.

EMPLOYEES

As of February 27, 1998 the Company employed 233 persons, of whom four are part-time. Of these employees, 62 are in manufacturing, 16 are in clinical and regulatory affairs, 10 are in research and development, 29 are in quality assurance, 90 are in sales and marketing, one is in corporate development and 25 are in finance and administration. None of the Company's current employees are represented by a labor union or are the subject of a collective bargaining agreement. The Company believes that it maintains good relations with its employees.

This Annual Report on Form 10-K contains forward looking statements that involve risks and uncertainties. The Company's actual results could differ from those set forth in such forward looking statements as a result of certain factors, including those set forth in this Risk Factors section.

## RISK FACTORS

### LIMITED MANUFACTURING EXPERIENCE; CAPACITY CONSTRAINTS

The Company has limited experience in manufacturing MUSE (alprostadil) in commercial quantities. Since the commercial launch of MUSE (alprostadil) in January 1997, the Company has experienced product shortages due to higher than expected demand and difficulties encountered in scaling up production of MUSE (alprostadil). The Company leased 90,000 square feet of space in New Jersey in which it has constructed additional manufacturing and testing facilities. The Company has filed for regulatory authorization of this facility with both the FDA and MCA. In March 1998, the MCA authorized the Company to begin commercial production and shipment of MUSE (alprostadil) from its new facility. Before the new facility in New Jersey can produce commercial product for the United States and certain other markets, the Company must obtain FDA approval. There is no assurance FDA approval will be completed and obtained in a timely manner, if at all. Until the Company receives the required approvals for its new New Jersey facility, domestic and certain international markets will need to be supplied from its current facility at Paco Pharmaceutical Services, Inc. ("Paco"). If international sales increase as anticipated, product available for the domestic market will be reduced and gross margins will be adversely impacted. If the Company encounters further difficulties with its current manufacturing facility or delays in regulatory approval of its new manufacturing facility, capacity constraints could continue for an extended period of time. Such extended capacity constraints could strain relationships with distribution partners due to the need to allocate product between domestic and international markets, and possibly cause patients to seek alternative therapies. Such events could have a material adverse effect on the Company's business, financial condition and results of operations. The Company anticipates an operating loss in the first quarter of 1998 primarily due to the impact of the continued capacity constraints, allocation of product to international markets which results in a lower gross margin, higher costs of goods sold as the Company ramps up its new manufacturing facility, and higher marketing and sales costs related to the Company's direct to consumer marketing campaign.

The formulation, filling and packaging of MUSE (alprostadil) is performed at Paco, a wholly owned subsidiary of The West Company, at its facility in Lakewood, New Jersey. In June 1995, the Company completed construction of its approximately 6,000 square feet of dedicated manufacturing and testing space within Paco's facility. Due to higher than expected demand, the Company has leased two adjacent buildings in New Jersey, totalling 90,000 square feet, in which it has constructed additional manufacturing and testing facilities. Until the Company further develops its in-house manufacturing capability, it will be substantially dependent upon Paco for the manufacture of its products. There can be no assurance that the Company's reliance on Paco for the manufacture of its products will not result in problems with product supply, and there can be no assurance that the Company will receive FDA approval for or be able to ramp-up its second manufacturing facility in a timely manner, if at all. Interruptions in the availability of products could delay or prevent the further development and commercial marketing of MUSE (alprostadil) and other potential products and would have a material adverse effect on the Company's business, financial condition and results of operations.

The Company and certain of its suppliers and service providers are subject to routine periodic inspections by the FDA and certain state and foreign regulatory agencies for compliance with cGMP and other applicable regulations. Certain of the Company's suppliers were inspected for compliance with cGMP requirements as part of the approval process. However, upon routine re-inspection of these facilities, there can be no assurance that the FDA will find the manufacturing process or facilities to be in compliance with cGMP and other regulations. A routine re-inspection of Chinoin, one of the Company's two sources of alprostadil, resulted in the issuance of an FDA Form 483 which set forth areas where Chinoin was not in compliance with cGMP requirements. Failure to achieve satisfactory cGMP compliance as confirmed by routine regulatory inspections would have a significant adverse effect on the Company's ability to continue to manufacture and distribute its

products and, in the most serious cases, result in the issuance of a regulatory warning letter or seizure or recall of products, injunction and/or civil fines.

In connection with post-approval inspections of the Company's New Jersey manufacturing facility at Paco, the FDA issued the Company FDA Form 483s and a Warning Letter, which detailed specific areas where the FDA observed that the Company's operations were not in full compliance with some areas of cGMP requirements. On November 19, 1997, after taking corrective action and providing the FDA a written response to the FDA observations, the Company received a letter from the FDA affirming that the Company's facility at Paco is in substantial compliance with cGMP requirements. Failure to maintain satisfactory cGMP compliance could have a material adverse effect on the Company's ability to continue to market and distribute its products and, in the most serious cases, could result in the issuance of additional Warning Letters, seizure or recall of products, civil fines or closure of the Company's manufacturing facility until cGMP compliance is achieved.

LIMITED SALES AND MARKETING EXPERIENCE; DEPENDENCE ON THIRD PARTIES

Before commercially launching its first product, MUSE (alprostadil), in January 1997, the Company had no experience in the sale, marketing and distribution of pharmaceutical products. The Company is marketing and selling its products initially through a direct sales force in the United States. VIVUS currently employs approximately 75 sales representatives who call upon urologists and other specialists. Effective February 1998, the Company entered into a Sales Force Services Agreement with Innovex Inc. ("Innovex"). Pursuant to the Sales Force Services Agreement, Innovex will provide approximately 200 additional contract sales representatives, the substantial majority of whom will be calling upon primary care physicians. Accordingly, the Company's ability to increase sales will be highly dependent upon the efforts of Innovex. There can be no assurance that Innovex's sales efforts will be successful or that primary care physicians will recommend the use of MUSE (alprostadil).

Because of production capacity constraints experienced by VIVUS, the Company did not initiate significant MUSE (alprostadil) advertising programs throughout 1997 and experienced declining demand for MUSE (alprostadil) in late 1997. In anticipation of receiving regulatory approvals of its new manufacturing facility and because of available inventories at the wholesale level, the Company launched its first domestic direct-to-consumer advertising campaign in January 1998. This campaign includes major television, newspaper and magazine placements. In February 1998, the FDA notified the Company that it objected to, among other things, the prominence and balance of side effect information relative to efficacy information in certain written materials and the Company's television advertisements. The Company is no longer utilizing the prior written materials and has modified its written materials in response to the FDA's comments. If the FDA does not believe the modified written materials respond to its concerns then further modifications would be required resulting in additional cost and delay prior to the Company resuming its written advertising. The Company has ceased running its television advertisements and requested a meeting with the FDA to discuss necessary changes to the Company's television advertisements. If the Company and the FDA cannot reach a prompt resolution regarding the necessary changes to the Company's television advertisements, this could result in additional cost and delay, and may prevent broadcast advertising on major networks. Cost and delay associated with the FDA's objections to the Company's direct-to-consumer advertising materials could have a negative effect upon the Company's domestic sales and marketing efforts. There can be no assurance that the Company's domestic sales and marketing efforts will be successful at increasing the demand for MUSE (alprostadil). In addition, there can be no assurance that the Company's capacity restraints will not prevent the Company from supplying any increased demand.

In February 1996, the Company entered into a distribution agreement with CORD Logistics, Inc. ("CORD"), a wholly-owned subsidiary of Cardinal Health, Inc. Under this agreement, CORD warehouses the Company's finished goods, takes customer orders, picks, packs and ships its product, invoices customers and collects related receivables. The Company also has access to CORD's information systems that support these functions. As a result of this distribution agreement with CORD, the Company is heavily dependent on CORD's efforts to fulfill orders and warehouse its products effectively. There can be no assurance such efforts will be successful.

In May 1996, the Company entered into an international marketing agreement with Astra to purchase the Company's products for resale in Europe, South America, Central America, Australia and New Zealand. As consideration for execution of the international marketing agreement, Astra paid the Company $10 million in June 1996. In September 1996, the Company received a $10 million milestone payment from Astra upon filing an application for marketing authorization for MUSE (alprostadil) in the United Kingdom, and, in December 1997, received a $2 million milestone payment upon receiving approval of this application by the MCA. The Company will be paid up to an additional $8 million in the event certain other milestones are achieved. However, there can be no assurance that such milestones will be achieved. The marketing agreement does not have minimum purchase commitments, and Astra may take up to twelve months to introduce a product in a given country following regulatory approval in such country. As a result of this marketing agreement with Astra, the Company is dependent on Astra's efforts to market, distribute and sell the Company's products effectively in the above mentioned markets. There can be no assurance that such efforts will be successful.

In July 1996, the Company entered into a distribution agreement with ASD, a subsidiary of Bergen Brunswig Corporation. ASD provides "direct-to-physician" distribution, telemarketing and customer service capabilities in support of the U.S. marketing and sales efforts. As a result of this distribution agreement with ASD, the Company is dependent on ASD's efforts to distribute, telemarket, and provide customer service effectively. There can be no assurance that such efforts will be successful.

In January 1997, the Company signed an international marketing agreement with Janssen, a subsidiary of Johnson & Johnson. Janssen will purchase the Company's products for resale in China, multiple Pacific Rim countries (excluding Japan), Canada, Mexico and South Africa. As consideration for execution of the international marketing agreement, Janssen paid the Company $5 million. In October 1997, the Company signed an international marketing agreement, amending the earlier agreement with Janssen, that expanded Janssen's territories to include the Middle East, Russia, the Indian sub-continent, and Africa. As consideration for execution of the expanded international territory marketing agreement, Janssen paid the Company $2 million. The Company will receive additional payments in the event certain other milestones are achieved. However, there can be no assurance that such milestones will be achieved. As a result of this distribution agreement with Janssen, the Company is dependent on Janssen's efforts to distribute and sell the Company's products effectively in the above mentioned markets. There can be no assurance that such efforts will be successful.

The Company intends to market and sell its products in other foreign markets through distribution, co-promotion or license agreements with corporate partners. To date, the Company has entered into international marketing agreements with Astra and Janssen. There can be no assurance that the Company will be able to successfully enter into additional agreements with corporate partners upon reasonable terms, if at all. To the extent that the Company enters into distribution, co-promotion or license agreements for the sale of its products, the Company will be dependent upon the efforts of third parties. These third parties may have other commitments, and there can be no assurance that they will commit the necessary resources to effectively market, distribute and sell the Company's product.

INTENSE COMPETITION

Competition in the pharmaceutical and medical products industries is intense and is characterized by extensive research efforts and rapid technological progress. Certain treatments for erectile dysfunction exist, such as needle injection therapy, vacuum constriction devices, penile implants and oral medications, and the manufacturers of these products will continue to improve these therapies. In July 1995, the FDA approved the use of alprostadil in The Upjohn Company's needle injection therapy product for erectile dysfunction. Previously, Upjohn had obtained approval in a number of European countries. In June 1997, Schwartz Pharma announced the FDA approval of their needle injection treatment for erectile dysfunction. Additional competitive therapies include an oral medication by Pfizer Inc., for which they received regulatory approval in the United States in March 1998 and have filed for regulatory approval in Europe. Commercial introduction of Pfizer Inc.'s oral medication could have a material adverse affect on the Company's business, financial condition and results of operations. Other large pharmaceutical companies are also actively engaged in the

development of therapies for the treatment of erectile dysfunction. These companies have substantially greater research and development capabilities as well as substantially greater marketing, financial and human resources than the Company. In addition, these companies have significantly greater experience than the Company in undertaking preclinical testing, human clinical trials and other regulatory approval procedures. There are also small companies, academic institutions, governmental agencies and other research organizations that are conducting research in the area of erectile dysfunction. For instance, Zonagen, Inc. and Pentech Pharmaceutical, Inc. have oral medications in Phase III clinical trials. These entities may market commercial products either on their own or through collaborative efforts. For example, Zonagen, Inc. announced a worldwide marketing agreement with Schering-Plough in November 1997. The Company's competitors may develop technologies and products that are more effective than those currently marketed or being developed by the Company. Such developments would render the Company's products less competitive or possibly obsolete. The Company is also competing with respect to marketing capabilities and manufacturing efficiency, areas in which it has limited experience.

DEPENDENCE ON THE COMPANY'S TRANSURETHRAL SYSTEM FOR ERECTION

The Company currently relies upon a single therapeutic approach to treat erectile dysfunction, its transurethral system for erection. Certain side effects have been found to occur with the use of MUSE (alprostadil). Mild to moderate transient penile/perineal pain was experienced by 21 percent to 42 percent of patients (depending on dosage) treated with MUSE (alprostadil) in the Company's Phase II/III Dose Ranging study. Moderate to severe decreases in blood pressure were experienced by 1 percent to 4 percent of patients (depending on dosage) treated with MUSE (alprostadil) in such study, and rarely (0.4 percent) patients experienced syncope (fainting). During 1997, the first year of commercial use of MUSE (alprostadil), the incidence of adverse side effects was consistent with that experienced in clinical trials.

The existence of side effects or dissatisfaction with product results may impact a patient's decision to use or continue to use, or a physician's decision to recommend, MUSE (alprostadil) as a therapy for the treatment of erectile dysfunction thereby affecting the commercial viability of MUSE (alprostadil). In addition, technological changes or medical advancements could diminish or eliminate the commercial viability of the Company's products. As a result of the Company's single therapeutic approach and its current focus on MUSE (alprostadil), the failure to successfully commercialize such product would have an adverse effect on the Company and could threaten the Company's ability to continue as a viable entity.

GOVERNMENT REGULATION AND UNCERTAINTY OF PRODUCT APPROVALS

The Company's research, preclinical development, clinical trials, manufacturing and marketing of its products are subject to extensive regulation by numerous governmental authorities in the United States and other countries. Clinical trials, manufacturing and marketing of the Company's products will be subject to the rigorous testing and approval processes of the FDA and equivalent foreign regulatory agencies. The process of obtaining FDA and other required regulatory approvals is lengthy and expensive. The Company completed pivotal clinical trials in 1995 and submitted an NDA for its first product, MUSE (alprostadil), to the FDA in March 1996. In November 1996, the Company received final marketing clearance from the FDA for MUSE (alprostadil). In November 1997, the Company obtained regulatory marketing clearance by the MCA to market MUSE (alprostadil) in the United Kingdom.

After regulatory approval is obtained, the Company's products are subject to continual review. Manufacturing, labeling and promotional activities are continually regulated by the FDA, and the Company must also report certain adverse events involving its drugs to the Agency under regulations issued by the FDA. Additionally, previously unidentified adverse events or an increased frequency of adverse events that occur post-approval could result in labeling modifications of approved products, which could adversely effect future marketing of a drug. Finally, approvals may be withdrawn if compliance with regulatory standards is not maintained or if problems occur following initial marketing. The restriction, suspension or revocation of regulatory approvals or any other failure to comply with regulatory requirements would have a material adverse effect on the Company's business, financial condition and results of operations.

The Company has submitted applications for approval of MUSE (alprostadil) in several other countries, including China, Australia, Canada and Mexico. These applications will be subject to rigorous approval processes. There can be no assurance that approval in these or other countries will be granted on a timely basis, if at all, or if granted, that such approval will not contain significant limitations in the form of warnings, precautions or contraindications with respect to condition of use. Any delay in obtaining, or failure to obtain such approval would adversely affect the Company's ability to generate product revenue.

The Company's clinical trials for future products will generate safety data as well as efficacy data and will require substantial time and significant funding. There is no assurance that clinical trials related to future products will be completed successfully within any specified time period, if at all. Furthermore, the FDA may suspend clinical trials at any time if it is believed that the subjects participating in such trials are being exposed to unacceptable health risks. There can be no assurance that FDA or other regulatory approvals for any products developed by the Company will be granted on a timely basis, if at all, or if granted, that such approval will not contain significant limitations in the form of warnings, precautions or contraindications with respect to conditions of use. Any delay in obtaining, or failure to obtain, such approvals would adversely affect the Company's ability to generate product revenue. Failure to comply with the applicable regulatory requirements can, among other things, result in fines, suspensions of regulatory approvals, product recalls, operating restrictions and criminal prosecution. In addition, the marketing and manufacturing of pharmaceutical products are subject to continuing FDA review, and later discovery of previously unknown problems with a product, manufacturer or facility may result in the FDA requiring further clinical research or restrictions on the product or the manufacturer, including withdrawal of the product from the market. The restriction, suspension or revocation of regulatory approvals or any other failure to comply with regulatory requirements would have a material adverse effect on the Company's business, financial condition and results of operations.

The Company obtains the necessary raw materials and components for the manufacture of MUSE (alprostadil) as well as certain services, such as testing and sterilization, from third parties. The Company currently contracts with suppliers and service providers, including foreign manufacturers, that are required to comply with strict standards established by the Company. Certain suppliers and service providers are required by the Federal Food, Drug, and Cosmetic Act, as amended, and by FDA regulations to follow cGMP requirements and are subject to routine periodic inspections by the FDA and certain state and foreign regulatory agencies for compliance with cGMP and other applicable regulations. Certain of the Company's suppliers were inspected for cGMP compliance as part of the approval process. However, upon routine re-inspection of these facilities, there can be no assurance that the FDA will find the manufacturing process or facilities to be in compliance with cGMP and other regulations. A routine re-inspection of Chinoin, one of the Company's two sources of alprostadil, resulted in the issuance of an FDA Form 483 which set forth areas where Chinoin was not in compliance with cGMP requirements. Failure to achieve satisfactory cGMP compliance as confirmed by routine inspections could have a material adverse effect on the Company's ability to continue to manufacture and distribute its products and, in the most serious case, result in the issuance of a regulatory Warning Letter or seizure or recall of products, injunction and/or civil fines.

In connection with post-approval inspections of the Company's New Jersey manufacturing facility at Paco, the FDA issued the Company FDA Form 483s and a Warning Letter, which detailed specific areas where the FDA observed that the Company's operations were not in full compliance with some areas of cGMP requirements. On November 19, 1997, after taking corrective action and providing the FDA a written response to the FDA observations, the Company received a letter from the FDA affirming that the Company's facility at Paco is in substantial compliance with cGMP requirements. Failure to maintain satisfactory cGMP compliance could have a material adverse effect on the Company's ability to continue to market and distribute its products and, in the most serious cases, could result in the issuance of additional Warning Letters, seizure or recall of products, civil fines or closure of the Company's manufacturing facility until cGMP compliance is achieved.

PROPRIETARY RIGHTS AND RISK OF PATENT LITIGATION

The Company's success will depend, in large part, on the strength of its current and future patent position relating to the transurethral delivery of pharmacologic agents for the treatment of erectile dysfunction. The

Company's patent position, like that of other pharmaceutical companies, is highly uncertain and involves complex legal and factual questions. Claims made under patent applications may be denied or significantly narrowed and issued patents may not provide significant commercial protection to the Company. The Company could incur substantial costs in proceedings before the United States Patent Office, including interference proceedings. These proceedings could also result in adverse decisions as to the priority of the Company's licensed or assigned inventions. There is no assurance that the Company's patents will not be successfully challenged or designed around by others.

The Company is presently involved in an opposition proceeding that was instigated by the Pharmedic Company against a European patent that is exclusively licensed to VIVUS. As a result of the opposition proceeding, certain claims in the European patent were held to be unpatentable by the Opposition Division of the European Patent Office ("EPO"). These claims all related to pharmaceutical compositions that include prostaglandin E1. The patentability of all other claims in the patent was confirmed (i.e., claims directed to the use of active agents in the treatment of erectile dysfunction by administration via the urethra to the corpora cavernosa, and a pharmaceutical composition claim for prazosin). The Company appealed the EPO's decision with respect to the pharmaceutical composition claims that were held unpatentable. The Pharmedic Company appealed the EPO's decision with respect to the claims that were held patentable, but has since withdrawn. Despite the withdrawal of the Pharmedic Company from the appeal process, the Company has continued with its own appeal in an attempt to reinstate the composition claims. The EPO Appeals Board must make its own finding whether the claims that were deemed unpatentable by the Opposition Division are indeed patentable before it can reverse the Opposition Division's decision. There can be no assurance that the appeal will be successful or that further challenges to the Company's European patent will not occur should the Company try to enforce the patent in the various European courts.

There can be no assurance that the Company's products do not or will not infringe on the patent or proprietary rights of others. The Company may be required to obtain additional licenses to the patents, patent applications or other proprietary rights of others. There can be no assurance that any such licenses would be made available on terms acceptable to the Company, if at all. If the Company does not obtain such licenses, it could encounter delays in product introductions while it attempts to design around such patents, or the development, manufacture or sale of products requiring such licenses could be precluded. The Company believes there will continue to be significant litigation in the pharmaceutical industry regarding patent and other intellectual property rights.

A former consultant to the Company had claimed that he was the inventor of certain technology disclosed in two of the Company's patents. The former consultant further claimed that the Company and certain of its officers and directors defrauded him by allegedly failing to inform him that it intended to use and patent this technology and by failing to compensate him for the technology in the manner allegedly promised. In May 1996, the Company filed a complaint for declaratory judgment against the former consultant in the United States District Court for the Northern District of California, which sought a declaration from the court that the former consultant was not an inventor of any of the technology. In September 1996, the consultant filed his counterclaim. In December 1997, the Company reached a settlement with the former consultant whereby the former consultant dismissed his claims against the Company and the Company's officers and directors involved in the lawsuit. In return, the Company paid the consultant $5.1 million. The Company recorded the settlement on its books in the fourth quarter of 1997 and paid the settlement on January 5, 1998.

The Company also relies on trade secrets and other unpatented proprietary technology. No assurance can be given that the Company can meaningfully protect its rights in such unpatented proprietary technology or that others will not independently develop substantially equivalent proprietary products and processes or otherwise gain access to the Company's proprietary technology. The Company seeks to protect its trade secrets and proprietary know-how, in part, with confidentiality agreements with employees and consultants. There can be no assurance that these agreements will not be breached, that the Company will have adequate remedies for any breach or that the Company's trade secrets will not otherwise become known or be independently developed by competitors. In addition, protracted and costly litigation may be necessary to enforce and determine the scope and validity of the Company's proprietary rights.

DEPENDENCE ON DUAL AND SINGLE SOURCE OF SUPPLY

The Company obtains its supply of alprostadil from two sources. The first is Spolana Chemical Works a.s. in Neratovice, Czech Republic ("Spolana") pursuant to a supply agreement that was executed in May 1997. In January 1996, the Company entered into an alprostadil supply agreement with CHINOIN Pharmaceutical and Chemical Works Co., Ltd. ("Chinoin"). Chinoin is the Hungarian subsidiary of the French pharmaceutical company Sanofi Winthrop. Alprostadil, a generic drug, is extremely difficult to manufacture and is only available to the Company from a limited number of other suppliers, none of which currently produce it in commercial quantities. The Company is seeking additional sources of alprostadil. In addition, the Company relies on a single injection molding company, The Kipp Group ("Kipp"), for its supply of plastic applicator components. In turn, Kipp obtains its supply of resin, a key ingredient of the applicator, from a single source, Huntsman Corporation. The Company also relies on a single source, E-Beam Services, Inc. ("E-Beam"), for sterilization of its product. There can be no assurance that the Company will be able to identify and qualify additional sources of alprostadil and plastic components and an additional sterilization facility. The Company is required to receive FDA approval for suppliers. The FDA may require additional clinical trials or other studies prior to accepting a new supplier. Unless the Company secures and qualifies additional sources of alprostadil and plastic components and an additional sterilization facility, it will be entirely dependent upon the existing suppliers and E-Beam. If interruptions in these supplies or services were to occur for any reason, including a decision by existing suppliers and/or E-Beam to discontinue manufacturing or services, political unrest, labor disputes or a failure of the existing suppliers and/or E-Beam to follow regulatory guidelines, the development and commercial marketing of MUSE (alprostadil) and other potential products could be delayed or prevented. An interruption in sterilization services or the Company's supply of alprostadil or plastic components would have a material adverse effect on the Company's business, financial condition and results of operations.

HISTORY OF LOSSES AND LIMITED OPERATING HISTORY

The Company has generated a cumulative net loss of $29.5 million for the period from its inception through December 31, 1997. To sustain profitability, the Company must successfully manufacture and market MUSE (alprostadil). The Company is subject to a number of risks including its ability to scale-up manufacturing capabilities and secure adequate supplies of raw materials, its ability to successfully market, distribute and sell its product, its reliance on a single therapeutic approach to erectile dysfunction and intense competition. There can be no assurance that the Company will be able to achieve profitability on a sustained basis. Accordingly, there can be no assurance of the Company's future success. The Company anticipates an operating loss in the first quarter of 1998 primarily due to the impact of the continued capacity constraints, allocation of product to international markets which results in a lower gross margin, higher cost of goods sold as the Company ramps up its new manufacturing facility, and higher marketing and sales costs related to the Company's direct to consumer marketing campaign.

The Company began generating revenues from product sales in January 1997. The Company has limited experience in manufacturing and selling MUSE (alprostadil) in commercial quantities. Until the Company receives FDA approval for its New New Jersey manufacturing facility, domestic and certain international markets will need to be supplied from its current facility at Paco. There can be no assurance such approval will be granted in a timely manner, if at all. If international sales increase as anticipated, product available for the domestic market will be reduced and gross margins will be adversely impacted. If the Company encounters further difficulties with its current manufacturing facility or delays in regulatory approval of its new manufacturing facility, capacity constraints could continue for an extended period of time. Such extended capacity constraints could strain relationships with distribution partners due to the need to allocate product between domestic and international markets, and possibly cause patients to seek alternative therapies. Such events could have a material adverse effect on the Company's business, financial condition and results of operations. Whether the Company can successfully manage the transition to a large scale commercial enterprise will depend upon successful further development of its manufacturing capability and its distribution network and attainment of foreign regulatory approvals for MUSE (alprostadil). Failure to make such a

transition successfully would have a material adverse effect on the Company's business, financial condition and results of operations.

FUTURE CAPITAL NEEDS AND UNCERTAINTY OF ADDITIONAL FINANCING

The Company expects to incur substantial additional costs, including expenses related to building its marketing and sales organization, ramping up its second manufacturing plant in the United States, building another manufacturing plant in Ireland, new product preclinical and clinical costs, ongoing research and development activities, and general corporate purposes. The Company anticipates that its existing capital resources will be sufficient to support the Company's operations through commercial introduction of MUSE (alprostadil) internationally but may not be sufficient for the introduction of any additional future products. Accordingly, the Company anticipates that it may be required to issue additional equity or debt securities and may use other financing sources including, but not limited to, corporate alliances and lease financing to fund the future development and possible commercial launch of its future products. The sale of additional equity securities would result in additional dilution to the Company's stockholders. There can be no assurance that additional funds will be available on terms satisfactory to the Company, if at all. Failure to obtain adequate funding could cause a delay or cessation of the Company's product development and marketing efforts and would have a material adverse effect upon the Company's business, financial condition and results of operations. The Company's working capital and additional funding requirements will depend upon numerous factors, including: (i) the level of resources that the Company devotes to sales and marketing capabilities; (ii) the level of resources that the Company devotes to expanding manufacturing capacity; (iii) the activities of competitors; (iv) the progress of the Company's research and development programs; (v) the timing and results of preclinical testing and clinical trials; (vi) technological advances; and (vii) operating results.

DEPENDENCE ON KEY PERSONNEL

The Company's progress to date has been highly dependent upon the skills of a limited number of key management personnel. To reach its future business objectives, the Company will need to hire and retain numerous qualified personnel in the areas of sales, manufacturing, clinical trial management and preclinical testing. There can be no assurance that the Company will be able to hire and retain such personnel, as the Company must compete with other companies, academic institutions, government entities and other agencies. The loss of any of the Company's key personnel or the failure to attract or retain necessary new employees could have an adverse effect on the Company's research, product development and business operations.

RISKS RELATING TO INTERNATIONAL OPERATIONS

As the Company receives necessary foreign regulatory approvals, the Company will market its products internationally. Changes in overseas economic and political conditions, currency exchange rates, foreign tax laws or tariffs or other trade regulations could have a material adverse effect on the Company's business, financial condition and results of operations. The anticipated international nature of the Company's business is also expected to subject it and its representatives, agents and distributors to laws and regulations of the foreign jurisdictions in which they operate or the Company's products are sold. The regulation of drug therapies in a number of such jurisdictions, particularly in the European Union, continues to develop, and there can be no assurance that new laws or regulations will not have a material adverse effect on the Company's business, financial condition and results of operations. In addition, the laws of certain foreign countries do not protect the Company's intellectual property rights to the same extent as do the laws of the United States.

PRODUCT LIABILITY AND AVAILABILITY OF INSURANCE

The commercial launch of MUSE (alprostadil) exposes the Company to a significant risk of product liability claims due to its availability to a large population of patients. In addition, pharmaceutical products are subject to heightened risk for product liability claims due to inherent side effects. The Company details potential side effects in the patient package insert and the physician package insert, both of which are included with MUSE (alprostadil), and the Company maintains product liability insurance coverage. However, the Company's product liability coverage is limited and may not be adequate to cover potential product liability

exposure. Product liability insurance is expensive, difficult to maintain and current or increased coverage may not be available on acceptable terms, if at all. Product liability claims brought against the Company in excess of its insurance coverage, if any, could have a material adverse effect upon the Company's business, financial condition and results of operations.

UNCERTAINTY OF PHARMACEUTICAL PRICING AND REIMBURSEMENT

In the United States and elsewhere, sales of pharmaceutical products currently are dependent, in part, on the availability of reimbursement to the consumer from third party payors, such as government and private insurance plans. Third party payors are increasingly challenging the prices charged for medical products and services. While more than 70 percent of prescriptions for MUSE (alprostadil) were reimbursed by third party payors in 1997, there can be no assurance that the Company's products will be considered cost effective and that reimbursement to the consumer will continue to be available or sufficient to allow the Company to sell its products on a competitive basis.

In addition, certain health care providers are moving towards a managed care system in which such providers contract to provide comprehensive health care services, including prescription drugs, for a fixed cost per person. The Company hopes to further qualify its transurethral system for erection for reimbursement in the managed care environment. However, the Company is unable to predict the reimbursement policies employed by third-party health care payors. Furthermore, attempts at qualifying its transurethral system for erection for reimbursement could be adversely affected by changes in reimbursement policies of governmental or private health care payors.

UNCERTAINTY AND POSSIBLE NEGATIVE EFFECTS OF HEALTHCARE REFORM

The healthcare industry is undergoing fundamental changes that are the result of political, economic and regulatory influences. The levels of revenue and profitability of pharmaceutical companies may be affected by the continuing efforts of governmental and third party payors to contain or reduce healthcare costs through various means. Reforms that have been and may be considered include mandated basic healthcare benefits, controls on healthcare spending through limitations on the increase in private health insurance premiums and Medicare and Medicaid spending, the creation of large insurance purchasing groups and fundamental changes to the healthcare delivery system. Due to uncertainties regarding the outcome of healthcare reform initiatives and their enactment and implementation, the Company cannot predict which, if any, of the reform proposals will be adopted or the effect such adoption may have on the Company. There can be no assurance that future healthcare legislation or other changes in the administration or interpretation of government healthcare or third-party reimbursement programs will not have a material adverse effect on the Company. Healthcare reform is also under consideration in some other countries.

POTENTIAL VOLATILITY OF STOCK PRICE

The stock market has recently experienced significant price and volume fluctuations unrelated to the operating performance of particular companies. In addition, the market price of the Company's Common Stock has been highly volatile and is likely to continue to be so. Factors such as variations in the Company's financial results, comments by security analysts, the Company's ability to scale up its manufacturing capability to commercial levels, adverse regulatory actions or decisions, the Company's ability to increase demand for its product in the United States, the Company's ability to successfully sell its product in the United States and internationally, any loss of key management, the results of the Company's clinical trials or those of its competition, announcements of technological innovations or new products by the Company or its competition, changing governmental regulations, patents or other proprietary rights, product or patent litigation or public concern as to the safety of products developed by the Company, may have a significant effect on the market price of the Company's Common Stock.

ANTI-TAKEOVER EFFECT OF PREFERRED SHARES RIGHTS PLAN AND CERTAIN CHARTER AND BYLAW PROVISIONS

In February 1996, the Company's Board of Directors authorized its reincorporation in the State of Delaware (the "Reincorporation") and adopted a Preferred Shares Rights Plan. The Company's reincorporation into the State of Delaware was approved by its stockholders and effective in May 1996. The Preferred Shares Rights Plan provides for a dividend distribution of one Preferred Shares Purchase Right (a "Right") on each outstanding share of the Company's Common Stock. The Rights will become exercisable following the tenth day after a person or group announces acquisition of 20 percent or more of the Company's Common Stock, or announces commencement of a tender offer, the consummation of which would result in ownership by the person or group of 20 percent or more of the Company's Common Stock. The Company will be entitled to redeem the Rights at $0.01 per Right at any time on or before the tenth day following acquisition by a person or group of 20 percent or more of the Company's Common Stock.

The Preferred Shares Rights Plan and certain provisions of the Company's Certificate of Incorporation and Bylaws may have the effect of making it more difficult for a third party to acquire, or of discouraging a third party from attempting to acquire, control of the Company. The Company's Certificate of Incorporation allows the Company to issue Preferred Stock without any vote or further action by the stockholders, and certain provisions of the Company's Certificate of Incorporation and Bylaws eliminate the right of stockholders to act by written consent without a meeting, specify procedures for director nominations by stockholders and submission of other proposals for consideration at stockholder meetings, and eliminate cumulative voting in the election of directors. Certain provisions of Delaware law could also delay or make more difficult a merger, tender offer or proxy contest involving the Company, including Section 203, which prohibits a Delaware corporation from engaging in any business combination with any interested stockholder for a period of three years unless certain conditions are met. The Preferred Shares Rights Plan, the possible issuance of Preferred Stock, the procedures required for director nominations and stockholder proposals and Delaware law could have the effect of delaying, deferring or preventing a change in control of the Company, including without limitation, discouraging a proxy contest or making more difficult the acquisition of a substantial block of the Company's Common Stock. These provisions could also limit the price that investors might be willing to pay in the future for shares of the Company's Common Stock.

ITEM 2. PROPERTIES

The Company currently occupies approximately 53,000 square feet of space in Mountain View, California under a fifteen year non-cancelable operating lease which expires in 2012. The Company's facility serves as the principal site for administration, clinical trial management, regulatory affairs and monitoring of product production and quality control, as well as its research and development lab.

In June 1995, the Company completed constructing and equipping to its specifications approximately 6,000 square feet of manufacturing and testing space within Paco's facility in Lakewood, New Jersey. In January and February 1997, the Company executed a five year lease for two buildings in New Jersey totalling 90,000 square feet in which it has constructed additional manufacturing and testing facilities.

ITEM 3. LEGAL PROCEEDINGS

On February 18, 1998 a purported shareholder class action entitled Crain, et al. v. Vivus, Inc., et al., was filed in Superior Court of the State of California for the County of San Mateo. Two identical complaints were subsequently filed in the same court. The complaints were filed on behalf of a purported class of persons who purchased stock between May 15 and December 9, 1997. The complaints allege that the Company and certain current and former officers or directors artificially inflated the Company's stock price by issuing false and misleading statements concerning the Company's prospects and by issuing false financial statements. The complaints do not specify the damages resulting from the alleged conduct. On March 20, 1998, the Company learned that a federal class action had been filed against the Company and certain current and former officers and directors in the United States District Court for the Northern District of California. The federal complaint asserts the same factual allegations, but asserts legal claims under the Federal Securities Laws. The Company believes the complaints lack merit and the Company will vigorously defend itself in the pending actions.

A former consultant to the Company had claimed that he was the inventor of certain technology disclosed in two of the Company's patents. The former consultant further claimed that the Company and certain of its officers and directors defrauded him by allegedly failing to inform him that it intended to use and patent this technology and by failing to compensate him for the technology in the manner allegedly promised. In May 1996, the Company filed a complaint for declaratory judgment against the former consultant in the United States District Court for the Northern District of California, which sought a declaration from the court that the former consultant was not an inventor of any of the technology. In September 1996, the consultant filed his counterclaim. In December 1997, the Company reached a settlement with the former consultant whereby the former consultant dismissed his claims against the Company and the Company's officers and directors involved in the lawsuit. In return, the Company paid the consultant $5.1 million. The Company recorded the settlement on its books in the fourth quarter of 1997 and paid the settlement on January 5, 1998.

In the normal course of business, the Company receives and makes inquiries regarding patent infringement and other legal matters. The Company believes that it has meritorious claims and defenses and intends to pursue any such matters vigorously. The Company is not aware of any asserted or unasserted claims against it where the resolution would have an adverse material impact on the operations or financial position of the Company.

ITEM 4. SUBMISSION OF MATTERS TO A VOTE OF SECURITY HOLDERS

No matters were submitted to a vote of the Company's stockholders during the quarter ended December 31, 1997.

## PART II

### ITEM 5. MARKET FOR REGISTRANT'S COMMON EQUITY AND RELATED STOCKHOLDER MATTERS

The Company's Common Stock trades publicly on The Nasdaq Stock Market under the symbol "VVUS". The following table sets forth for the periods indicated the quarterly high and low closing sales prices of the Common Stock on The Nasdaq Stock Market.

| | THREE MONTHS ENDED | | | |
|---|---|---|---|---|
| | MARCH 31 | JUNE 30 | SEPTEMBER 30 | DECEMBER 31 |
| 1997 | | | | |
| High | $39.06 | $25.88 | $38.13 | $40.56 |
| Low | 18.75 | 15.31 | 22.81 | 9.94 |
| 1996* | | | | |
| High | $15.63 | $16.38 | $20.38 | $19.00 |
| Low | 11.88 | 13.00 | 14.44 | 14.50 |

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* Adjusted to reflect the Company's two-for-one stock split reflected on the Nasdaq Stock Market on June 24, 1997.

As of February 27, 1998, there were no outstanding shares of Preferred Stock and 659 holders of record of 31,721,292 shares of outstanding Common Stock. The Company has not paid any dividends since its inception and does not intend to pay any dividends on its Common Stock in the foreseeable future.

### ITEM 6. SELECTED FINANCIAL DATA

The information required by this item is incorporated by reference from the section captioned "Selected Financial Data" of the Registrant's Annual Report. Such information is also set forth in Exhibit 13.1 attached hereto.

### ITEM 7. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

The information required by this item is incorporated by reference from the section captioned "Management's Discussion and Analysis of Financial Condition and Results of Operations" of the Registrant's Annual Report. Such information is also set forth in Exhibit 13.1 attached hereto.

### ITEM 8. FINANCIAL STATEMENTS AND SUPPLEMENTAL DATA

The information required by this item is incorporated by reference from the sections captioned "Consolidated Balance Sheets", "Consolidated Statements of Operations", "Consolidated Statements of Shareholders' Equity", "Consolidated Statements of Cash Flows", "Notes to Consolidated Financial Statements" and "Report of Independent Public Accountants" of the Registrant's Annual Report. Such information is also set forth in Exhibit 13.1 attached hereto.

### ITEM 9. CHANGES IN AND DISAGREEMENTS WITH ACCOUNTANTS ON ACCOUNTING AND FINANCIAL DISCLOSURE

Not applicable.

## PART III

### ITEM 10. EXECUTIVE OFFICERS AND DIRECTORS OF THE REGISTRANT

The information required by this item is incorporated by reference from the discussion in the Proxy Statement captioned "Proposal One: Election of Directors."

ITEM 11. EXECUTIVE COMPENSATION

The information required by this item is incorporated by reference from the discussion in the Proxy Statement captioned "Executive Compensation."

ITEM 12. SECURITY OWNERSHIP OF CERTAIN BENEFICIAL OWNERS AND MANAGEMENT

The information required by this item is incorporated by reference from the discussion in the Proxy Statement captioned "Record Date and Share Ownership."

ITEM 13. CERTAIN RELATIONSHIPS AND RELATED TRANSACTIONS

This information required by this item is incorporated by reference from the discussion in the Proxy Statement captioned "Certain Transactions and Reports."

PART IV

ITEM 14. EXHIBITS, FINANCIAL STATEMENTS SCHEDULES AND REPORTS ON FORM 8-K

(a) The following documents are filed as part of this Report:

1. FINANCIAL STATEMENTS

Financial statements have been incorporated by reference to the Registrant's Annual Report.

2. FINANCIAL STATEMENT SCHEDULES

Schedules have been omitted because the information required to be set forth therein is not applicable or is shown in the consolidated financial statements or notes thereto incorporated by reference herein.

3. EXHIBITS

| NUMBER | |
|---|---|
| ##3.2 | Amended and Restated Certificate of Incorporation of the Company |
| ****3.3 | Bylaws of the Registrant, as amended |
| ###3.4 | Certificate of Designations of Rights, Preferences and Privileges of Series A Participating Preferred Stock |
| ##4.1 | Specimen Common Stock Certificate of the Registrant |
| *4.2 | Registration Rights, as amended |
| *4.4 | Form of Preferred Stock Purchase Warrant issued by the Registrant to Invemed Associates, Inc., Frazier Investment Securities, L.P., and Cristina H. Kepner |
| ###4.5 | Second Amended and Restated Preferred Shares Rights Agreement, dated as of April 15, 1997 by and between the Registrant and Harris Trust Company of California, including the Certificate of Determination, the form of Rights Certificate and the Summary of Rights attached thereto as Exhibits A, B, and C, respectively |
| *+10.1 | Assignment Agreement by and between Alza Corporation and the Registrant dated December 31, 1993 |
| *+10.2 | Memorandum of Understanding by and between Ortho Pharmaceutical Corporation and the Registrant dated February 25, 1992 |
| *10.3 | Assignment Agreement by and between Ortho Pharmaceutical Corporation and the Registrant dated June 9, 1992 |

| NUMBER | |
|---|---|
| *+10.4 | License Agreement by and between Gene A. Voss, M.D., Allen C. Eichler, M.D., and the Registrant dated Decmeber 28, 1992 |
| *+10.5A | License Agreement by and between Ortho Pharmaceutical Corporation and Kjell Holmquist AB dated June 23, 1989 |
| *+10.5B | Amendment by and between Kjell Holmquist AB and the Registrant dated July 3, 1992 |
| *10.5C | Amendment by and between Kjell Holmquist AB and the Registrant dated April 22, 1992 |
| *+10.5D | Stock Purchase Agreement by and between Kjell Holmquist AB and the Registrant dated April 22, 1992 |
| *+10.6A | License Agreement by and between Amsu, Ltd., and Ortho Pharmaceutical Corporation dated June 23, 1989 |
| *+10.6B | Amendment by and between Amsu, Ltd., and the Registrant dated July 3, 1992 |
| *10.6C | Amendment by and between Amsu, Ltd., and the Registrant dated April 22, 1992 |
| *+10.6D | Stock Purchase Agreement by and between Amsu, Ltd., and the Registrant dated July 10, 1992 |
| *10.7 | Supply Agreement by and between Paco Pharmaceutical Services, Inc., and the Registrant dated November 10, 1993 |
| *10.10 | Lease by and between McCandless-Triad and the Registrant dated November 23, 1992, as amended |
| ****10.11 | Form of Indemnification Agreements by and among the Registrant and the Directors and Officers of the Registrant |
| **10.12 | 1991 Incentive Stock Plan and Form of Agreement, as amended |
| *10.13 | 1994 Director Option Plan and Form of Agreement |
| *10.14 | Form of 1994 Employee Stock Purchase Plan and Form of Subscription Agreement |
| *10.17 | Letter Agreement between the Registrant and Leland F. Wilson dated June 14, 1991 concerning severance pay |
| ***+10.21 | Distribution Services Agreement between the Registrant and Synergy Logistics, Inc. (a wholly-owned subsidiary of Cardinal Health, Inc.) dated February 9, 1996 |
| ***+10.22 | Manufacturing Agreement between the Registrant and CHINOIN Pharmaceutical and Chemical Works Co., Ltd. dated December 20, 1995 |
| ++10.22A | Amendment One, dated as of December 11, 1997, to the Manufacturing Agreement by and between VIVUS and CHINOIN Pharmaceutical and Chemical Works Co., Ltd. dated December 20, 1995 |
| #+10.23 | Distribution and Services Agreement between the Registrant and Alternate Site Distributors, Inc. dated July 17, 1996 |
| *****+10.24 | Distribution Agreement made as of May 29, 1996 between the Registrant and Astra AB |
| #10.25 | Menlo McCandless Office Lease made as of August 30, 1996 by and between Registrant and McCandless-Triad |
| #10.26 | Sublease Agreement made as of August 22, 1996 by and between Registrant and Plant Research Technologies |

| NUMBER | |
|---|---|
| ##+10.27 | Distribution Agreement made as of January 22, 1997 between the Registrant and Jenssen Pharmaceutical International, a division of Cilag AG International |
| ++10.27A | Amended and Restated Addendum 1091, dated as of October 29, 1997, between VIVUS International Limited and Janssen Pharmaceutical International |
| ##10.28 | Lease Agreement made as of January 1, 1997 between the Registrant and Airport Associates |
| ##10.29 | Lease Amendment No. 1 as of February 15, 1997 between Registrant and Airport Associates |
| #####10.29A | Lease Amendment No. 2 dated July 24, 1997 by and between the Registrant and Airport Associates |
| #####10.29B | Lease Amendment No. 3 dated July 24, 1997 by and between the Registrant and Airport Associates |
| ## 10.30 | Lease agreement by and between 605 East Fairchild Associates, L.P. and Registrant dated as of March 5, 1997 |
| ####++10.31 | Manufacture and Supply Agreement between Registrant and Spolana Chemical Works, A.S. dated May 30, 1997 |
| 10.32A | Agreement between ADP Marshall, Inc. and the Registrant dated December 19, 1997 |
| 10.32B | General Conditions of the Contract for Construction |
| 10.32C | Addendum to General Conditions of the Contract for Construction |
| ++10.33 | Sales Force Services Agreement dated as of February 1, 1998 between the Registrant and Innovex, Inc. |
| 13.1 | Portions of the 1997 Annual Report to Security Holders..... |
| 21.2 | List of Subsidiaries..... |
| 23.1 | Consent of Independent Public Accountants..... |
| 24.1 | Power of Attorney (see "Power of Attorney")..... |
| 27.1 | Financial Data Schedule |

- ---

* Incorporated by reference to the same-numbered exhibit filed with the Registrant's Registration Statement on Form S-1 No. 33-75698, as amended.

** Incorporated by reference to the same numbered exhibit filed with the Registrant's Registration Statement on Form S-1 No. 33-90390, as amended.

*** Incorporated by reference to the same-numbered exhibit filed with the Registrant's Annual Report on Form 10-K for the year ended December 31, 1995, as amended.

**** Incorporated by reference to the same numbered exhibit filed with the Registrant's Form 8-B filed with the Commission on June 24, 1996.

***** Incorporated by reference to the same numbered exhibit filed with the Registrant's Current Report on Form 8-K/A filed with the Commission on June 21, 1996.

\# Incorporated by reference to the same-numbered exhibit filed with the Registrant's Quarterly Report on Form 10-Q for the quarter ended September 30, 1996.

## Incorporated by reference to the same-numbered exhibit filed with the Registrant's Annual Report on Form 10-K for the year ended December 31, 1996, as amended.

### Incorporated by reference to exhibit 99.1 filed with Registrant's Amendment Number 2 to the Registration Statement of Form 8-A (File No. 0-23490) filed with the Commission on April 23, 1997.

#### Incorporated by reference to the same-numbered exhibit filed with the Registrant's Quarterly Report on Form 10-Q for the quarter ended June 30, 1997.

##### Incorporated by reference to the same numbered exhibit filed with the Registrant's Quarterly Report on Form 10-Q for the quarter ended September 30, 1997.

+ Confidential treatment granted.

++ Confidential treatment requested.

- ---

(b) Reports on Form 8-K
None

(c) Exhibits
See Item 14(a)(3) above

(d) Financial Statement Schedule
See Item 14(a)(2) above

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized:

VIVUS, INC.,
a Delaware Corporation

By: /s/ DAVID C. YNTEMA
---
David C. Yntema
Vice President of Finance and Chief Financial Officer
(Principal Financial and Accounting Officer)

Date: March 31, 1998

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints each of Leland F. Wilson and David C. Yntema as his attorney-in-fact for him, in any and all capacities, to sign each amendment to this Report on Form 10-K, and to file the same, with exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, hereby ratifying and confirming all that said attorney-in-fact or his substitute or substitutes may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Exchange Act of 1934, this Report has been signed below by the following persons on behalf of the Registrant and in the capacities and on the dates indicated:

| SIGNATURE | TITLE | DATE |
|---|---|---|
| /s/ LELAND F. WILSON<br>Leland F. Wilson | President, Chief Executive Officer (Principal Executive Officer) and Director | March 31, 1998 |
| /s/ VIRGIL A. PLACE<br>Virgil A. Place | Chairman of the Board and Chief Scientific Officer and Director | March 31, 1998 |
| /s/ DAVID C. YNTEMA<br>David C. Yntema | Vice President of Finance and Chief Financial Office (Principal Financial and Accounting Officer) | March 31, 1998 |
| /s/ RICHARD L. CASEY<br>Richard L. Casey | Director | March 31, 1998 |
| /s/ JOSEPH E. SMITH<br>Joseph E. Smith | Director | March 31, 1998 |
| /s/ BRIAN H. DOVEY<br>Brian H. Dovey | Director | March 31, 1998 |
| /s/ LINDA JENCKES<br>Linda Jenckes | Director | March 31, 1998 |
| /s/ ELIZABETH A. FETTER<br>Elizabeth A. Fetter | Director | March 31, 1998 |

VIVUS, INC.

REPORT ON FORM 10-K FOR THE YEAR ENDED DECEMBER 31, 1997

INDEX TO EXHIBITS*



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* Only exhibits actually filed are listed. Exhibits incorporated by reference are set forth in the exhibit listing included in Item 14 of the Report on Form 10-K.

** Confidential treatment requested.

EXHIBIT 10.22A

# AMENDMENT ONE
# TO THE MANUFACTURING AGREEMENT
# BY AND BETWEEN VIVUS AND CHINOIN

This AMENDMENT ONE to the Manufacturing Agreement by and between VIVUS, Inc., having a principal place of business at 545 Middlefield Road, Suite 200, Menlo Park, CA 94025, United States of America ("VIVUS"), and CHINOIN PHARMACEUTICAL AND CHEMICAL WORKS CO., LTD., having a principal place of business at H-1045 Budapest, To u. 1-5 Hungary ("Chinoin") is entered into as of December 11, 1997. Terms that are capitalized in this Amendment and not defined herein shall have the meanings ascribed to them in the Agreement (as defined below).

WHEREAS, VIVUS and Chinoin have entered into that certain Manufacturing Agreement dated December 12, 1995 (the "Agreement");

WHEREAS, the parties desire to amend the Agreement to modify, among other things, terms related to price and quantity;

NOW, THEREFORE, in consideration of the mutual covenants and promises herein contained, the parties hereto agree to amend the Agreement as follows:

1. The parties hereby acknowledge and agree that the Agreement was between Chinoin and VIVUS, Inc., a California corporation, which has been merged into its wholly subsidiary, VIVUS, Inc., a Delaware corporation. The parties hereby agree that VIVUS, Inc., a Delaware corporation, assumes all rights and benefits of VIVUS, Inc., a California corporation, under the Agreement. The parties further agree that for purposes of the Agreement and this Amendment, "VIVUS" shall mean VIVUS, Inc., a Delaware corporation.

2. The parties hereby agree that the First Agreement Year as defined in the Agreement is 1997.

3. Section 2.6 of the Agreement is hereby amended in its entirety to read as follows:

    2.6 Maximum Quantities. Chinoin shall not be obligated to supply to VIVUS more than [*] of the Product in any Agreement Year, provided that Chinoin agrees to use all reasonable efforts to supply any quantities in excess of such amounts as VIVUS may order at a price agreed between the parties pursuant to Section 2.7.

[*] Certain information on this page has been omitted and filed separately with the Securities and Exchange Commission. Confidential treatment has been requested with respect to the omitted portions.

4. Section 2.7 of the Agreement is hereby amended in its entirety to read as follows:

2.7 Price. The price to be paid by VIVUS per gram of the Product ordered by VIVUS shall be based upon the quantities of the Product ordered by VIVUS for delivery during the particular Agreement Year, as follows:

| Quantity Ordered for Delivery During the Agreement Year | U.S. $/gram |
|---|---|
| [*] | [*] |
| [*] | [*] |
| [*] | [*] |

The price of any quantity in excess of [*] grams in each Agreement Year, if any, shall be agreed upon by the parties. It is understood that the foregoing prices are based upon the total cumulative quantities ordered by VIVUS for delivery during the particular Agreement Year, and not only on the size of the particular order. It is also understood that the prices are for the incremental quantities (i.e. the first [*] will be at [*], the next quantities will be at [*] and so on). These prices shall be effective beginning calendar year 1998.

5. Section 2.9 of the Agreement is hereby amended in its entirety to read as follows:

2.9 Terms. All prices set forth in section 2.7 shall be Delivered Duty Unpaid (DDU) to a U.S. airport (in the case of shipment by airfreight) or to any U.S. address ( in the case of shipment by courier service). The manner of shipment shall be designated by Chinoin and the U.S. airport or address shall be designated by VIVUS. The title and risk of loss will transfer to VIVUS at such a delivery point. Payments shall be made in U.S. dollars by settling each of Chinoin's invoices in two equal installments, the first of which shall be made thirty (30) days from the date of the invoice accompanying the shipment and the second of which shall be made sixty (60) days from the date of the invoice accompanying the shipment. Payment shall be made by direct bank transfer to an account designated by Chinoin.

6. Section 2.11 of the Agreement is hereby amended in its entirety to read as follows:

2.11 Packaging. [*]

[*] Certain information on this page has been omitted and filed separately with the Securities and Exchange Commission. Confidential treatment has been requested with respect to the omitted portions.

7. Section 2.12.1 of the Agreement is hereby amended in its entirety to read as follows:

   2.12.1 Minimum Quantities. VIVUS agrees to purchase the [*] during the [*] Areement Years, provided, however, that VIVUS is experiencing ordinary business conditions. In the case of an unexpected decrease of its consumption of Product, VIVUS may notify Chinoin that it will be unable to meet the Initial Annual quantity obligation, and it may purchase a lower quantity of the Product in the Agreement Year concerned, provided, however, that in no event shall the minimum quantity purchased by VIVUS in such Agreement Year fall below [*].

8. Sections 2.12.2 and 2.12.3 of the Agreement are hereby deleted in their entirety.

9. Section 2.12.4 of the Agreement is hereby amended in its entirety to read as follows:

   2.12.4 Effect of the Minimum Quantities. The minimum quantities indicated in 2.12.1 above shall have no effect on the obligations of the parties with respect to quantities already ordered for supply or included in the [*] stipulated in Section 2.3.

10. Schedule A of the Agreement is hereby amended in its entirety and is replaced with Amended Schedule A attached hereto.

11. All other terms of the Agreement shall remain in full force and effect. In the event there is an inconsistency between this Amendment and the Agreement, this Amendment shall prevail.

[*] Certain information on this page has been omitted and filed separately with the Securities and Exchange Commission. Confidential treatment has been requested with respect to the omitted portions.

IN WITNESS WHEREOF, the parties hereto have caused their duly authorized representatives to execute this Amendment.

| VIVUS, INC. | CHINOIN PHARMACEUTICAL AND CHEMICAL WORKS, CO. LTD. |
|---|---|
| By: /s/ Leland F. Wilson | By: /s/ Philpee Besse |
| Name: Leland F. Wilson | Name: Philippe Besse |
| Title: Presidend and CEO | Title: Executive Vice Presidnent |

A

Manufacturing Agreement between VIVUS and CHINOIN

| | | |
|---|---|---|
| CHINOIN<br>Quality Control - Prostaglandins | QUALITY<br>SPECIFICATION<br>PGE(1) | Code:<br>A-PGU/SZME/0648/01/97 |

Prepared on: 20-Oct-97 ID#:

Effective from: 01-Dec-97 Page: 1/12

- ---

ALPROSTADIL
(PGE1)

QUALITY REQUIREMENTS

| | |
|---|---|
| [*] | [*] |
| [*] | [*] |
| [*] | [*] |
| [*] | [*] |
| [*] | [*] |

- ---

Translated by: Pal Vofely

[*] Certain information on this page has been omitted and filed separately with the Securities and Exchange Commission. Confidential treatment has been requested with respect to the omitted portions.

Controlled by: Ervin Vajda /s/ Ervin Vajda
PG Chemical Development

Approved by: /s/ Dr. Zoltan Szeverenyi
PG Quality Control manager

A

Manufacturing Agreement between VIVUS and CHINOIN

| | | |
|---|---|---|
| CHINOIN<br>Quality Control - Prostaglandins | QUALITY<br>SPECIFICATION<br>PGE(1) | Code:<br>A-PGU/SZME/0648/01/97 |

Prepared on: 20-Oct-97 ID#:

Effective from: 01-Dec-97 Page: 1/12

- ---

[*]

- ---

Translated by: Pal Vofely

Controlled by: Ervin Vajda /s/ Ervin Vajda
PG Chemical Development

Approved by: /s/ Dr. Zoltan Szeverenyi
PG Quality Control manager

[*] Certain information on this page has been omitted and filed separately with the Securities and Exchange Commission. Confidential treatment has been requested with respect to the omitted portions.

EXHIBIT 10.27A

# AMENDED AND RESTATED ADDENDUM 1097

This Amended and Restated Addendum (hereinafter "Addendum 1097R") effective as of the 29th day of October 1997, between VIVUS International Limited, a company organized under the laws of Bermuda and having a place of business at Clarendon House, Church Street, Hamilton, Bermuda ("VIVUS"), a wholly-owned subsidiary of VIVUS, Inc., a Delaware corporation ("VIVUS, Inc."), and Janssen Pharmaceutica International, a division of Cilag AG International, and having its registered office at Kollerstrasse 38, CH-6300, Zug., Switzerland ("Janssen").

## RECITALS

WHEREAS VIVUS and Janssen along with certain of their Affiliates have entered into a Distribution Agreement dated January 22, 1997 ("Agreement 197").

WHEREAS VIVUS and Janssen entered into an addendum to Agreement 197 dated October 29, 1997, pursuant to which the parties expanded the Territory for which Janssen is responsible under Agreement 197 ("Addendum 1097").

WHEREAS VIVUS and Janssen wish to supersede and replace Addendum 1097 in its entirety with this Addendum 1097R.

NOW, THEREFORE, VIVUS and Janssen agree to modify or supplement obligations under Agreement 197 as follows:

1. This Addendum 1097R hereby amends and revises Agreement 197 to incorporate the terms and conditions set forth in this Addendum 1097R. In addition, this Addendum 1097R hereby supersedes and replaces Addendum 1097. The relationship of the parties shall continue to be governed by the terms and conditions of the Agreement 197, as amended and revised herein; and in the event that there is any conflict between the terms and conditions of the Agreement 197 and this Addendum 1097R, the terms and conditions of this Addendum 1097R shall control. As used in this Addendum 1097R all capitalized terms shall have the meanings defined for such terms in this Addendum 1097R or, if not defined in the Addendum 1097R, the meanings defined in the Agreement 197.

2. "Territory" as defined in Section 1.15 shall be expanded to include the countries listed in Exhibit 1097A ("Expansion Territory") along with the Janssen Subdistributors presently responsible for each country.

3. Addendum 1097 Initial and Milestone Payments. Without modification of the rights and obligations of Agreement 197, in consideration of the costs incurred by VIVUS in connection with the research and development of the Product and in exchange for the exclusive rights granted herein, Janssen shall pay VIVUS the following non-refundable one time fees:

(a) [*] of the end of the first year in which [*] of Product in the Expansion Territories [*];

(b) [*] of the end of the first year in which [*] of Product in the Expansion Territories [*];

(c) [*] of the end of the first year in which [*] of Product in the Expansion Territories [*];

and

(d) [*] of the end of the first year in which [*] of Product in the Expansion Territories [*]. For avoidance of doubt, the milestone payments for (a) through (d) above are cumulative. For example, if in the first year of sales of Product [*] in the Expansion Territory were in [*] then Janssen would owe VIVUS [*] ([*] for [*] in [*] for [*] in [*] and [*] for [*] in [*]).

As additional consideration for the exclusive rights granted herein, Janssen paid to VIVUS $2 million on or about November 7, 1997, the receipt of which is hereby acknowledged by VIVUS.

4. For the "fraction" calculated in Section 4.1.2, the calculation of the numerator and the denominator will include only the countries of [*].

5. Add a Section 4.3:

4.3 Expansion Territory Diligence and Marketing.

4.3.1 Diligence. Janssen will meet all obligations of Agreement 197 for countries of the Expansion Territory as if they were countries of the Territory as defined in Section 1.15. Regardless of the foregoing, Janssen shall be presumed to meet (i) its required [*] to register First Product of Section 3.3 and (ii) its required [*] to launch and sell First Product of Section 4.1.1 and (iii) its requirement to "launch" the First Product [*] of MAA approval of Section 4.1.2 for the countries of the Expansion Territory listed as follows:
(a) [*];
(b) [*];
(c) [*];
(d) [*];
[*] In each case of (a) through (d) for so long as Janssen is using

[*] Certain information on this page has been omitted and filed separately with the Securities and Exchange Commission. Confidential treatment has been requested with respect to the omitted portions.

4.3.2 Expansion Territory Reversion. In the event that one of the following countries cease to be a part of the Territory or of the Expansion Territory then the countries named below in association therewith may at VIVUS' option on a country by country basis also cease to be a part of the Territory or of the Expansion Territory if Janssen and/or its Affiliates or Sublicensees are not marketing in such associated country or countries:
(a) [*];
(b) [*];
(c) [*];
(d) [*];
(e) [*].

4.3.3 Marketing. For the Expansion Territory, [*], Janssen may meet its obligation to "prepare reasonably detailed marketing plans" of Section 3.4.1 by consolidating the individual country plans into [*] regional plans.

6. In accordance with the terms of Section 4.2, VIVUS will provide one-time training in English at two additional locations.

7. In Section 6.2.1(b), for "All other countries together" the value of [*] will be amended to [*] and [*] will be amended to [*].

8. In accordance with the terms of Section 9.3, VIVUS agrees to file, register, and maintain a registration for the VIVUS Trademark in the countries of the Expansion Territory listed as follows: [*].

9. The Parties agree to adhere strictly to applicable laws of the United States in the conduct of international commercial transactions. Notwithstanding anything herein to the contrary, where the United States maintains an embargo against a country of the Territory, Janssen shall be presumed to meet (i) its required [*] to register First Product of Section 3.3 and (ii) its required [*] to launch and sell First Product of Section 4.1.1 and (iii) its requirement to "launch" the First Product [*] of MAA approval of Section 4.1.2 for the term of such embargo.

10. Sales of Product in the countries [*] will not operate to begin the running of the two year period referred to in Section 6.2.1(c)(i).

11. The Agreement 197, Addendum 497 and this Addendum 1097R and the Exhibits

[*] Certain information on this page has been omitted and filed separately with the Securities and Exchange Commission. Confidential treatment has been requested with respect to the omitted portions.

hereto and thereto constitute the entire agreement between the parties in connection with the subject matter thereof and supersede all prior and contemporaneous agreements, understandings, negotiations and discussions, whether oral or written, of the parties, including without limitation Addendum 1097.

IN WITNESS WHEREOF, the parties hereto have caused this Addendum 1097R to be executed by their duly authorized representatives on the dates indicated below.

| VIVUS | JANSSEN |
|---|---|
| BY: /s/ Leland F. Wilson | BY: /s/ Heinz Schmid |
| | Heinz Schmid<br>General Manager |
| DATE: Jan. 7, 1998 | DATE: Jan. 16, 1998 |

EXHIBIT 1097A

EXPANSION TERRITORY
COUNTRIES OF RESPONSIBILITY AND
JANSSEN AFFILIATES AND SUBDISTRIBUTORS

| Countries of the Former Soviet Union and Related Area | |
|---|---|
| Armenia | Lambron Pharmimpex Co., Ltd.<br>22 K. Parpetsi Street<br>Yerevan, 375002<br>Republic of Armenia<br>(currently representing McNeil Tylenol) |
| Azerbaijan | agency agreements currently being negotiated |
| Belarus | Belpharm<br>Masherov Ave. 23<br>220004 Minsk<br>Belarus |
| Georgia | Beta-2 Ltd.<br>45, Vazha Pshavela Ave.<br>Tbilisi, Georgia |
| Kazachstan | Interfarma K<br>Park of Republic<br>Spartak Stadium, Build. 1<br>480100 Almaty<br>Kazachstan |
| Krygyzstan | currently no representation |
| Mongolia | currently no representation |
| Russia | Janssen-Cilag<br>A division of Johnson & Johnson Ltd.<br>43, Bolshaya Tulskaya<br>Moscow 113191<br>Russia |
| Tajikistan | currently no representation |
| Turkmenistan | agency agreements currently being negotiated |
| Ukraine | B. D. Lux SA<br>Leontovitch Str. 9 |

| | |
|---|---|
| | 252030 Kiev<br>Ukraine |
| Uzbekistan | Berlin Chemie (Janssen-Cilag)<br>Uzbekistanski av. 98<br>Tashkent 700027<br>Uzbekistan |
| Countries of the Mideast and Related Area | |
| Afghanistan | currently no representation |
| Bahrain | Wael Pharmacy & Drug Store<br>P. O. Box 648 Manama<br>Arabian Gulf |
| Egypt | Sofico Pharm<br>12 Ismail El Kabani Street<br>Nasr City, Cairo |
| Iran | Jahan Behbood Co.<br>Farbro Bldg. No. 17<br>Seventh Str. Naft Ave., Mirdamad Blvd.<br>Teheran |
| Iraq | currently no representation |
| Jordan | Mina Drug Stores & Co.<br>P. O. Box 1010, Basman Str,<br>11118 Amman |
| Kuwait | Al Mojil Drug Co.<br>P. O. Box 2761 - Al-Kwful Bldg. No. 11<br>Flat 27, Hilali Str.<br>Safat 13028 |
| Lebanon | Mersaco S.A.L.<br>Sami Sohl Street<br>P. O. Box 11-9073<br>Beirut |
| Libya | A. M. Mangion Ltd.<br>U.B. 42 Industrial Estate, San Gwann<br>Malta |
| Oman | Waleed Pharmacy<br>P. O. Box 437 Muscat 113<br>Sultanate of Oman |

| | |
|---|---|
| Qatar | EBN Sina Medical Est.<br>P.O. Box 337, Bin Jassem Al Thani<br>Doha |
| Saudi Arabia | Al Haya Medical Company<br>P. O. Box 442<br>Marwan Bin Malek Str., Hay Al Moe'tarat<br>Riyadh 11411 |
| Sudan | Dr. Nabil Pharmaceutical Ent.<br>P.O. Box 2989<br>Khartoum West |
| Syria | Damascus Scientific Office<br>Ain el Kurch, Jadet Zarka, Soubhi Dabbas Bldg.<br>No. 10, 3rd Floor<br>P.O. Box 2659 Damascus |
| United Arab Emirates | City Pharmacy<br>P.O. Box 23841<br>Dubai<br>U.A.R. |
| Yemen | Arra'Afah Corporation<br>Ali Abdulmughni Street<br>P. O. Box 1090 Sana'a |

Countries of the Indian Sub-Continent and Related Area

| | |
|---|---|
| Bangladesh | Fisons Ltd.<br>Fisons House<br>6/2/A Segun Bagicha<br>GPO Box 676<br>Dahaka - 1000 |
| India | J&J/Janssen Cilag<br>30 Forjett Street<br>P.O. Box 9301 Mumbai<br>Bombay 400 036 |
| Pakistan | J&J/Janssen Cilag<br>Plots 10 + 25, Sektor 20<br>Korangi, Industrial Area<br>Karachi 75180 |
| Sri Lanka | Pettah Pharmacy Ltd. |

| | |
|---|---|
| | 8-4/2 Leyden Bastian Road<br>York Aecade Building<br>Colombo 1 |
| Countries of Africa<br>- ---------- | |
| Burundi | Dispopharm AG<br>Baseler Strasse 364<br>P.O. Box 36<br>CH-1241 Allschwil |
| Ethiopia | 640-123Pharma (Share Company)<br>P. O. Box 1122, Addis Abada<br>Mahatama Gandhi Road, Addia Ababax |
| Ghana | Abba Promotions, West Africa<br>P. O. Box 1820 Mamprobi Accra<br>1st Floor, Sedco Publishing House<br>Tabon Street, North Ridge, Accra |
| Kenya | Twiga Chemical Industries Limited<br>P. O. Box 30172 Nairobi<br>16th Floor, View Park tower<br>Uhuru Highway, Nairobi |
| Malawi | Pharma Chemie Ltd.<br>P. O. Box 392 Blantyre<br>Kidney Crescent, off Kamazu, Blantyre |
| | Pharma Vet<br>P. O. Box 2957, Blantyre, Malawi |
| Namibia | Geka Pharma Pty. Ltd.<br>Box 683, Windhoek, Namibia<br>46 Mandume Ndemufayo Ave.<br>Windhoek |
| Rwanda | Dispopharm AG<br>Baseler Strasse 364<br>P. O. Box 36<br>CH-1241 Allschwil |
| Tanzania | Diocare Limited<br>P. O. Box 70257, Dar Es Salaam |

| | |
|---|---|
| | Mansoor Daya Chemicals Limited<br>P. O. Box 2999 Dar Es Salaam<br>JPS Building, Pugu Road, Dar Es Salaam |
| | Medipharm Limited<br>P. O. Box 77032 Dar Es Salaam<br>Samora Avenue, Dar Es Salaam |
| | Twiga Chemical Industries (Tanzania) Ltd.<br>P. O. Box 20786, Dar Es Salaam<br>Saza Rd., Chang'ombe<br>Dar Es Salaam |
| Uganda | Twiga Chemical Industries (Uganda) Ltd.<br>P. O. Box 4800, Kampala<br>Plot No. 71, 7th Street, Industrial Area<br>Kampala |
| Zaire | Dispopharm AG<br>Baseler Strasse 364<br>P. O. Box 36<br>CH-1241 Allschwil |
| Zambia | Gamma Pharmaceuticals Ltd.<br>P O. Box 70286 Ndola<br>Zambia Road, Ndola |
| Zimbabwe | Johnson & Johnson (Pvt.) Limited<br>P. O. Box 3355, Harare<br>310 Woodlands Estate<br>Masasa, Harare |
| Other | |
| - ------------ | |
| North Korea | currently no representation |

EXHIBIT 1097A

| COUNTRY | RESPONSIBLE COUNTRY |
|---|---|
| Algeria | Janssen-Cilag France |
| Benin | Janssen-Cilag France |
| Burkina Faso | Janssen-Cilag France |
| Cameroon | Janssen-Cilag France |
| Central African Republic | Janssen-Cilag France |
| Chad | Janssen-Cilag France |
| Comoros | Janssen-Cilag France |
| Congo | Janssen-Cilag France |
| Cote d'Ivoire | Janssen-Cilag France |
| Djibouti | Janssen-Cilag France |
| Gabon | Janssen-Cilag France |
| Guinea | Janssen-Cilag France |
| Ivory Coast | Janssen-Cilag France |
| Madagascar | Janssen-Cilag France |
| Maji | Janssen-Cilag France |
| Mauritania | Janssen-Cilag France |
| Morocco | Janssen-Cilag France |
| Niger | Janssen-Cilag France |
| Senegal | Janssen-Cilag France |
| Togo | Janssen-Cilag France |
| Tunisia | Janssen-Cilag France |
| Angola | Janssen-Cilag South Africa |
| Bophuthatswana | Janssen-Cilag South Africa |
| Botswana | Janssen-Cilag South Africa |
| Ethiopia | Janssen-Cilag South Africa |
| Kenya | Janssen-Cilag South Africa |
| Lesotho | Janssen-Cilag South Africa |
| Malawi | Janssen-Cilag South Africa |
| Mozambique | Janssen-Cilag South Africa |
| Namibia | Janssen-Cilag South Africa |
| Swaziland | Janssen-Cilag South Africa |
| Tanzania | Janssen-Cilag South Africa |
| Tanskei | Janssen-Cilag South Africa |
| Uganda | Janssen-Cilag South Africa |
| Zambia | Janssen-Cilag South Africa |
| Zimbabwe | Janssen-Cilag South Africa |
| Zansibar | Janssen-Cilag South Africa |
| Burundi | Janssen-Cilag Zug |
| Egypt | Janssen-Cilag Zug |
| Eritrea | Janssen-Cilag Zug |

| | |
|---|---|
| Gambia | Janssen-Cilag Zug |
| Ghana | Janssen-Cilag Zug |
| Liberia | Janssen-Cilag Zug |
| Libya | Janssen-Cilag Zug |
| Nigeria | Janssen-Cilag Zug |
| North Korea | Janssen-Cilag Zug |
| Rwanda and Burundi | Janssen-Cilag Zug |
| Seychelles | Janssen-Cilag Zug |
| Sierra Leone | Janssen-Cilag Zug |
| Somalia | Janssen-Cilag Zug |
| Sudan | Janssen-Cilag Zug |
| Zaire | Janssen-Cilag Zug |

EXHIBIT 10.32A

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AIA Document A111

STANDARD FORM OF AGREEMENT
BETWEEN OWNER AND CONTRACTOR

where the basis of payment is the
COST OF THE WORK PLUS A FEE
with or without a Guaranteed Maximum Price

1987 EDITION

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES: CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION.

The 1987 Edition of AIA Document A201. General Conditions of the Contract for Construction is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

This document has been approved and endorsed by The Associated General Contractors of America.

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AGREEMENT

made as of the 19th day of December in the year of Nineteen Hundred and Ninety Seven.

BETWEEN the Owner:
(Name and Address) VIVUS, INC.
545 Middlefield Road, Suite 200
Menlo Park, CA 94025

and the Contractor:
(Name and address) ADP MARSHALL, INC.
75 Newman Avenue
Rumford, RI 02916

the Project is: VIVUS MANUFACTURING FACILITY IMPROVEMENT PROJECT
735 and 745 Airport Road
Lakewood, NJ 08701

the Architect is:
(Name and address) O'BRIEN - ATKINS ASSOCIATES
P.O. Box 12037
Morrisville, NC 27709

The Owner and Contractor agree as set forth below.

ARTICLE 1
THE CONTRACT DOCUMENTS

1.1 The Contract Documents consist of this Agreement, Conditions of the Contract General, Supplementary and other Conditions, Drawings, Specifications, addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement: these form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 16. If anything in the other Contract Documents is inconsistent with this Agreement, this Agreement shall govern.

ARTICLE 2
THE WORK OF THIS CONTRACT

2.1 The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others.

2.2 The Work includes Preconstruction Services (as defined in 2.3 below) and all labor, materials, equipment and services contemplated by the Construction Documents (including, without limitation, the Drawings ("Drawings") and Specifications ("Specifications") prepared by the Architect, as more particularly described in Exhibit A attached hereto and made a part hereof) for the following improvements:

2.2.1 The installation and construction of a cold box, five thousand (5,000) square feet of office space, four (4) packaging rooms (with an equipment mezzanine overhead), shipping/receiving docks and related utilities/services within the single-story metal building located at 735 Airport Road, Lakewood, New Jersey in the area south of the existing masonry demising wall (collectively, the "735 Improvements");

2.2.2 The installation and construction of eight thousand five hundred (8,500) square feet of "Class 10,000 Cleanrooms" and an additional forty-one thousand (41,000) square feet of space consisting of office, laboratory and warehouse space, including utilities, services and an equipment mezzanine above the proposed packaging areas therein within the single-story metal building located at 745 Airport Road, Lakewood, New Jersey, underground utility, pad and equipment site work and cleanroom validation assistance (collectively, the "745 Improvements");

2.2.3 The installation of a cold box and related service upgrades at the E-Beam Services, Inc. facility located at 32 Melrich Road in Cranbury, New Jersey (collectively, the E-Beam Improvements"); and

2.2.4 The installation of base cabinet, cart and counter top improvements at the Paco Facility located on Paco Way in Lakewood, New Jersey (collectively, the "Paco Improvements").

2.2.5 The 735 Improvements, 745 Improvements, E-Beam Improvements, and Paco Improvements are collectively referred to herein as the "Work."

2.3 The preconstruction activities and services (the "Preconstruction Services") associated with the design and construction of the Work to be performed by the Contractor include, without limitation, the following:

2.3.1 Provide recommendations on relative feasibility of construction methods, availability of materials and labor, time requirements for procurement, installation and construction, and factors related to cost including, costs of alternative designs or materials, preliminary budgets and possible economies.

2.3.2 Review designs and details during their development. Advise on use and improvements, selection of materials, building systems and equipment and methods of Project delivery. Provide recommendations on relative feasibility of construction methods, availability of materials and labor, time requirements for procurement, installation and construction, and factors related to cost including, without limitation, costs of alternative designs or materials.

2.3.3 Provide for the Architect's and the Owner's review and acceptance, and periodically update, a Project schedule that coordinates and integrates the Contractor's services hereunder and the Owner's responsibilities with anticipated construction schedules for each component of the Project.

2.3.4 Advise on the method to be used for selecting Subcontractors and awarding Subcontracts. Review the drawings and specifications and make recommendations as required to provide that the Work of the Subcontractors is coordinated.

2.3.5 Provide recommendations and information to the Owner and the Architect regarding the assignment of responsibilities for safety precautions and programs; temporary Project facilities; and equipment, materials and services for common use of Subcontractors.

2.3.6 Advise on the separation of the Project into contracts for various categories of Work. Advise on the method to be used for selecting Subcontractors and awarding Subcontracts. Review the Drawings and Specifications and make recommendations as required to provide that (1) the Work of the Subcontractors is coordinated, (2) all requirements of the Project have been assigned to the appropriate Subcontract, (3) the likelihood of jurisdictional disputes has been minimized, and (4) proper coordination has been provided for phased construction.

2.3.7 Develop a Project critical path or network construction schedule showing the relationship of the various phases of the Work which provides for all major elements such as times of commencement and completion required of each Subcontractor.

2.3.8 Investigate and recommend a schedule for the Owner's purchase of materials, equipment and third party vendors requiring long lead time procurement, and coordinate the schedule with the early preparation of portions of the Contract Documents by the Architect.

2.3.9 Provide an analysis of the types and quantities of labor required for the Project and review the availability of appropriate categories of labor required for critical components of the Work. Make recommendations for actions designed to minimize adverse effects of labor shortages.

2.3.10 Make recommendations for pre-qualification criteria for bidders and develop bidders' interest in the Project. Establish bidding schedules for each component of Work. Issue bidding documents only to bidders approved by Owner. Conduct pre-bid conferences to familiarize bidders with the bidding documents and management techniques and with any special systems, materials or methods. Cooperate with the Architect in responding to questions from bidders, and with the issuance of addenda. Receive bids and prepare bid analyses and make recommendations to the Owner for award of Subcontracts or rejection of bids.

2.3.11 Prepare construction contracts and purchase orders for Subcontractors for Owner's approval and advise the Owner of the acceptability of Subcontractors and materials suppliers proposed by the Contractor.

2.4 The Contractor acknowledges that the Owner holds only a leasehold estate in the various premises where the Work is to be performed pursuant to separate lease agreements between the Owner and the landlords of each of the separate premises, and that such landlords have no responsibility for the Work or the Owner's obligations under this Agreement.

## ARTICLE 3
## RELATIONSHIP OF THE PARTIES

3.1 The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and Owner and utilize the Contractor's best skill, efforts and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to make best efforts to furnish at all times an adequate supply of workers and materials; and to perform the Work in the best way and most expeditious and economical manner consistent with the interests of the Owner. The Owner agrees to exercise best efforts to enable the Contractor to perform the Work in the best way and most expeditious manner by furnishing and approving in a timely way information required by the Contractor and making payments to the Contractor in accordance with requirements of the Contract Documents.

## ARTICLE 4
## DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

4.1 The date of commencement is the date from which the Contract Time of Subparagraph 4.2 is measured.

4.2 The Work under this Agreement commenced in January of 1997.

4.3 On or before October 15, 1997 (the "RFE Milestone Date"), the Contractor shall complete the "Class 10,000 Cleanrooms" included as part of the 745 Improvements to the extent required for the

installation of the Owner's process systems production equipment therein (the "RFE Completion Milestone"). The Work associated with the RFE Completion Milestone shall not be deemed complete unless and until the Contractor has substantiated to the reasonable satisfaction of the Owner that the assembly inspection, dispensing, compounding, filling and pouching cleanrooms are functioning in strict accordance with the design parameters set forth in the Drawings and Specifications for such cleanrooms. [The Owner and the Contractor acknowledge that the RFE Completion Milestone was achieved by the Contractor on the RFE Milestone Date and that the Contractor is entitled to receive a Ninety-Six Thousand Four Hundred Twenty Dollar ($96,420) schedule incentive in connection therewith.]

4.4 The Contractor shall achieve Substantial Completion of the entire Work (except for the procurement and installation of laboratory furniture for the analytical laboratory space at 745 Airport Road, stainless steel casework and counters for the compounding areas and the "hot" USP Water System (collectively, the "Laboratory Furniture Installation")) on or before December 19, 1997 (the "Scheduled Substantial Completion Date"). Contractor is required to complete all Work related to the Laboratory Furniture Installation by no later than January 24, 1998. Time is of the essence in the completion of the Work. As more fully set forth in Article 5 hereof, the guaranteed maximum price established for the various components of the Work include contingency funds for, among other items, overtime and acceleration of the Work, which are intended to ensure that the Contractor will (1) complete all Work required for the RFE Completion Milestone by no later than the RFE Milestone Date, and (2) Substantially Complete the entire Work (except for the Laboratory Furniture Installation) by no later than the Scheduled Substantial Completion Date.

## ARTICLE 5
## CONTRACT SUM

5.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Contractor's Fee determined as follows:

5.1.1 In consideration of the full and complete performance of the Work and all other related obligations of the Contractor hereunder in connection therewith, the Owner shall pay to the Contractor a sum of money equal to the "Contract Sum" which is defined to be the total of the Cost of the Work (as defined in Article 7) and the Contractor's Fee (as determined pursuant to 5.2 below). The Contract Sum is guaranteed by the Contractor not to exceed Twenty-One Million Seventy-Four Thousand Eight Hundred Dollars ($21,074,800) (the "Guaranteed Maximum Price").

5.2 Contractor's Fee. The Contractor's Fee shall be the amount equal to four and one-half percent (4.5%) of the sum of the Cost of the Work, subject to the Guaranteed Maximum Price; provided, however, that in no event will the Contractor be entitled to charge any Contractor's fee or other additional mark-up on any schedule incentive paid by the Owner to the Contractor, including, without limitation, the $96,420 schedule incentive payable by the Owner in connection with the RFE Completion Milestone.

5.3 Construction Contingency. The Guaranteed Maximum Price shall include a contingency of Six Hundred Eighty-Two Thousand Two Hundred Seven Dollars ($682,207) (the "Construction Contingency"). It is understood that the Construction Contingency represents the maximum sum available for the Contractor's use to cover the Cost of the Work (including impact costs) resulting from events not evidenced at the time of execution of this Agreement, such as (1) refinement of details of the Drawings and Specifications within the scope and standards of quality and quantities on which the Guaranteed Maximum Price is based (but excluding additions to the scope of the Work requested by the Owner), (2) abnormal field conditions, (3) impact costs on materials and labor intended to be included as a part of the Work, but not reasonably foreseeable by the Contractor, such as impact costs on materials and labor due to Change Orders, (4) time extensions, (5) delays due to labor disputes and severe weather conditions (other than hurricanes and blizzards), (6) other causes of lost time which are not recoverable pursuant to Article 6 hereof; (7) labor disputes within transportation or manufacturing industries, fixed job site costs that continue during on-site or off-site labor disputes that materially affect job site manpower levels, (9) delays in receipt of materials not the fault of Contractor (10) costs for Subcontractor and Contractor overtime, (11) costs for expediting the delivery of necessary equipment and materials, (12) cost for higher than expected Subcontractor bids and (13) costs for bonuses to be paid by the Owner to the Contractor for completing the Work in accordance with the contract schedules.

5.3.1 Intentionally Omitted.

5.3.2 The Contractor shall not charge any sum to the Construction Contingency without the Owner's prior written approval, which approval shall not be unreasonably withheld or delayed. The Contractor shall deliver to the Owner all supporting back-up documentation for such charges reasonably requested by the Owner. No sums may be charged to the Construction Contingency to cover any costs disapproved by the Owner pursuant to this Section 5.3. Sums may only be charged to the extent that such amounts have been paid or are to be paid by the Contractor.

5.4 Savings. If upon final completion of the Work, the sum of the Cost of the Work and Contractor's Fee is less than the Guaranteed Maximum Price, then all such savings shall benefit the Owner; if any such sum is more than the Guaranteed Maximum Price then the Contractor shall pay such excess from its own funds, the Owner shall not be required to pay any part of such excess, and the Contractor shall have no claim against Owner on account thereof. The Guaranteed Maximum Price shall be modified only as provided by Change Order.

## ARTICLE 6
## CHANGES IN THE WORK

6.1 Contracts with a Guaranteed Maximum Price

6.1.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work may be determined by any of the methods listed in subparagraph 7.3.3 of the General Conditions, as amended by the Addendum to General Conditions.

6.1.2 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Clause 7.3.3.3 of the General Conditions as amended by the Addendum to General Conditions and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Subparagraph 7.3.6 of the General Conditions as amended by the Addendum to General Conditions shall have the meanings assigned to them in the General Conditions and shall not be modified by Article 5.7 and 8 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

6.1.3 In calculating adjustments to this Contract, the terms "cost" and "costs" as used in the above-referenced provisions of the General Conditions shall mean the Cost of the Work as defined in Article 7 of this Agreement and the terms "fee" and "a reasonable allowance for overhead and profit" shall mean the Contractor's Fee as defined in Paragraph 5.1 of this Agreement.

## ARTICLE 7
## COSTS TO BE REIMBURSED

7.1 The term Cost of the Work shall mean costs necessarily incurred by the Contractor in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 7.

7.1.1 Labor Costs

7.1.1.1 Wages of construction workers directly employed by the Contractor to perform the construction of the Work at the site or, with the Owner's prior written agreement, at off-site workshops, pursuant to the Wage and Salary Schedule attached hereto as Exhibit A.

7.1.1.2 Wages or salaries of the Contractor's supervisory and administrative personnel when stationed at the site with the Owner's agreement pursuant to the Wage and Salary Schedule attached hereto as Exhibit A.

7.1.1.3 Wages and salaries of the Contractor's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

7.1.1.4 Costs paid or incurred by the Contractor for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Clauses 7.1.1.1 through 7.1.1.3.

7.1.2 Subcontract Costs

Payments made by the Contractor to Subcontractors in accordance with the requirements of the subcontracts approved by Owner pursuant to Article 10.

7.1.3 Costs of Materials and Equipment Incorporated in the Completed Construction

7.1.3.1 Costs, including transportation, or materials and equipment incorporated or to be incorporated in the completed construction.

7.1.3.2 Costs of materials described in the preceding Clause 7.1.3.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Contractor; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

7.1.4 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

7.1.4.1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Contractor at the site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed, whether sold to others or retained by the Contractor. Cost for items previously used by the Contractor shall mean fair market value.

7.1.4.2 Rental charges for necessary temporary facilities not provided by the Owner machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Contractor at the site, whether rented from the Contractor or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval.

7.1.4.3 Costs of removal of debris from the site.

7.1.4.4 Costs of telegrams and long-distance telephone calls, postage and parcel delivery charges, telephone service at the site and reasonable petty cash expenses of the site office.

7.1.4.5 That portion of the reasonable travel and subsistence expenses of the Contractor's personnel incurred while traveling in discharge of duties connected with the Work only with the Owner's prior written consent.

7.1.4.6 Costs for spares or "attic stock" as specified in the Drawings or Specifications.

7.1.5 Miscellaneous Costs

7.1.5.1 That portion directly attributable to this Contract of premiums for insurance and bonds required to be carried by the Contractor under the Contract Documents.

7.1.5.2 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Contractor is liable.

7.1.5.3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Contractor is required by the Contract Documents to pay.

7.1.5.4 Fees of testing laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work and which do not fall within the scope of Subparagraphs 7.2.2 through 7.2.4 below.

7.1.5.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Contractor resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Contractor's Fee or of a Guaranteed Maximum Price, if any, and provided that such royalties, fees and costs are not excluded by the last sentence of Subparagraph 3.17.1 of the General Conditions or other provisions of the Contract Documents.

7.1.5.6 Deposits lost for causes other than the Contractor's fault or negligence.

7.1.6 Other Costs

7.1.6.1 Other costs incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

7.1.6.2 A reserve has been included as part of the Construction Contingency for Buildings 735 and 745 to address the need for the Contractor to provide supervision on second, third or weekend shifts so that the Subcontractors can staff the Project in the most productive way possible to shorten the overall Project schedule. A second shift will be permanently instituted upon commencement of the cleanroom construction in Building 745 and will continue until its effectiveness is determined by the Owner and the Contractor to be minimal. Third and weekend shift work will be scheduled at the convenience of the Subcontractors with the prior agreement of the Owner.

7.1.6.3 A reserve for Selective Subcontractor overtime has been included in the Construction Contingency for Buildings 735 and 745 to address the need for the Contractor to induce individual Subcontractors to work on a selective overtime basis in limited areas that will have the greatest opportunity to shorten the overall Project schedule. This overtime item accounts for shift

differentials and premiums beyond what the individual Subcontractors had planned in order to achieve the schedule milestones contained within their individual contracts. All selective Subcontractor overtime must be pre-approved by the Owner and the Contractor prior to the directive to proceed on selective overtime.

7.1.6.4 A reserve for material expediting surcharges has been included in the Construction Contingency for Buildings 735 and 745 to address the need for the Contractor to selectively induce material suppliers and equipment venders to fabricate and/or deliver their products in a more timely fashion in concert with opportunities in the field to shorten the installation period in Project schedule. All requests to pay material expediting surcharges must be pre-approved by the Owner and the Contractor.

7.2 Emergencies: Repairs to Damaged, Defective or Nonconforming Work

The Cost of the Work shall also include costs described in Paragraph 7.1 which are incurred by the Contractor.

7.2.1 In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Paragraph 10.3 of the General Conditions.

7.2.2 In repairing or correcting Work damaged or improperly executed by construction workers in the employ of the contractor, provided such damage or improper execution did not result from the fault or negligence of the Contractor or the Contractor's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Contractor.

7.2.3 In repairing damaged Work other than that described in Subparagraph 7.2.2, provided such damage did not result from the fault or negligence of the Contractor or the Contractor's personnel, and only to the extent that the cost of such repairs is not recoverable by the Contractor from others and the Contractor is not compensated therefor by insurance or otherwise.

7.2.4 In correcting defective or nonconforming Work performed or supplied by a Subcontractor or material supplier and not corrected by them, provided such defective or nonconforming Work did not result from the fault or neglect of the Contractor or the Contractor's personnel adequately to supervise and direct the Work of the Subcontractor or material supplier, and only to the extent that the cost of correcting the defective or nonconforming Work is not recoverable by the Contractor from the Subcontractor or material supplier.

## ARTICLE 8
## COSTS NOT TO BE REIMBURSED

8.1 The Cost of the Work shall not include:

8.1.1 Salaries and other compensation of the Contractor's personnel stationed at the Contractor's principal office or offices other than the site office, except as specifically provided in Clauses 7.1.1.2 and 7.1.1.3 or as may be provided in Article 14.

8.1.2 Expenses of the Contractor's principal office and offices other than the site office.

8.1.3 Overhead and general expenses, except as may be expressly included in Article 7.

8.1.4 The Contractor's capital expenses, including interest on the Contractor's capital employed for Work.

8.1.5 Rental costs of machinery and equipment, except as specifically provided in Clause 7.1.4.2.

8.1.6 Except as provided in Subparagraphs 7.2.2 through 7.2.4 and Paragraph 13.5 of this Agreement, costs due to the fault, negligence or breach of the Contract Documents by the Contractor, Subcontractors, Material Suppliers, anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable, including but not limited to costs for the correction of damaged, defective or nonconforming Work, disposal and replacement of materials and equipment incorrectly ordered or supplied, and making good damage to property not forming part of the Work.

8.1.7 Any cost not specifically and expressly described in Article 7.

8.1.8 Costs which would cause the Guaranteed Maximum Price, if any, to be exceeded.

8.1.9 Costs, losses, expenses, bonds and/or insurance incurred by reason of the Contractor's general operations which the Contractor would customarily incur or carry without reference to Contractor's obligations under this Agreement.

8.1.10 Losses and expenses not covered by insurance if the Contractor shall fail to obtain and/or maintain in effect the insurance required by the Contract Documents and insurance deductibles.

## ARTICLE 9
## DISCOUNTS, REBATES AND REFUNDS

9.1 Cash discounts obtained on payments made by the Contractor shall accrue to the Owner if (1) before making the payment, the Contractor included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Contractor with which to make payments; otherwise, cash discounts shall accrue to the Contractor. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Contractor shall make provisions so that they can be secured. The contractor shall notify the Owner of the availability of cash discounts and provide Owner with a

reasonable opportunity to make the payments described in clauses (1) and (2) of the preceding sentence in order to realize such discounts.

9.2 Amounts which accrue to the Owner in accordance with the provisions of paragraph 9.1 shall be credited to the Owner as a deduction from the Cost of the Work.

## ARTICLE 10
## SUBCONTRACTS AND OTHER AGREEMENTS

10.1 Those portions of the Work that the Contractor does not customarily perform with the Contractor's own personnel shall be performed under subcontracts or by other appropriate agreements with the Contractor. The Contractor shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated especially for the Work and shall deliver such bids to the Owner. The Owner will then determine, with the advice of the Contractor and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the contractor shall obtain bids; however, if a Guaranteed Maximum Price has been established, the Owner may not prohibit the Contractor from obtaining bids from others. The Contractor shall not be required to contract with anyone to whom the Contractor has reasonable objection.

10.2 If a Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Contractor to the Owner (1) is recommended to the Owner by the Contractor; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted; then the Contractor may require that a Change Order be issued to adjust the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Contractor and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

10.3 Subcontracts or other agreements shall conform to the payment provisions of Paragraphs 12.7 and 12.8, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

10.4 The Contractor shall invite bids from, and enter into contracts and material orders with only Subcontractors and suppliers who have first been approved by the Owner. The Owner shall have the right to require the Contractor to include additional Subcontractors or suppliers, and/or to delete certain Subcontractors or suppliers from the list of Subcontractors and suppliers from whom the Contractor shall invite bids. For each such subcontract and purchase order, the Contractor shall receive bids from at least three (3) Subcontractors or suppliers. The Owner may attend all bid openings relating to such subcontracts and/or purchase orders. After receiving such bids, the Contractor shall analyze them and shall award the subcontract or purchase order to the Subcontractor or supplier selected by the Contractor and approved by the Owner. The Contractor shall contract solely in its own name and behalf, and not in the name or behalf of the Owner, with the specified Subcontractor or supplier. The Contractor's subcontract form shall be subject to the prior approval of

the Owner and shall provide that the Subcontractor shall perform its portion of the Work in accordance with all applicable provisions of this Agreement and the other Contract Documents.

10.5 All subcontracts shall, so far as practicable, contain unit prices and any other feasible formula for use in the determination of the cost of changes in the Work and shall contain (where applicable) warranties, conditions and covenants which are substantively similar to the Contract Documents. Upon request by the Owner, the Contractor shall furnish the Owner with copies of all warranties provided by manufacturers, laborers or material suppliers relating to any subcontracts or purchase orders.

10.6 The Contractor shall hold all Subcontractors, including all persons directly or indirectly employed by them, responsible for any damages due to breach of contract or any negligent act and to endeavor diligently to effect recoveries of such damages. All subcontracts shall contain a clause approved by the Owner allowing for the direct assignment of each subcontract to the Owner upon termination or full performance of this Agreement.

10.7 Owner may require Contractor to change any Subcontractor previously approved and, if at such time Contractor is not then in default under this Agreement, the Guaranteed Maximum Price shall be increased or decreased by the difference in cost, if any, occasioned by such change.

## ARTICLE 11
## ACCOUNTING RECORDS

11.1 The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Contract; the accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Contract and the Contractor shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

## ARTICLE 12
## PROGRESS PAYMENTS

12.1 Based upon Applications for Payment submitted to the Architect and approved by the Owner, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

12.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

12.3 Provided an Application for Payment is received by the Owner not later than the twenty-fifth (25th) day of a month, the Owner shall make payment to the Contractor not later than the thirty (30) days thereafter. If an Application for Payment is received by the Owner after the application date

fixed above, payment shall be made by the Owner not later than forty-five (45) days after the Owner approves the Application for Payment.

12.4 With each Application for Payment the Contractor shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Contractor on account of the Cost of the Work equal or exceed (1) progress payments already received by the Contractor; less (2) that portion of those payments attributable to the Contractor's Fee; plus (3) payrolls for the period covered by the present Application for Payment; plus (4) retainage provided in Subparagraph 12.5.4, if any, applicable to prior progress payments.

12.5 Contracts with a Guaranteed Maximum Price

12.5.1 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Contractor and approved in writing by the Owner in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Contractor's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect and the Owner may require. This schedule, unless objected to by the Owner, shall be used as a basis for reviewing the Contractor's Applications for Payment.

12.5.2 Applications for Payment shall show the percentage completion of each portion of the work as indicated on the approved Schedule of Values as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Contractor on account of that portion of the Work for which the Contractor has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

12.5.3 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed in accordance with the provisions of clauses 12.5.3.1 and 12.5.3.2 attached hereto as follows:

12.5.3.1 Each Application for Payment (other than the final Application for Payment) shall include a sum equal to one hundred percent (100%) of the Cost of the Work in place which was performed through the period covered by the Application for Payment.

12.5.3.2 Each Application for Payment (other than the final Application for Payment) shall also include the amount of the Contractor Fee determined in accordance with the provisions of 5.2 to which Contractor is entitled for the period covered by the Application for Payment; provided, however, that after the Contractor has received a total of Four Hundred Fifty Thousand Dollars ($450,000) of the Contractor Fee, all remaining Contractor Fee shall be held by the Owner as retention, and any unused retention shall be released to the Contractor within thirty (30)

days after the date that the Contractor achieves the Substantial Completion of the entire Work, except for the Laboratory Furniture Installation.

12.5.3.3 Subtract the aggregate of previous payments made by the Owner for the Cost of the Work and the Contractor's Fee.

12.5.3.4 Subtract the shortfall, if any, indicated by the Contractor in the documentation required by Paragraph 12.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation.

12.5.3.5 Subtract amounts, if any, which the Owner has rejected as provided in Paragraph 9.5 of the General Conditions.

12.5.4 Additional retainage, if any, shall be as follows:

In accordance with Article 9 of the General Conditions, as amended.

12.6 Except with the Owner's prior approval, payments to Subcontractors included in the Contractor's Applications for Payment shall not exceed an amount for each Subcontractor calculated as follows:

12.6.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion in the Subcontractor's schedule of values, less retainage of _____ percent (_____%). Pending final determination of amounts to be paid to the Subcontractor for changes in the Work, amounts not in dispute may be included as provided in Subparagraph 7.3.7 of the General Conditions even through the Subcontract Sum has not yet been adjusted by Change Order.

12.6.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing, less retainage of _____ percent (_____%).

12.6.3 Subtract the aggregate of previous payments made by the Contractor to the Subcontractor or higher amount as the Owner has paid the Contractor with respect to Subcontractor's Work.

12.6.4 Subtract amounts, if any, which the Owner has not approved for reasons which are the fault of the Subcontractor.

12.6.5 Add, upon Substantial Completion of the entire Work of the Contractor, a sum sufficient to increase the total payments to the Subcontractor to one hundred percent (100%) of the Subcontract Sum, less amounts, if any, for incomplete Work and unsettled claims; and, if final

completion of the entire Work is thereafter materially delayed through no fault of the Subcontractor, add any additional amounts or other sum properly withheld under the Contract Documents payable on account of Work of the Subcontractor in accordance with Subparagraph 9.10.3 of the General Conditions.

The Subcontract Sum is the total amount stipulated in the subcontract to be paid by the Contractor to the Subcontractor for the Subcontractor's performance of the subcontract.

12.7 Except with the Owner's prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

12.8 In taking action on the Contractor's Applications for Payment, the Architect and the Owner shall be entitled to rely on the accuracy and completeness of the information furnished by the Contractor and shall not be deemed to represent that the Architect or the Owner has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Paragraph 12.4 or other supporting data; that the Architect or the Owner has made exhaustive or continuous on-site inspections or that the Architect or the Owner has made examinations to ascertain how or for what purposes the Contractor has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

## ARTICLE 13
## FINAL PAYMENT

13.1 Final payment shall be made by the Owner to the Contractor when (1) the Contract has been fully performed by the Contractor except for the Contractor's responsibility to correct defective or nonconforming Work, as provided in Subparagraph 12.2.2 of the General Conditions, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Contractor and reviewed by the Owner's accountants; and (3) the final Application for Payment has been approved by the Owner. Such final payment shall be made by the Owner not more than 30 days after the Owner has approved the final Application for Payment and the conditions set forth in Paragraph 9.1 of the Addendum to General Conditions have been satisfied.

13.2 The amount of the final payment shall be calculated as follows:

13.2.1 Take the sum of the Cost of the Work substantiated by the Contractor's final accounting and the Contractor's Fee; but not more than the Guaranteed Maximum Price, if any.

13.2.2 Subtract amounts, if any, for which the Owner withholds, in whole or in part its approval of the final Application for Payment as provided in Subparagraph 9.5.1 of the General Conditions or other provisions of the Contract Documents.

13.2.3 Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Contractor, the Contractor shall reimburse the difference to the Owner.

13.3 The Owner's accountants will review and report in writing on the Contractor's final accounting within 30 days after delivery of the final accounting to the Architect and the Owner by the Contractor. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Contractor's final accounting, and provided the other conditions of Paragraph 13.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either make final payment to the Contractor or notify the Contractor in writing of the Owner's reasons for withholding a payment as provided in Subparagraph 9.5.1 of the General Conditions. The time periods stated in this Paragraph 13.3 supersede those stated in Subparagraph 9.4.1 of the General Conditions.

13.4 If, subsequent to final payment and at the Owner's request, the Contractor incurs costs described in Article 7 and not excluded by Article 8 to correct defective or nonconforming Work, the Owner shall reimburse the Contractor such costs and the Contractor's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price, if any. If the Contractor has participated in savings as provided in Paragraph 5.2, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Contractor.

## ARTICLE 14
## MISCELLANEOUS PROVISIONS

14.1 Where reference is made in this Agreement to a provision of the General Conditions or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

14.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

14.2.1 Two percent above the current prime rate as documented in The Wall Street Journal on the last Friday of the month of the period covered by the affected Request for Payment.

14.3 Other provisions:

14.3.1 Contractor and all Subcontractors shall keep confidential any information required from Owner's employees or from inspection of Owner's property relating to Owner's designs, business plans, business opportunities, financial or other confidential information. Contractor and those of its employees as may be designated by Owner, and all Subcontractors, shall execute Owner's standard form confidentiality agreement.

14.3.2 Any Work performed by Contractor or its predecessor, Marshall Contractor's Inc., prior to the date of this Agreement, shall be and hereby is incorporated into this Agreement and covered by the conditions and requirements set forth herein.

## ARTICLE 15
## TERMINATION OR SUSPENSION

15.1 The Contract may be terminated by the Contractor as provided in Article 14 of the General Conditions; however, amount to be paid to the Contractor under Subparagraph 14.1.2 of the General Conditions shall not exceed the amount the Contractor would be entitled to receive under Paragraph 15.3 below, except that the Contractor's Fee shall be calculated as if the Work has been fully completed by the Contractor, including a reasonable estimate of the Cost of the Work for Work not actually completed.

15.2 If a Guaranteed Maximum Price is established in Article 5, the Contract may be terminated by the Owner for cause as provided in Article 14 of the General Conditions; however, the amount, if any, to be paid to the Contractor under Subparagraph 14.2.4. of General Conditions shall not cause the Guaranteed Maximum Price to be exceeded, nor shall it exceed the amount the Contractor would be entitled to receive under Paragraph 15.3 below.

15.3 If no Guaranteed Maximum Price is established in Article 5, the Contract may be terminated by the Owner for cause as provided in Article 14 of the General Conditions; however, the Owner shall then pay the Contractor an amount calculated as follows:

15.3.1 Take the Cost of the Work incurred by the Contractor to the date of termination.

15.3.2 Add the Contractor's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Paragraph or, if the Contractor's Fee is stated as a fixed sum in that Paragraph, an amount which bears the same ratio to that fixed-sum Fee as Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.

15.3.3 Subtract the aggregate of previous payments made by the Owner.

The Owner shall also pay the Contractor fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Contractor which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Subparagraph 15.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Contractor shall, as a condition of receiving the payments referred to in this Article 15, execute and deliver such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Contract as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Contractor under such subcontracts or purchase orders.

15.4 The Work may be suspended by the Owner as provided in Article 14 of the General Conditions; in such case, the Guaranteed Maximum Price, if any, shall be increased as provided in Subparagraph 14.3.2 of the General Conditions except that the term "cost performance of the Contract" in that Subparagraph shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Contractor's Fee as described in Paragraphs 5.1 and 6.3 of this Agreement.

## ARTICLE 16
## ENUMERATION OF CONTRACT DOCUMENTS

16.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

16.1.1 The Agreement is this executed Standard Form of Agreement Between Owner and Contractor, AIA Document A111.1987 Edition.

16.1.2 The General Conditions are the General Conditions of the Contract for Construction. AIA Document A201. 1987 Edition.

16.1.3 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated _____, and are as follows:

[Not Applicable.]

16.1.4 The Specifications are those contained in the Project Manual dated as in Paragraph 16.1.3, and are as follows:

[See Exhibit B Attached.]

16.1.5 The Drawings are as follows and are dated _____ unless a different date is shown below:

[See Exhibit B Attached.]

16.1.6 The addenda, if any, are as follows:

Any and all Addenda to the Drawings and Specifications on Exhibit B attached hereto, and any new or supplemental drawings and specifications for the Project, issued by Owner or Architect through and including November 5, 1997.

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 16.

16.1.7 Other Documents, if any, forming part of the Contract Documents are as follows:

| | | |
|---|---|---|
| Exhibit A to AIA A111 | - | Wage Schedule |
| Exhibit B to AIA A111 | - | Drawings and Specifications |
| Addendum to AIA A201 | - | General Conditions |

This Agreement is entered into as of the day and year first written above and is executed in at least three original copies of which one is to be delivered to the Contractor, one to the Architect for use in the administration of the Contract, and the remainder to the Owner.

| OWNER | CONTRACTOR |
| --- | --- |
| /s/ DAVID C. YNTEMA | /s/ S. JAMES BUSAM |
| (Signature) | (Signature) |
| David C. Yntema, CFO | S. James Busam, Sr. V.P. |
| (Printed name and title) | (Printed name and title) |

EXHIBIT A

WAGE SCHEDULE

SCHEDULE OF STANDARD HOURLY RATES

VIVUS, INC. - Lakewood, New Jersey

Marshall Contractors Inc.

| COST CODE | POSITION | NAME | HOURLY RATE |
|---|---|---|---|
| 01035 | Project Executive | John Magyar | $102.64 |
| 01039 | Contracts Manager | Bob Kimmel | 78.49 |
| 01040 | Project Manager | Lorranie Marsden | 56.35 |
| 01041 | Gen. Superintendent | Greg Kisshauer | 54.34 |
| 01042 | Superintendent-745 | Dick Piscitelli | 40.25 |
| 01043 | 2nd Shift Super. | Ken Duval | 40.25 |
| 01044 | Project Engineer | Kim Pepe | 32.20 |
| 01144 | MEP Coordinator | Gerry Consoio | 44.28 |
| 01115 | MEP Super - 735 | Sean Gaffney | 44.27 |
| 01115 | MEP Super - 745 | Ken Higby | 61.38 |
| 01215 | Admin. Asst. | Tinamarie Falasco | 28.18 |
| 01300 | Tech. SVCS. Mgr. | Bob Lewis | 48.78 |
| 01305 | Estimator | Emery Vaughn | 61.38 |
| 01305 | Estimator | Art Caron | 61.38 |
| 01305 | Estimator | Steve Kieman | 61.38 |
| 01306 | Elect. Estimator | Andrea Mollo | 61.38 |
| 01306 | Sr. Mech. Estimator | Phil Wald | 79.86 |
| 01306 | Mech. Estimator | Steve Pagiiuca | 61.38 |
| 01310 | Sr. Scheduler | Bob Edwards | 66.41 |
| 01310 | Scheduler | Umberto Donato | 44.28 |
| 01314 | Purch. Manager | Brian Fugere | 56.35 |
| 01315 | Purch. Agent | Peter Capone | 40.61 |
| 01318 | Purch. Clerical | Nancy Blatchley | 23.08 |
| 01325 | Dir. Preconst. SVCS. | Mark Hanchar | 90.56 |
| 01330 | Accounting Clerk | Susan Feuti | 23.48 |
| 01340 | Safety Manager | Tony O'Dea | 47.46 |
| 01370 | Accounting Manager | John Habershaw | 37.28 |
| 01400 | Manager - Process | Bob Graf | 66.41 |
| 01410 | Certification Coord. | Chuck White | 40.25 |

EXHIBIT B

DRAWINGS AND SPECIFICATIONS

Building 735
Contract Document List

DRAWINGS BY O'BRIEN ATKINS ASSOCIATES

| Sheet Number | Title | Date |
|---|---|---|
| N/A | Cover | April 15, 1997 |
| **Landscape** | | |
| LA-1 | Site Plan | April 4, 1997 |
| **Structural** | | |
| 3S1 | Foundation Plan | March 19, 1997 |
| 3S2 | Mezzanine Framing Plan | March 19, 1997 |
| 3S3 | Details | March 19, 1997 |
| **Architectural** | | |
| 3A-1 | First Floor Plan | April 15, 1997 |
| 3A-2 | Mezzanine Floor Plan | March 20, 1997 |
| 3A-3 | First Floor Reflected Ceiling Plan | April 15, 1997 |
| 3A-5 | Finish Schedule/Door Schedule Window & Frame Types/Details | April 15, 1997 |
| 3A-6 | Enlarged Plans/Schedule | April 15, 1997 |
| 3A-7 | Sections | April 15, 1997 |
| 3A-8 | Details | April 15, 1997 |
| **Plumbing - Phase 1** | | |
| 3P0.1 | Schedules, Symbol Legend, Building Data | March 20, 1997 |
| 3P1.1 | Floor Plan | March 20, 1997 |
| 3P1.2 | Floor Plans & Riser Diagrams | March 20, 1997 |
| 3P2.0 | Fire Stop Details | March 20, 1997 |
| **Mechanical - Phase 1** | | |
| 3HVAC0.1 | Legend | March 20, 1997 |
| 3HVAC1.1 | First floor - HVAC Ductwork Plan | March 20, 1997 |
| 3HVAC1.2 | First Floor - HVAC Piping Plan | March 20, 1997 |

| | | |
|---|---|---|
| 3HVAC2.1 | Mezzanine - Enlarged HVAC Plan | March 20, 1997 |
| 3HVAC2.2 | Enlarged Boiler Room Plans/Sections | March 20, 1997 |
| 3HVAC3.1 | Details | March 20, 1997 |
| 3HVAC3.2 | Details | March 20, 1997 |
| 3HVAC3.3 | Firestopping Details | March 20, 1997 |
| 3HVAC4.1 | Chilled/Hot Water Schedule | March 20, 1997 |
| 3HVAC4.2 | Controls | March 20, 1997 |
| 3HVAC5.1 | Schedules | March 20, 1997 |

Electrical

| | | |
|---|---|---|
| 3E-1 | Abbreviations/Details | March 19, 1997 |
| 3E-2 | First Floor Lighting Plan | March 19, 1997 |
| 3E-3 | Mezzanine Lighting Plan | March 19, 1997 |
| 3E-4 | First Floor Power Plan | March 19, 1997 |
| 3E-5 | Mezzanine Power Plan | March 19, 1997 |
| 3E-6 | Single Line Diagrams | March 19, 1997 |
| 3E-7 | Panel Schedules | March 19, 1997 |
| 3E-8 | Panel Schedules | March 19, 1997 |
| 3E-9 | Details | March 19, 1997 |

SPECIFICATIONS BY O'BRIEN ATKINS ASSOCIATES

| | | | |
|---|---|---|---|
| | **Division 3 - Concrete** | | |
| 03310 | Concrete | # | 14 pages |
| | **Division 5 - Metals** | | |
| 05120 | Structural Steel | # | 7 pages |
| 05210 | Steel Joists | # | 3 pages |
| 05300 | Metal Decking | # | 3 pages |
| 05500 | Miscellaneous Metals | # | 6 pages |
| | **Division 6 - Wood and Plastics** | | |
| 06100 | Carpentry | # | 4 pages |
| 06400 | Architectural Woodwork | # | 6 pages |
| | **Division 7 - Thermal and Moisture Protection** | | |
| 07200 | Thermal Insulation | # | 1 page |
| 07250 | Sprayed-on Fireproofing | # | 4 pages |
| 07255 | Firestopping | # | 3 pages |
| 07900 | Joint Sealers | # | 3 pages |

| | | | |
|---|---|---|---|
| | **Division 8 - Doors and Windows** | | |
| 08100 | Hollow Metal Work | # | 5 pages |
| 08211 | Flush Wood Doors | # | 4 pages |
| 08330 | Overhead Coiling doors | # | 3 pages |
| 08710 | Builders Hardware | # | 2 pages |
| | **Division 9 - Finishes** | | |
| 09100 | Metal Studs | # | 4 pages |
| 09250 | Gypsum Drywall | # | 5 pages |
| 09510 | Acoustical Panel Ceilings | # | 4 pages |
| 09650 | Resilient flooring | # | 5 pages |
| 09680 | Carpet | # | 5 pages |
| 09900 | Carpet | # | 6 pages |
| | **Division 10 - Specialties** | | |
| 10200 | Louvers | # | 5 pages |
| 10400 | Miscellaneous Specialties | # | 1 page |
| 10618 | Demountable Metal Partitions and Integrated Ceiling Grid | # | 5 pages |
| | **Division 13 - Special construction** | | |
| 13038 | Environmental Room | # | 3 pages |
| | **Division 15 - Mechanical** | | |
| 15010 | General Mechanical | # | 9 pages |
| 15020 | Firestopping | # | 3 pages |
| 15035 | Pipe Testing | # | 1 page |
| 15055 | Piping Specialities and Accessories | # | 3 pages |
| 15100 | Valves | # | 4 pages |
| 15110 | Hydronic Water specialties | # | 4 pages |
| 15135 | Meters and Gauges | # | 2 pages |
| 15140 | Roof Curbs, Supports & Equipment Pads | # | 1 page |
| 15150 | Motors and Electrical Work | # | 3 pages |
| 15175 | Variable Speed Drive | # | 5 pages |
| 15190 | Mechanical Identification | # | 7 pages |
| 15192 | Painting | # | 1 page |
| 15200 | Noise Control | # | 3 pages |
| 15205 | Vibration Isolation | # | 17 pages |
| 15250 | Mechanical Insulation | # | 9 pages |
| 15405 | Piping and Equipment Insulation | # | 2 pages |
| 15409 | Plumbing Pipe and Pipe Fittings | # | 2 pages |
| 15411 | Plumbing Systems | # | 6 pages |
| 15440 | Plumbing Fixtures | # | 6 pages |
| 15510 | Pipe and Pipe Fittings | # | 3 pages |

| | Pre-Purchased Equipment | | |
|---|---|---|---|
| No Section | Hot Water Heating Boilers and Air-Cooled Screw Chillers | @ | 1 page |

Legend: # These specifications were not dated by the Issuer, but were dated received by Marshall Contractors on March 20, 1997

@ This specification was not dated by the issuer, but was dated received by Marshall Contractors on March 19, 1997

E-BEAM COLD BOX
CONTRACT DOCUMENT LIST

DRAWINGS BY O'BRIEN ATKINS ASSOCIATES

| Sheet Number | Title | Date |
|---|---|---|
| SK-1 | Vivus, Inc. - E-Beam Cold Box | May 23, 1997 |

BUILDING 745
CONTRACT DOCUMENT LIST

DRAWINGS BY O'BRIEN ATKINS ASSOCIATES

| Sheet Number | Title | Date |
|---|---|---|
| N/A | Cover | April 15, 1997 |
| **Landscape** | | |
| LA-1 | Site Plan | April 4, 1997 |
| **Structural** | | |
| 4S1 | Foundation Plan | March 19, 1997 |
| 4S2 | Mezzanine Framing Plan | March 19, 1997 |
| 4S3 | Details | March 19, 1997 |
| **Architectural** | | |
| 4A-1 | First Floor Plan | April 9, 1997 |
| 4A-2 | Mezzanine Floor Plan | april 9, 1997 |
| 4A-3 | Reflected Ceiling Plan | April 9, 1997 |
| 4A-4 | Finish Schedule | April 9, 1997 |
| 4A-5 | Door Schedule/Details | April 9, 1997 |
| 4A-6 | Enlarged Plans/Schedule | April 9, 1997 |
| 4A-7 | Sections | April 9, 1997 |
| 4A-8 | Details | April 9, 1997 |
| **Plumbing** | | |
| 4P0.1 | Schedules, Symbol Legend, Building Data | April 9, 1997 |
| 4P1.0 | Floor Plan - Plumbing - DWV | April 9, 1997 |
| 4P1.1 | Floor Plan - Plumbing - Piping Services | April 9, 1997 |
| 4P1.2 | Mezzanine Floor Plans | April 9, 1997 |
| 4P2.0 | Enlarged Plans | April 9, 1997 |
| 4P2.1 | Enlarged Plans | April 9, 1997 |
| 4P3.0 | Plumbing Details | April 9, 1997 |
| 4P3.1 | Riser Diagrams | April 9, 1997 |
| 4P4.0 | Fire Stop Details | April 9, 1997 |

Mechanical

| | | |
|---|---|---|
| 4HVAC0.1 | Legend | April 9, 1997 |
| 4HVAC1.1 | First Floor - HVAC Ductwork | April 9, 1997 |
| 4HVAC1.2 | First Floor - HVAC Piping Plan | April 9, 1997 |
| 4HVAC2.1 | Mezzanine - HVAC Plan | April 9, 1997 |
| 4HVAC2.2 | Enlarged Boiler Room Plans/Sections | April 9, 1997 |
| 4HVAC3.1 | Details | April 9, 1997 |
| 4HVAC3.2 | Details | April 9, 1997 |
| 4HVAC3.3 | Firestopping Details | April 9, 1997 |
| 4HVAC4.1 | Chilled/Hot Water Schedule | April 9, 1997 |
| 4HVAC4.2 | Controls | April 9, 1997 |
| 4HVAC5.1 | Schedules | April 9, 1997 |

Electrical

| | | |
|---|---|---|
| 4E-1 | Abbreviations/Details | April 9, 1997 |
| 4E-2 | First Floor Lighting Plan | April 9, 1997 |
| 4E-3 | Mezzanine Lighting Plan | April 9, 1997 |
| 4E-4 | First Floor Power Plan | April 9, 1997 |
| 4E-5 | Mezzanine Power Plan | April 9, 1997 |
| 4E-6 | Single Line Diagrams | April 9, 1997 |
| 4E-7 | Panel Schedules | April 9, 1997 |
| 4E-8 | Panel Schedules | April 9, 1997 |
| 4E-9 | Details | April 9, 1997 |
| 4E-10 | Details | April 9, 1997 |

SPECIFICATIONS O'BRIEN ATKINS ASSOCIATES

| | | | |
|---|---|---|---|
| Cover | Project Manual - Upfit/Permit Package | April 9, 1997 | |
| | Division 5 - Metals | | |
| 05500 | Miscellaneous Metals | * | 6 pages |
| | Division 6 - Wood and Plastics | | |
| 06100 | Carpentry | * | 4 pages |
| 06400 | Architectural Woodwork | * | 6 pages |
| | Division 7 - Thermal and Moisture Protection | | |
| 07200 | Thermal Insulation | * | 2 pages |
| 07250 | Sprayed-on Fireproofing | * | 4 pages |
| 07255 | Firestopping | * | 3 pages |
| 07900 | Joint Sealers | * | 4 pages |

| | | | |
|---|---|---|---|
| | **Division 8 - Doors and Windows** | | |
| 08100 | Hollow Metal Work | * | 5 pages |
| 08211 | Flush Wood Doors | * | 4 pages |
| 08330 | Overhead Coiling Doors | * | 3 pages |
| 08710 | Builders Hardware | * | 2 pages |
| | **Division 9 - Finishes** | | |
| 09100 | Metal Studs | * | 4 pages |
| 09250 | Gypsum Drywall | * | 5 pages |
| 09300 | Tile Work | * | 4 pages |
| 09510 | Acoustical Panel Ceilings | * | 4 pages |
| 09650 | Resilient Flooring | * | 5 pages |
| 09680 | Carpet | * | 5 pages |
| 09900 | Painting | * | 7 pages |
| | **Division 10 - Specialties** | | |
| 10200 | Louvers | * | 5 pages |
| 10400 | Miscellaneous Specialties | * | 3 pages |
| 10618 | Demountable Metal Partitions and Integrated Ceiling Grid | * | 5 pages |
| 10650 | Operable Partitions | * | 3 pages |
| | **Division 11 - Equipment** | | |
| 11600 | Laboratory Equipment | * | 5 pages |
| | **Division 12 - Furnishings** | | |
| 12345 | Metal Laboratory Equipment | * | 21 pages |
| | **Division 13 - Special Construction** | | |
| 13038 | Environmental Room | * | 3 pages |
| | **Division 15 - Equipment** | | |
| 15010 | General Mechanical | # | 9 pages |
| 15020 | Firestopping | # | 3 pages |
| 15035 | Pipe Testing | # | 1 page |
| 15055 | Piping Specialties and Accessories | # | 3 pages |
| 15100 | Valves | # | 4 pages |
| 15110 | Hydronic Water Specialties | # | 4 pages |
| 15135 | Meters and Gauges | # | 2 pages |
| 15140 | Roof Curbs, Supports & Equipment Pads | # | 1 page |
| 15150 | Motors and Electrical Work | # | 3 pages |
| 15175 | Variable Speed drive | # | 5 pages |
| 15190 | Mechanical Identification | # | 7 pages |
| 15192 | Painting | # | 1 page |

| | | | |
|---|---|---|---|
| 15200 | Noise control | # | 3 pages |
| 15205 | Vibration Isolation | # | 17 pages |
| 15250 | Mechanical Insulation | # | 9 pages |
| 15405 | Piping and Equipment Insulation | # | 2 pages |
| 15409 | Plumbing Pipe and Pipe Fittings | # | 2 pages |
| 15411 | Plumbing Systems | # | 6 pages |
| 15440 | Plumbing Fixtures | # | 6 pages |
| 15510 | Pipe and Pipe Fittings | # | 3 pages |
| 15540 | Pumps (HVAC) | # | 2 pages |
| 15556 | Low Pressure Hot Water Fire Box Water Boilers | # | 3 pages |
| 15683 | Water Chiller (Air Cooled Package) | # | 3 page |
| 15830 | Hot Water Unit Heaters | # | 2 pages |
| 15852 | Air Handling Units | # | 4 pages |
| 15862 | Exhaust Fans | # | 3 pages |
| 15885 | Air filtration | # | 2 pages |
| 15891 | Ductwork | # | 5 pages |
| 15910 | Duct Accessories | # | 4 pages |
| 15932 | Air Distribution Devices | # | 2 pages |
| 15933 | VAV Terminals | # | 3 pages |
| 15940 | Chemical Treatment and Cleaning | # | 3 pages |
| 15950 | Building Management and Automatic Temperature Control Systems | # | 27 pages |
| 15990 | Testing, Adjusting and Balancing | # | 6 pages |

Division 16 - Electrical

| | | | |
|---|---|---|---|
| 16001 | Summary of Electrical Work | # | 2 pages |
| 16002 | Electrical General Provisions | # | 10 pages |
| 16010 | Basic Electrical Requirements | # | 6 pages |
| 16025 | Division of Work, Divisions 15/16 | # | 2 pages |
| 16040 | Demolition | # | 3 pages |
| 16110 | Raceways | # | 12 pages |
| 16111 | Cable Trays | # | 5 pages |
| 16120 | Secondary Voltage Wire and Cables | # | 7 pages |
| 16135 | Electrical Boxes and Fittings | # | 6 pages |
| 16142 | Electrical Connections for Equipment | # | 5 pages |
| 16143 | Wiring Devices | # | 6 pages |
| 16170 | Circuit and Motor Disconnects | # | 4 pages |
| 16183 | Molded Case Circuit Breakers (MCCB's) | # | 2 pages |
| 16195 | Electrical Identification | # | 5 pages |
| 16425 | Switchboards | # | 7 pages |
| 16452 | Grounding | # | 5 pages |
| 16460 | Transformers | # | 5 pages |
| 16470 | Panelboards | # | 7 pages |
| 16477 | Fuses, Low Voltage | # | 3 pages |

| | | | |
|---|---|---|---|
| 16495 | Automatic Transfer Switches | # | 8 pages |
| 16515 | Interior Lighting Fixtures | # | 7 pages |
| 16621 | Diesel Generator Set | # | 8 pages |
| 16721 | Addressable Fire Alarm System | # | 14 pages |
| 16741 | Telephone/Data Communication System | # | 6 pages |
| | Pre-Purchased Equipment | | |
| No Section | Hot Water Heating Boilers and Air-Cooled Screw Chillers | @ | 1 page |

Legend: * Only the cover of the project manual was dated April 9, 1997, no individual specification sections were dated.

# These specifications were not dated by the Issuer, but were dated received by Marshall Contractors on March 20, 1997

@ This specification was not dated by the issuer, but was dated received by Marshall Contractors on March 19, 1997

THE AMERICAN INSTITUTE OF ARCHITECTS

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AIA Document A201

# GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS MODIFICATION

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1987 EDITION

TABLE OF ARTICLES



This document has been approved and endorsed by the Associated General Contractors of America.

INDEX

EXHIBIT 10.32B

# GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

## ARTICLE 1

## GENERAL PROVISIONS

### 1.1 BASIC DEFINITIONS

#### 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of addenda relating to bidding requirements).

#### 1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

#### 1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

#### 1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

1.1.5 THE DRAWINGS

The Drawings are the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, construction systems, standards and workmanship for the Work, and performance of related services.

1.1.7 THE PROJECT MANUAL

The Project Manual is the volume usually assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

1.2 EXECUTION, CORRELATION AND INTENT

1.2.1 The Contract Documents shall be signed by the Owner and Contractor as provided in the Agreement. If either the Owner or Contractor or both do not sign all the Contract Documents, the Architect shall identify such unsigned Documents upon request.

1.2.2 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

1.2.3 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

1.2.4 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.5 Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

1.3 OWNERSHIP AND USE OF ARCHITECT'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS

1.3.1 The Drawings, Specifications and other documents prepared by the Architect are instruments of the Architect's service through which the Work to be executed by the Contractor is described. The Contractor may retain one contract record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect, and unless otherwise indicated the Architect shall be deemed the author of them and will retain all common law, statutory and other reserved rights, in addition to the copyright. All copies of them, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects for additions to this Project outside the scope of the Work without the specific written consent of the Owner and Architect. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are granted a limited license to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this license shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's copyright or other reserved rights.

1.4 CAPITALIZATION

1.4.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to Paragraphs, Subparagraphs and Clauses in the document or (3) the titles of other documents published by the American Institute of Architects.

1.5 INTERPRETATION

1.5.1 In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

## ARTICLE 2

## OWNER

2.1 DEFINITION

2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Owner" means the Owner or the Owner's authorized representative.

2.1.2 The Owner upon reasonable written request shall furnish to the Contractor in writing information which is necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein at the time of execution of the Agreement and, within five days after any change, information of such change in title, recorded or unrecorded.

2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

2.2.1 The Owner shall, at the request of the Contractor, prior to execution of the Agreement and promptly from time to time thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. [Note: Unless such reasonable evidence were furnished on request prior to the execution of the Agreement, the prospective contractor would not be required to execute the Agreement or to commence the Work.]

2.2.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site.

2.2.3 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

2.2.4 Information or services under the Owner's control shall be furnished by the Owner with reasonable promptness to avoid delay in orderly progress of the Work.

2.2.5 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work.

2.2.6 The foregoing are in addition to other duties and responsibilities of the Owner enumerated herein and especially those in respect to Article 6 (Construction by Owner or by Separate Contractors), Article 9 (Payments and Completion) and Article II (Insurance and Bonds).

2.3 OWNER'S RIGHT TO STOP THE WORK

2.3.1 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or persistently fails to carry out Work in accordance with the Contract Documents, the Owner, by written order signed personally or by an agent specifically so empowered by the Owner in writing, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Subparagraph 6.1.3.

2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a second seven-day period. If the Contractor within such second seven-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the cost of correcting such deficiencies, including compensation for the Architect's additional services and expenses made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

## ARTICLE 3

## CONTRACTOR

3.1 DEFINITION

3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the Owner pursuant to Subparagraph 2.2.2 and shall at once report to the Architect errors, inconsistencies or omissions discovered. The Contractor shall not

be liable to the Owner or Architect for damage resulting from errors, inconsistencies or omissions in the Contract Documents unless the Contractor recognized such error, inconsistency or omission and knowingly failed to report it to the Architect. If the Contractor performs any construction activity knowing it involves a recognized error, inconsistency or omission in the Contract Documents without such notice to the Architect, the Contractor shall assume appropriate responsibility for such performance and shall bear an appropriate amount of the attributable costs for correction.

3.2.2 The Contractor shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to the Contractor with the Contract Documents before commencing activities. Errors, inconsistencies or omissions discovered shall be reported to the Architect at once.

3.2.3 The Contractor shall perform the Work in accordance with the Contract Documents and submittals approved pursuant to Paragraph 3.12.

3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

3.3.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

3.3.4 The Contractor shall be responsible for inspection of portions of Work already performed under this Contract to determine that such portions are in proper condition to receive subsequent Work.

3.4 LABOR AND MATERIALS

3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

3.4.2 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

3.5 WARRANTY

3.5.1 The Contractor warrants to the Owner and Architect 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 will be free from defects 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, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

3.6 TAXES

3.6.1 The Contractor shall pay sales, consumer, use and similar taxes for the Work or portions thereof provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

3.7 PERMITS, FEES AND NOTICES

3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and 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 and which are legally required when bids arc received or negotiations concluded.

3.7.2 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work.

3.7.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations. However, if the Contractor observes that portions of the Contract Documents are at variance therewith, the Contractor shall promptly notify the Architect and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

3.7.4 If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Architect and Owner, the Contractor shall assume full responsibility for such Work and shall bear the attributable costs.

3.8 ALLOWANCES

3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities against which the Contractor makes reasonable objection.

3.8.2 Unless otherwise provided in the Contract Documents:

.1 materials and equipment under an allowance shall be selected promptly by the Owner to avoid delay in the Work;

.2 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

.3 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum and not in the allowances;

.4 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Clause 3.8.2.2 and (2) changes in Contractor's costs under Clause 3.8.2.3.

3.9 SUPERINTENDENT

3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

3.10.2 The Contractor shall prepare and keep current, for the Architect's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Architect reasonable time to review submittals.

3.10.3 The Contractor shall conform to the most recent schedules.

3.11 DOCUMENTS AND SAMPLES AT THE SITE

3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, addenda, Change Orders and other Modifications, in good order and marked currently to record changes and selections made during construction, and in addition approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work.

3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required the way the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Subparagraph 4.2.7.

3.12.5 The Contractor shall review, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals made by the Contractor which are not required by the Contract Documents may be returned without action.

3.12.6 The Contractor shall perform no portion of the Work requiring submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect. Such Work shall be in accordance with approved submittals.

3.12.7 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

3.12.8 The Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and the Architect has given written approval to the specific deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals.

3.12.10 Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents.

3.12.11 When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such calculations and certifications.

3.13 USE OF SITE

3.13.1 The Contractor 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.

3.14 CUTTING AND PATCHING

3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

3.15 CLEANING UP

3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor.

3.16 ACCESS TO WORK

3.16.1 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

3.17 ROYALTIES AND PATENTS

3.17.1 The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

3.18 INDEMNIFICATION

3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them 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 (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

3.18.2 In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 3.18 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

3.18.3 The obligations of the Contractor under this Paragraph 3.18 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions

by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

## ARTICLE 4

## ADMINISTRATION OF THE CONTRACT

### 4.1 ARCHITECT

4.1.1 The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

4.1.2 Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

4.1.3 In case of termination of employment of the Architect, the Owner shall appoint an architect against whom the Contractor makes no reasonable objection and whose status under the Contract Documents shall be that of the former architect.

4.1.4 Disputes arising under Subparagraphs 4.1.2 and 4.1.3 shall be subject to arbitration.

### 4.2 ARCHITECTS ADMINISTRATION OF THE CONTRACT

4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents, and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 12.2. The Architect will advise and consult with the Owner. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with other provisions of the Contract.

4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work.

4.2.3 The Architect will not have control over or charge of and will 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 as provided in Paragraph 3.3. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

4.2.4 COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION. Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate through the Architect. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

4.2.5 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

4.2.6 The Architect will have authority to reject Work which does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable for implementation of the intent of the Contract Documents, the Architect will have authority to require additional inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons performing portions of the Work.

4.2.7 The Architect will review and approve or take other appropriate action upon the 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. The Architect's action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Paragraph 7.4.

4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, will receive and forward to the Owner for the Owner's review and records written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

4.2.11 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made with reasonable promptness and within any time limits agreed upon. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations until 15 days after written request is made for them.

4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

4.3 CLAIMS AND DISPUTES

4.3.1 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 the Owner and Contractor 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.

4.3.2 DECISION OF ARCHITECT. Claims, including those alleging an error or omission by the Architect, shall be referred initially to the Architect for action as provided in Paragraph 4.4. A decision by the Architect, as provided in Subparagraph 4.4.4, shall be required as a condition precedent to arbitration or litigation of a Claim between the Contractor and Owner as to all such

matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed. The decision by the Architect in response to a Claim shall not be a condition precedent to arbitration or litigation in the event (1) the position of Architect is vacant, (2) the Architect has not received evidence or has failed to render a decision within agreed time limits, (3) the Architect has failed to take action required under Subparagraph 4.4.4 within 30 days after the Claim is made, (4) 45 days have passed after the Claim has been referred to the Architect or (5) the Claim relates to a mechanic's lien.

4.3.3 TIME LIMITS ON CLAIMS. Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. An additional Claim made after the initial Claim has been implemented by Change Order will not be considered unless submitted in a timely manner.

4.3.4 CONTINUING CONTRACT PERFORMANCE. Pending final resolution of a Claim including arbitration, unless otherwise agreed in writing the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

4.3.5 WAIVER OF CLAIMS: FINAL PAYMENT. The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

.1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;

.2 failure of the Work to comply with the requirements of the Contract Documents; or

.3 terms of special warranties required by the Contract Documents.

4.3.6 CLAIMS FOR CONCEALED OR UNKNOWN CONDITIONS. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the Owner and Contractor cannot agree on an adjustment in the Contract Sum or

Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

4.3.7 CLAIMS FOR ADDITIONAL COST. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.3. If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with the procedure established herein.

4.3.8 CLAIMS FOR ADDITIONAL TIME

4.3.8.1 If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

4.3.8.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time and could not have been reasonably anticipated, and that weather conditions had an adverse effect on the scheduled construction.

4.3.9 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 party is legally liable, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after first observance. The notice shall provide sufficient detail to enable the other party to investigate the matter. If a Claim for additional cost or time related to this Claim is to be asserted, it shall be filed as provided in Subparagraphs 4.3.7 or 4.3.8.

4.4 RESOLUTION OF CLAIM AND DISPUTES

4.4.1 The Architect will review Claims and take one or more of the following preliminary actions within ten days of receipt of a Claim: (1) request additional supporting data from the claimant, (2) submit a schedule to the parties indicating when the Architect expects to take action, (3) reject the Claim in whole or in part, stating reasons for rejection, (4) recommend approval of the Claim by the other party or (5) suggest a compromise. The Architect may also, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim.

4.4.2 If a Claim has been resolved, the Architect will prepare or obtain appropriate documentation.

4.4.3 If a Claim has not been resolved, the party making the Claim shall, within ten days after the Architect's preliminary response, take one or more of the following actions: (1) submit additional supporting data requested by the Architect, (2) modify the initial Claim or (3) notify the Architect that the initial Claim stands.

4.4.4 If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Architect, the Architect will notify the parties in writing that the Architect's decision will be made within seven days, which decision shall be final and binding on the parties but subject to arbitration. Upon expiration of such time period, the Architect will render to the parties the Architect's written decision relative to the Claim, including any change in the Contract Sum or Contract Time or both. If there is a surety and there appears to be a possibility of a Contractor's default, the Architect may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

4.5 ARBITRATION

4.5.1 CONTROVERSIES AND CLAIMS SUBJECT TO ARBITRATION. Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, except controversies or Claims relating to aesthetic effect and except those waived as provided for in Subparagraph 4.3.5. Such controversies or Claims upon which the Architect has given notice and rendered a decision as provided in Subparagraph 4.4.4 shall be subject to arbitration upon written demand of either party. Arbitration may be commenced when 45 days have passed after a Claim has been referred to the Architect as provided in Paragraph 4.3 and no decision has been rendered.

4.5.2 RULES AND NOTICES FOR ARBITRATION. Claims between the Owner and Contractor not resolved under Paragraph 4.4 shall, if subject to arbitration under Subparagraph 4.5.1, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, unless the parties mutually agree otherwise. Notice of demand for arbitration shall be filed in writing with the other party to the Agreement between the Owner and Contractor and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.5.3 CONTRACT PERFORMANCE DURING ARBITRATION. During arbitration proceedings, the Owner and Contractor shall comply with Subparagraph 4.3.4.

4.5.4 WHEN ARBITRATION MAY BE DEMANDED. Demand for arbitration of any Claim may not be made until the earlier of (1) the date on which the Architect has rendered a final written decision on the Claim, (2) the tenth day after the parties have presented evidence to the Architect or have been given reasonable opportunity to do so, if the Architect has not rendered a final written decision by that date, or (3) any of the five events described in Subparagraph 4.3.2.

4.5.4.1 When a written decision of the Architect states that (1) the decision is final but subject to arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

4.5.4.2 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.5.1 and 4.5.4 and Clause 4.5.4.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

4.5.5 LIMITATION ON CONSOLIDATION OR JOINDER. No arbitration arising out of or relating to the Contract Documents shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a dispute not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

4.5.6 CLAIMS AND TIMELY ASSERTION OF CLAIMS. A party who files a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded. When a party fails to include a Claim through oversight, inadvertence or excusable neglect, or when a Claim has matured or been acquired subsequently, the arbitrator or arbitrators may permit amendment.

4.5.7 JUDGMENT ON FINAL AWARD. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

## ARTICLE 5

## SUBCONTRACTORS

### 5.1 DEFINITIONS

5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

### 5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. The Contract Sum shall be increased or decreased by the difference in cost occasioned by such change and an appropriate Change Order shall be issued. However, no increase in the Contract Sum shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

5.2.4 The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such change.

5.3 SUBCONTRACTUAL RELATIONS

5.3.1 By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors shall similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

.1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor in writing; and

.2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

5.4.2 If the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted.

## ARTICLE 6

## CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided elsewhere in the Contract Documents.

6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule and Contract Sum deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

6.2 MUTUAL RESPONSIBILITY

6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractors' completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

6.2.3 Costs caused by delays or by improperly timed activities or defective construction shall be borne by the party responsible therefor.

6.2.4 The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or separate contractors as provided in Subparagraph 10.2.5.

6.2.5 Claims and other disputes and matters in question between the Contractor and a separate contractor shall be subject to the provisions of Paragraph 4.3 provided the separate contractor has reciprocal obligations.

6.2.6 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Paragraph 3.14.

6.3 OWNER'S RIGHT TO CLEAN UP

6.3.1 If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish as described in Paragraph 3.15, the Owner may clean up and allocate the cost among those responsible as the Architect determines to be just.

## ARTICLE 7

## CHANGES IN THE WORK

7.1 CHANGES

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor, an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

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

7.2 CHANGE ORDERS

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

.1 a change in the Work;

.2 the amount of the adjustment in the Contract Sum, if any; and

.3 the extent of the adjustment in the Contract Time, if any.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

7.3 CONSTRUCTION CHANGE DIRECTIVES

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work and stating a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

.1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

.2 unit prices stated in the Contract Documents or subsequently agreed upon;

.3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or

.4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

.1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' or workmen's compensation insurance;

.2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;

.3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;

.4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and

.5 additional costs of supervision and field office personnel directly attributable to the change.

7.3.7 Pending final determination of cost to the Owner, amounts not in dispute may be included in Applications for Payment. The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

7.3.8 If the Owner and Contractor do not agree with the adjustment in Contract Time or the method for determining it, the adjustment or the method shall be referred to the Architect for determination.

7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

7.4 MINOR CHANGES IN THE WORK

7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

## ARTICLE 8

## TIME

8.1 DEFINITIONS

8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments allotted in the Contract Documents for Substantial Completion of the Work.

8.1.2 The date of commencement of the Work is the date established in the Agreement. The date shall not be postponed by the failure to act of the Contractor or of persons or entities for whom the Contractor is responsible.

8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

8.2 PROGRESS AND COMPLETION

8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by other causes which the Architect determines may justify delay, then

the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.

8.3.3 This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

## ARTICLE 9

## PAYMENTS AND COMPLETION

### 9.1 CONTRACT SUM

9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

### 9.2 SCHEDULE OF VALUES

9.2.1 Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

### 9.3 APPLICATIONS FOR PAYMENT

9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment for operations completed in accordance with the schedule of values. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for elsewhere in the Contract Documents.

9.3.1.1 Such applications may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives but not yet included in Change Orders.

9.3.1.2 Such applications may not include requests for payment of amounts the Contractor does not intend to pay to a Subcontractor or material supplier because of a dispute or other reason.

9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

9.4 CERTIFICATES FOR PAYMENT

9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1.

9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's observations at the site and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to minor deviations from the Contract Documents correctable prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect 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) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

9.5 DECISIONS TO WITHHOLD CERTIFICATION

9.5.1 The Architect may decide not to certify payment and may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Subparagraph 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Subparagraph 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also decide not to certify payment or, because of subsequently discovered evidence or subsequent observations, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss because of:

.1 defective Work not remedied;

.2 third party claims filed or reasonable evidence indicating probable filing of such claims;

.3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;

.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;

.5 damage to the Owner or another contractor;

.6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or

.7 persistent failure to carry out the Work in accordance with the Contract Documents.

9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

9.6 PROGRESS PAYMENTS

9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

9.6.2 The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in similar manner.

9.6.3 The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

9.6.4 Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

9.6.5 Payment to material suppliers shall be treated in a manner similar to that provided in Subparagraphs 9.6.2, 9.6.3 and 9.6.4.

9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

9.7 FAILURE OF PAYMENT

9.7.1 If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, which shall be accomplished as provided in Article 7.

9.8 SUBSTANTIAL COMPLETION

9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use.

9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Contractor shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not in accordance with the requirements of the Contract Documents, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. The Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion. When the Work or designated portion thereof is substantially

complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate.

9.8.3 Upon Substantial Completion of the Work or designated portion thereof and upon application by the Contractor and certification by the Architect, the Owner shall make payment, reflecting adjustment in retainage, if any, for such Work or portion thereof as provided in the Contract Documents.

9.9 PARTIAL OCCUPANCY OR USE

9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Subparagraph 11.3.11 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Subparagraph 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

9.10 FINAL COMPLETION AND FINAL PAYMENT

9.10.1 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, when the Architect finds the Work acceptable under the Contract Documents

and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's observations and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in said final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims. The making of final payment shall constitute a waiver of claims by the Owner as provided in Subparagraph 4.3.5.

9.10.4 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment. Such waivers shall be in addition to the waiver described in Subparagraph 4.3.5.

## ARTICLE 10

## PROTECTION OF PERSONS AND PROPERTY

### 10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

10.1.2 In the event the Contractor encounters on the site material reasonably believed to be asbestos or polychlorinated biphenyl (PCB) which has not been rendered harmless, the Contractor shall immediately stop Work in the area affected and report the condition to the Owner and Architect in writing. The Work in the affected area shall not thereafter be resumed except by written agreement of the Owner and Contractor if in fact the material is asbestos or polychlorinated biphenyl (PCB) and has not been rendered harmless. The Work in the affected area shall be resumed in the absence of asbestos or polychlorinated biphenyl (PCB), or when it has been rendered harmless, by written agreement of the Owner and Contractor, or in accordance with final determination by the Architect on which arbitration has not been demanded, or by arbitration under Article 4.

10.1.3 The Contractor shall not be required pursuant to Article 7 to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

10.1.4 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Architect, Architect's consultants and agents and employees of any of them 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 in the affected area if in fact the material is asbestos or polychlorinated biphenyl (PCB) and has not been rendered harmless, 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 (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Owner, anyone directly or indirectly employed by the Owner or anyone for whose acts the Owner may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Subparagraph 10.1.4.

### 10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and

.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

10.2.2 The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Clauses 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Clauses 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 3.18.

10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

10.2.7 The Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

10.3 EMERGENCIES

10.3.1 In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 and Article 7.

## ARTICLE 11

## INSURANCE AND BONDS

### 11.1 CONTRACTOR'S LIABILITY INSURANCE

11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a 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 workers' or workmen's compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;

.2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;

.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;

.4 claims for damages insured by usual personal injury liability coverage which are sustained (1) by a person as a result of an offense directly or indirectly related to employment of such person by the Contractor, or (2) by another person;

.5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

.6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle; and

.7 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

11.1.2 The insurance required by Subparagraph 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

11.1.3 Certificates of Insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These Certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2. Information

concerning reduction of coverage shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

11.2 OWNER'S LIABILITY INSURANCE

11.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance unless specifically required by the Contract Documents.

11.3 PROPERTY INSURANCE

11.3.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance in the amount of the initial Contract Sum as well as subsequent modifications thereto for the entire Work at the site on a replacement cost basis without voluntary deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.3 to be covered, whichever is earlier. The insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work.

11.3.1.1 Property insurance shall be on an all-risk policy form and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, false work, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's services and expenses required as a result of such insured loss. Coverage for other perils shall not be required unless otherwise provided in the Contract Documents.

11.3.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor, then the Owner shall bear all reasonable costs properly attributable thereto.

11.3.1.3 If the property insurance requires minimum deductibles and such deductibles are identified in the Contract Documents, the Contractor shall pay costs not covered because of such deductibles. If the Owner or insurer increases the required minimum deductibles

above the amounts so identified or if the Owner elects to purchase this insurance with voluntary deductible amounts, the Owner shall be responsible for payment of the additional costs not covered because of such increased or voluntary deductibles. If deductibles are not identified in the Contract Documents, the Owner shall pay costs not covered because of deductibles.

11.3.1.4 Unless otherwise provided in the Contract Documents, this property insurance shall cover portions of the Work stored off the site after written approval of the Owner at the value established in the approval, and also portions of the Work in transit.

11.3.2 BOILER AND MACHINERY INSURANCE. The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

11.3.3 LOSS OF USE INSURANCE. The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

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

11.3.5 If during the Project construction period the Owner insures properties, real or personal or both, adjoining or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

11.3.6 Before an exposure to loss may occur, the owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Paragraph 11.3. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

11.3.7 WAIVERS OF SUBROGATION. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if

any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

11.3.8 A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 11.3.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

11.3.9 If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Paragraph 4.5. If after such loss no other special agreement is made, replacement of damaged property shall be covered by appropriate Change Order.

11.3.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection be made, arbitrators shall be chosen as provided in Paragraph 4.5. The Owner as fiduciary shall, in that case, make settlement with insurers in accordance with directions of such arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

11.3.11 Partial occupancy or use in accordance with Paragraph 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

11.4 PERFORMANCE BOND AND PAYMENT BOND

11.4.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

11.4.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

## ARTICLE 12

## UNCOVERING AND CORRECTION OF WORK

12.1 UNCOVERING OF WORK

12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Architect, be uncovered for the Architect's observation and be replaced at the Contractor's expense without change in the Contract Time.

12.1.2 If a portion of the Work has been covered which the Architect has not specifically requested to observe prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner. If such Work is not in accordance with the Contract Documents, the Contractor shall pay such costs unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

12.2 CORRECTION OF WORK

12.2.1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. The Contractor shall bear costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby.

12.2.2 If, within one year after the date of Substantial Completion of the Work or designated portion thereof, or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to

do so unless the Owner has previously given the Contractor a written acceptance of such condition. This period of one year shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work. This obligation under this Subparagraph 12.2.2 shall survive acceptance of the Work under the Contract and termination of the Contract. The Owner shall give such notice promptly after discovery of the condition.

12.2.3 The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

12.2.4 If the Contractor fails to correct nonconforming Work within a reasonable time, the Owner may correct it in accordance with Paragraph 2.4. If the Contractor does not proceed with correction of such nonconforming Work within a reasonable time fixed by written notice from the Architect, the Owner may remove it and store the salvable materials or equipment at the Contractor's expense. If the Contractor does not pay costs of such removal and storage within ten days after written notice, the Owner may upon ten additional days' written notice sell such materials and equipment at auction or at private sale and shall account for the proceeds thereof, after deducting costs and damages that should have been borne by the Contractor, including compensation for the Architect's services and expenses made necessary thereby. If such proceeds of sale do not cover costs which the Contractor should have borne, the Contract Sum shall be reduced by the deficiency. If payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

12.2.5 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

12.2.6 Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

12.3 ACCEPTANCE OF NONCONFORMING WORK

12.3.1 If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## ARTICLE 13

## MISCELLANEOUS PROVISIONS

13.1 GOVERNING LAW

13.1.1 The Contract shall be governed by the law of the place where the Project is located.

13.2 SUCCESSORS AND ASSIGNS

13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

13.3 WRITTEN NOTICE

13.3.1 Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

13.4 RIGHTS AND REMEDIES

13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and otherwise imposed or available by law.

13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

13.5 TESTS AND INSPECTIONS

13.5.1 Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of

when and where tests and inspections are to be made so the Architect may observe such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

13.5.2 If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Subparagraph 13.5.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so the Architect may observe such procedures. The owner shall bear such costs except as provided in Subparagraph 13.5.3.

13.5.3 If such procedures for testing, inspection or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, the Contractor shall bear all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses.

13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

13.5.5 If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

13.6 INTEREST

13.6.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

13.7.1 As between the Owner and Contractor:

.1 BEFORE SUBSTANTIAL COMPLETION. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion.

.2 BETWEEN SUBSTANTIAL COMPLETION AND FINAL CERTIFICATE FOR PAYMENT. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable

statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and

.3 AFTER FINAL CERTIFICATE FOR PAYMENT. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

## ARTICLE 14

## TERMINATION OR SUSPENSION OF THE CONTRACT

### 14.1 TERMINATION BY THE CONTRACTOR

14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor, for any of the following reasons:

.1 issuance of an order of a court or other public authority having jurisdiction;

.2 an act of government, such as a declaration of national emergency, making material unavailable;

.3 because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents;

.4 if repeated suspensions, delays or interruptions by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less; or

.5 the Owner has faded to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

14.1.2 If one of the above reasons exists, the Contractor may, upon seven additional days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

14.1.3 If the Work is stopped for a period of 60 days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.2.

14.2 TERMINATION BY THE OWNER FOR CAUSE

14.2.1 The Owner may terminate the Contract if the Contractor:

.1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

.2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;

.3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or

.4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

14.2.2 When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

.1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;

.2 accept assignment of subcontracts pursuant to Paragraph 5.4; and

.3 finish the Work by whatever reasonable method the Owner may deem expedient.

14.2.3 When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

14.3.2 An adjustment shall be made for increases in the cost of performance of the Contract, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent:

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of this Contract.

14.3.3 Adjustments made in the cost of performance may have a mutually agreed fixed or percentage fee.

EXHIBIT 10.32C

# ADDENDUM TO

# GENERAL CONDITIONS OF

# THE CONTRACT FOR CONSTRUCTION

# (AIA Document A201-1987 Edition)

THIS ADDENDUM TO GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION is entered into between Vivus, Inc.("Owner") and ADP Marshall, Inc. ("Contractor") as an amendment and supplement to those certain General Conditions of the Contract for Construction (AIA Document A201 - 1987 Edition) (hereinafter "General Conditions"), which has been incorporated by reference into that certain Standard Form of Agreement Between Owner and Contractor - Cost of the Work Plus a Fee (AIA Document A111 - 1987 Edition) executed by Owner and Contractor concurrently herewith (the "Agreement"). References in this Addendum to sections of the General Conditions shall appear in this Addendum as "GC Section ___". Paragraphs in this Addendum are numbered to correspond to the Articles in the General Conditions to which such paragraphs in this Addendum generally relate. In the event of any conflict between this Addendum and any other Contract Document, this Addendum shall prevail; provided, however, that any typed or handwritten additions to the printed form Agreement shall prevail over conflicting provisions contained in this Addendum. This Addendum shall be deemed a part of the Agreement.

1.A DEFINITIONS. Unless otherwise provided in this Addendum, the capitalized terms used in this Addendum shall have the meanings given to those terms in the Contract Documents. In addition, the following terms shall have the following meanings: (i) "Materials" shall mean materials, equipment, apparatus, articles, or processes; (ii) "Laws" shall mean all laws, statutes, ordinances, rules, regulations, building codes and orders; (iii) "Suppliers" shall mean all materialmen or other persons providing Materials to Contractor or any Subcontractor; (iv) "Claims" shall mean liabilities, judgments, claims, damages, losses and expenses, of every type and nature, including but not limited to attorneys' fees, experts' fees and court costs; and (v) "Lien" shall mean any mechanics' or other lien, stop notice, charge, imposition, garnishment or attachment.

1.B CONTRACTOR AND ARCHITECT AS INDEPENDENT CONTRACTORS. GC Section 1.1.2. is modified as follows: Contractor and Architect are independent contractors of Owner. Neither Contractor nor Architect is the employee, agent, joint venturer, or partner of Owner. The Contract Documents shall not be deemed to create any relationship, express or implied, between Owner and any Subcontractor or Supplier of Contractor. Contractor shall have the sole responsibility for performance under any Subcontract or employment agreement entered into by Contractor with respect to the Work.

1.C DISCREPANCIES. The following is hereby added to GC Section 1.2.3: Conflicts or discrepancies among the Contract Documents shall be resolved in the following order of priority:

.1 The Agreement;

.2 The General Conditions; and

.3 Drawings and specifications.

Amendments and revisions of later date take precedence over those of earlier date. Drawings govern specifications for quantity and location and specifications govern drawings for quality and performance. In the event of ambiguity in quantity or quality, the greater quantity and the better quality shall govern.

1.D DRAWINGS. GC Section 1.3.1 is modified as follows: Ownership of all drawings, specifications and copies thereof furnished by Architect is determined by the Architect's Agreement. They shall not be used on any other project without the prior written consent of Owner.

2.A DEFINITION OF OWNER. GC Section 2.1.1 is modified as follows: Owner and Contractor acknowledge and agree that Owner does not hold fee title to the Project sites and instead holds leasehold interests thereunder. Notwithstanding the foregoing, Contractor agrees that the provisions herein for the benefit of Owner and Owner's leasehold interests in the properties shall, at Owner's election, also apply to the owners of the fee interests in the properties.

2.B MODIFICATION OF OWNER'S OBLIGATIONS. GC Section 2.2.1 is deleted. No action taken by Owner pursuant to the Contract Documents requires the

approval of Architect. However, Owner will not have control over or charge of, and will 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 Contractor's responsibility as provided in the Contract Documents. Owner will not be responsible for Contractor's failure to carry out the Work in accordance with the Contract Documents. Owner will not have control over or charge of, and will not be responsible for, negligent acts or omissions of Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

2.C OWNER'S RIGHT TO STOP THE WORK. GC Section 2.3.1 is deleted and replaced with the following, which rights shall be in addition to, and not in restriction of, other rights and remedies given to Owner:

2.C.1 Suspension Due to Unforeseen Conditions. Notwithstanding any provision in the Contract Documents to the contrary, if suspension of the Work is warranted by reason of unforeseen conditions which may adversely affect the quality of the Work, if the Work were continued, Owner (but not Architect) by written notice to Contractor may do either or both of the following, to the extent necessary to address such unforeseen conditions: (i) entirely suspend the Work; or (ii) cause the Work, or portions thereof, to be partially suspended or delayed, while other portions of the Work continue on the same or different schedule redetermined by Owner and Contractor. In such event, the Contract Time shall be extended by the amount of delay caused by the exercise by Owner of such remedies. In addition, if Contractor has taken all reasonable steps to mitigate the effects of such suspension, then Contractor shall be entitled to reimbursement of its reasonable, direct, out-of-pocket, additional general conditions costs resulting from such suspension. If Contractor reasonably believes that a suspension of the Work is warranted by reason of unforeseen circumstances which may adversely affect the quality of the Work, if the Work were continued, Contractor shall immediately notify Owner and Architect of such belief, but Contractor shall have no right to suspend the Work, except with the written consent of Owner or except in the case of an emergency (in which event Contractor shall resume work upon cessation of the emergency).

2.C.2 Upon Contractor's Default. Notwithstanding any provision in the Contract Documents to the contrary, if Contractor fails to correct defective Work as required by GC Section 12.2, fails to complete the Work on time as required by the Agreement, or is in material default of its obligations hereunder, Owner may order Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated pursuant to GC Section 14.B.2, hereof.

3.A REVIEW BY CONTRACTOR. GC Section 3.2.1 (second sentence only) is deleted and the remainder of GC Section 3.2 is modified as follows: Contractor acknowledges that it is responsible for inspecting all site conditions, Contract Documents, and other matters which may affect the prosecution, completion, and Cost of the Work (herein, the "Conditions of the Work"). Contractor represents to Owner that: (i) Contractor has inspected and tested to the extent necessary for its purposes, the Conditions of the Work; (ii) Contractor's knowledge of the Conditions of the Work as of the execution of the Agreement is sufficient to enable Contractor to determine the Cost of the Work; and (iii) to the best of Contractor's knowledge, the Work described in the Contract Documents can be performed in strict compliance with all Laws.

3.B LABOR AND MATERIALS. GC Section 3.4 is supplemented as follows: Neither Contractor nor any Subcontractor or Supplier shall incorporate into the Work any Materials (i) to which its title is imperfect, (ii) against which there is any claim by a manufacturer or other entity, or (iii) which is encumbered by any security interest. Contractor shall be responsible for all Materials specified by the Contract Documents which are delivered to the Project sites. Any Materials delivered to the Project sites, which are not to be used in or incorporated into the Work under the Contract Documents, shall be forthwith removed from the Project sites and Contractor shall be solely responsible for all cost incurred with respect to such Materials.

3.C [INTENTIONALLY OMITTED.]

3.D PERMITS, FEES AND NOTICES. GC Section 3.7.1 is supplemented as follows: Contractor shall furnish to Owner copies of all permits obtained during the course of the Work.

3.E COMPLIANCE WITH LAW. GC Sections 3.7.3 and 3.7.4 are modified and supplemented as follows: Contractor shall comply with all Laws applicable to the performance of the Work and the employment of labor. Although Contractor is not responsible for the preparation of Drawings and Specifications, Contractor shall nevertheless (i) review the Contract Documents to determine whether they are in accordance with applicable Law, (ii) notify Owner and Architect of any deviation in the Drawings and Specifications from the requirements of applicable Law of which Contractor is or reasonably should be aware, and (iii) perform no Work which Contractor knows or reasonably should know to be contrary to

applicable Law. Owner acknowledges that city or county building officials may refuse to approve components of the Work even if Contractor has complied with applicable Law.

3.F SUPERINTENDENT. GC Section 3.9 is modified as follows: All of Contractor's supervisory personnel at the Project sites shall be satisfactory to Owner, and Contractor shall replace such personnel only with Owner's consent, which shall not be unreasonably withheld.

3.G PROGRESS SCHEDULE AND ON-SITE MEETINGS. Contractor shall adhere to the Project schedule approved by Owner and shall immediately notify Owner and Architect of any material deviation by any party from said schedule. If, in the judgment of Architect or Owner, any phase of the Work is or may become behind schedule, Contractor shall take such steps as Owner deems necessary to improve the progress of the Work and insure Substantial Completion of the Work within the Contract Time. Upon request by Architect or Owner, Contractor shall submit for their approvals a revised progress schedule showing the manner in which any lost time will be regained. Contractor shall hold weekly progress meetings at the Project sites, or at such other time, frequency, and location as are reasonably acceptable to Owner. Progress of the Work shall be reported in detail with reference to construction schedules prepared by and approved by Owner and Architect. Upon request by Owner, Contractor shall cause each interested Subcontractor to attend the meeting for the purposes of reporting upon the progress of the Subcontractor's Work and receiving information; provided, however, that nothing that may transpire at such meeting shall modify or release any Subcontractor from its obligations to the Contractor under a Subcontract.

3.H USE OF SITE. GC Section 3.13 is supplemented as follows: In performing the Work, Contractor shall not cause or allow rain water, dust, nauseous vapors, excessive noise, or other intrusions to go beyond the boundaries of the Project sites in any manner that would constitute a nuisance or a violation of Law.

3.I CLEANING UP. GC Section 3.15 is supplemented. Upon completion of the Work, Contractor shall remove from the Project sites and sell to a third party or transfer to itself at the fair market value all machinery, equipment, scaffolding, forms, hand tools and other items which were purchased exclusively for use in the Work and charged to Owner and paid as a cost of the Project, which Owner does not elect to retain. Proceeds from such sales, or the fair market value of the item in the case of a transfer to Contractor, shall be deducted from the Contract Sum payable to Contractor.

3.J LABOR RELATIONS.

3.J.1 Labor Agreements. Employment of labor by Contractor shall be effected under conditions which are satisfactory to Owner. Should there be picketing on the Project sites and if Owner establishes a reserved gate for Contractor's purposes, Contractor shall continue the proper performance of the Work, without interruption or delay, using such gate.

3.J.2 Equal Opportunity. Contractor and the Subcontractors shall not discriminate against any employee or applicant for employment because of handicap, age, religion, color, sex, or national origin. Contractor shall take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their handicap, age, race, religion, color, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting forth its policies of non-discrimination. Contractor and each Subcontractor shall, in all solicitations or advertisements for employees placed by them or on their behalf, state that all qualified applicants will receive consideration for employment without regard to handicap, age, race, religion, color, sex or national origin. Contractor will not discriminate in the selection of Subcontractors or Suppliers because of age, sex, race, creed, color, national origin, age, or handicap. Contractor will, in the selection of Suppliers and in the award of Subcontracts, use its best efforts to identify qualified minority business enterprises, and to assure that such enterprises shall have the maximum practicable opportunity for selection by Contractor. Contractor shall inform Owner in writing as to any such enterprises that have been so identified.

3.K MECHANICS' LIENS. GC Section 3.18.1 is supplemented. Contractor shall pay when due all sums payable to persons or firms who furnish labor, or Materials for the Work or who are otherwise entitled to file a mechanic's Lien upon Owner's property. Except to the extent attributable to Owner's wrongful withholding of monies payable to Contractor under the Contract Documents, within five (5) business days following Owner's written demand, Contractor shall take such action as may be required to discharge any Lien against Owner or Owner's real property in connection with the Work and Contractor shall indemnify and hold harmless Owner and the real property from and against any and all Claims arising out of the

filing or service, or attempted filing or service, of any Lien or out of Contractor's failure to remove or satisfy any Lien in accordance with this Contract. Except to the extent caused solely by Owner's wrongful withholding of the amounts due and payable to Contractor, Contractor shall not (i) file or record, or suffer the filing or recording of, any Lien upon Owner's real property, (ii) shall not impose, or suffer the imposition of, any stop notice on funds held by Owner, and (iii) shall not garnish or attach, or suffer the garnishment or attachment of, any funds held by Owner.

3.L [INTENTIONALLY OMITTED.]

3.M SIGNAGE. Except as approved by Owner, neither Contractor nor any of its agents, contractors or employees shall post any signs at the Project sites. All signs shall comply with all applicable Laws.

4.A ARCHITECT'S RESPONSIBILITIES. Notwithstanding anything to the contrary in the Contract Documents, (including without limitation GC Sections 4.1, 4.2, 4.4, 1.1.2, and 8.3.1) Architect may be replaced by Owner at any time, and from time to time, by written notice to Contractor, and Owner shall (i) have the right to exercise any right or power given to Architect by the Contract Documents, which Owner may do either in conjunction with Architect or by itself without consultation with or involvement of Architect, and (ii) receive or obtain any notices, plans, or other documents Architect is entitled to receive or obtain pursuant to the Contract Documents, and (iii) communicate directly with Contractor. Except as Owner may hereafter notify Contractor in writing, Architect shall have no right to act on behalf of Owner, to provide any approval for Owner, or to otherwise bind Owner to any action or promise. Architect's approval, decision, or determination as to any matter is advisory only and shall not be binding upon Owner. If Architect requests additional inspection, testing, labor, materials or other Work, Owner shall not be bound to pay the cost thereof, unless Owner has agreed in writing to do so. Nothing in the Contract shall limit Architect's duties under the Architect's Agreement.

4.B CONSTRUCTION OBSERVATION. In GC Section 4.2.2, the word "Work" means only the product of construction and does not include Contractor's equipment, services, construction means, methods, techniques, sequences, procedures, or safety precautions or programs. However, if Architect notices any activity of Contractor which is inconsistent with the Contract Documents, Architect shall notify Contractor of same.

4.C CLAIMS.

4.C.1 Time Limits on Claims. GC Section 4.3.1, Section 4.3.3 and the phrase "which decision shall be final and binding on the parties but subject to arbitration" in GC Section 4.4.4 are deleted. Claims by Contractor must be made within twenty-one (21) days after occurrence of the event giving rise to such Claim or within twenty-one (21) days after Contractor first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. Failure to deliver any such notice or request within the required period shall constitute an irrevocable waiver of any such Claim. If a Claim has been implemented by Change Order, no further consideration will be given to such Claim.

4.C.2 Claims for Additional Time. GC Section 4.3.8.2 is modified as follows: Notwithstanding anything to the contrary contained in the Contract Documents, and except for delays due to any damage to the Work caused by hurricanes or blizzards, Contractor shall not be entitled to additional time resulting from any delays caused by adverse weather conditions.

4.C.3 Resolution of Claims. GC Sections 4.3 and 4.4 are modified and supplemented as set forth herein. In the event of any dispute between Owner and Contractor, which relates to the Contract Documents or the Work, Contractor shall not interrupt the progress of the Work during the pendency of any such dispute, unless ordered to do so by Owner in writing. If either party becomes involved in litigation in connection with the Contract Documents or the Work, the court or tribunal in such litigation, or in a separate suit, may award reasonable costs and expenses of litigation, including court costs, experts' fees and attorneys' fees, to be paid by the losing party to the prevailing party. In the event either party becomes the subject of any bankruptcy or insolvency proceeding, the other parties shall be entitled to reimbursement of all costs and expenses, including attorneys' fees and court costs, incurred by said other party to obtain adequate protection of its rights under the Contract Documents or to obtain other requested relief in such bankruptcy or insolvency proceeding.

4.D ARBITRATION. GC Section 4.5 is deleted. If a dispute arises out of or relating to this Agreement or the breach thereof, and if such dispute cannot be settled through direct discussions, the parties shall submit the dispute to nonbinding mediation under the Construction Industry Mediation Rules of the American Arbitration Association before having recourse to a judicial forum. The mediation may be initiated by the written request of either party and shall be commenced within fifteen (15) days of receipt of such notice.

5 SUBCONTRACTORS. GC Section 5.2.3 is deleted. The fourth sentence of GC Section 5.3.1 shall end with the words "...will be bound," and the remainder of said sentence is deleted. GC Sections 5.1, 5.2, and 5.3 are supplemented. Owner, acting reasonably and in good faith after consultation with Contractor, may require Contractor to terminate a Subcontractor and replace the Subcontractor with another Subcontractor acceptable to Owner. If at such time Contractor is not in default hereunder, the Contract Sum shall be increased or decreased by the difference in cost occasioned by such change and the Contract Time shall be equitably adjusted. Work performed for Contractor by a Subcontractor shall be performed only pursuant to a written subcontract between Contractor and Subcontractor in a form reasonably acceptable to Owner. Each subcontract shall provide that (i) Subcontractor waives all rights it may have against Owner for damages caused by fire or other perils which would be covered by the property insurance described in the Contract Documents or which is otherwise covered by insurance; (ii) Subcontractor will furnish such additional lien waivers and other documents as Owner and Contractor may reasonably request; and (iii) require the Subcontractor to perform strictly in accordance with the Contract Documents (including specifically, but without limiting the generality of the foregoing the labor and employment relations provision thereof). In addition, all Suppliers and Subcontractors shall warrant the Work and Materials supplied and/or installed by them in the same manner and for the same period as is required of Contractor under this Contract or in such broader manner and for such longer period as may be required by the Specifications. Contractor and all Subcontractors shall coordinate their Work with all adjacent work and all other trades so as to facilitate the general progress of all work. Each Subcontractor shall afford all other contractors every reasonable opportunity to install other work and materials. All Subcontractors shall be required to place all debris in a central location.

7.A INITIAL AUTHORIZATION OF WORK. GC Section 7.1 is modified to delete all references to or any "major or minor change in the Work, other than a Change Order or a Construction Change Directive."

7.B [INTENTIONALLY OMITTED.]

7.C. CHANGE ORDER FOR NEW WORK. The following is hereby added as GC Section 7.2.4: From time to time during the term of this Contract, Owner may elect in its discretion to submit to Contractor Drawings and Specifications for portions of the Work. Upon receipt of such Drawings and Specifications, Contractor shall immediately obtain bids for such Work. Based on bids approved by Owner, Contractor shall deliver to Owner a proposed Change Order for the Work described in the Drawings and Specifications so delivered to Contractor. If after requesting bids, Owner and Contractor are unable to agree upon the terms of a Change Order for the Work, Owner may rescind its request for Work and may obtain performance of the Work by others. Contractor shall be authorized to undertake only those portions of the Work authorized in writing by Owner in a written Change Order complying with this section or otherwise as authorized by this Contract. Each Change Order initially authorizing Work shall (i) describe the Work to be performed and reference the Drawings, Specifications and any other additional Contract Documents applicable to such Work, (ii) set forth the adjustment to the Contract Sum proposed by Contractor and approved by Owner for such Work, and (iii) specify any modification of the Substantial Completion Date as a consequence of the Change Order.

7.D SUBSEQUENT MODIFICATIONS. The following is hereby added as GC Section 7.2.5:

"7.2.5 Subsequent Modifications. Furthermore, notwithstanding anything to the contrary in GC Section 7.2, the Contract Sum may be adjusted and the Contract Time may be extended or shortened only upon written approval of a Change Order by Owner and Contractor. Notwithstanding anything to the contrary in GC Section 7.1.2, Architect may, but is not required to, execute Change Orders but in all events, Change Orders shall be ineffective unless executed by Owner. Each Change Order for adjustments in previously authorized Work shall include (i) a cost breakdown for the maximum increase or decrease in the Contract Sum as a consequence of a Change, (ii) a description of all plans and specifications for the Change, and (iii) the adjustment, if any, in the Contract Time as a consequence of the Change."

7.E RIGHT TO PAYMENT. The following is hereby added as GC Section 7.2.6:

"7.2.6 Right to Payment. Contractor shall not be entitled to include in any Application for Payment, or to receive payment for, Work, unless the Work is authorized by a valid Change Order executed by Owner. No course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that Owner has been unjustly enriched by any alteration or addition to the Work, whether or not there is in fact any such unjust enrichment, shall be the basis for a change in the Contract Time, an increase in the Contract Sum, or a right to any other payment by Owner to Contractor. Contractor shall complete all Work specified in Change Orders executed by Owner and Contractor in

accordance with the Contract Documents on or before the scheduled Substantial Completion Date specified in the Change Orders."

7.F MINOR CHANGES. GC Section 7.4.1 is deleted.

7.G PRICING FOR CHANGE ORDERS. The change in the Contract Sum for the Work authorized by each Change Order, shall be equal to: the sum of the total actual net increase or decrease in the Cost of the Work based upon Subcontractor's bids and bid revisions approved by Contractor and Owner for the Change in the Work, if such bids are available, or in all other cases based upon Owner's and Contractor's estimate of the actual labor and Materials added or saved by the Change Order.

8.A DEFINITION OF SUBSTANTIAL COMPLETION. GC Sections 8.1.3 and 9.8 are amended modified and supplemented as follows: "Substantial Completion" of any portion of the Work is the date when (i) such Work is substantially complete as set forth in a written certification executed by Architect and approved by Owner, which approval shall not be unreasonably withheld, or upon Owner's taking beneficial occupancy of the Work, and (ii) Contractor has delivered to Owner all occupancy permits and approvals from the appropriate governmental authorities necessary for the occupancy of such Work for Owner's intended use, and (iii) there remains no incomplete or defective item of such Work that would adversely affect Owner's intended use of such Work.

8.B [INTENTIONALLY OMITTED.]

8.C CLAIM OF DELAY. GC Section 8.3.1 is deleted. If through no fault or collusion by Contractor or any Subcontractor, Contractor is delayed at any time in the progress of the Work by any act or neglect of Owner or Architect, or by any employee of either, or by any separate contractor employed by Owner, or by fire, flood, war, embargo, earthquake or injunction (not the fault of Contractor), or any other casualty not the fault of Contractor or any Subcontractor, then (i) the Contract Time shall be extended by Change Order for such reasonable time as the Contractor's work has been actually delayed, as approved by Owner and Contractor (based on the advice of Architect), which approval shall not be unreasonably withheld and (ii) Contractor shall be entitled to reimbursement of its and its Subcontractor's reasonable, direct, out-of-pocket, additional general conditions costs resulting from such delay, provided, however, that in no event will Contractor be entitled to recover any damages, additional profit or fee, or any other costs other than the foregoing additional general conditions costs. Notwithstanding the foregoing, no delay or force majeure event shall be deemed to have occurred, unless Contractor delivers a written claim of justifiable delay to Owner and Architect within twenty-one (21) days following the commencement of the delay. Immediately upon commencement of a delay, Contractor shall take all steps reasonably available to lessen the adverse impact of such delay upon Owner and to prevent and mitigate the effects thereof.

9.A PAYMENTS TO CONTRACTOR. GC Section 9 is amended and supplemented as follows: Copies of all Applications for Payment shall be submitted to Owner and Architect no later than the twenty-fifth (25th) day of any calendar month for any period preceding such date. Notwithstanding anything to the contrary in the Construction Documents, the parties acknowledge that Architect will not review or issue Certificates for Payment, and that Owner shall be entitled to review all Applications for Payment without consulting with Architect. Owner shall be entitled to withhold amounts included in an Application for Payment if Owner does not approve such amount as set forth in this Section 9. Contractor shall submit to Owner the Application for Payment and all notices and documents required in the Contract Documents to be provided to Architect in connection with its review of the Application for Payment or the issuance of a Certificate for Payment. If requested by Owner, each Application for Payment (after the first) shall be accompanied by an accounting of the disbursement of funds previously received by Contractor from Owner, certified to be true and correct by Contractor. Upon the reasonable request of Owner, such accounting also shall itemize all disbursements to Subcontractors and Suppliers and Contractor shall deliver to Owner copies of all vendors' invoices, payroll and other data substantiating actual expenditures by Contractor for the Work, and upon reasonable request, shall allow Owner to inspect the books and records of Contractor relating to such expenditures. In each Application for Payment, Contractor shall certify that: (i) the requested payment represents a just determination of the actual amount payable to Contractor under the Contract Documents; (ii) the information set forth in the Application for Payment is correct; (iii) the Contract, to the best of Contractor's knowledge, is in full force and effect and free from default by any party (or if Owner is in default, the nature of the default); (iv) any contingency reserve under the Contract has or has not been utilized, and if utilized, the amount that remains; (v) all Subcontractors and Suppliers have been paid all sums that are due and payable to them in full (excluding payments due which are included in the Application for Payment in question); (vi) Contractor shall promptly pay all sums due and payable to Subcontractors, unions, laborers, and

Suppliers out of funds to be received pursuant to the Application for Payment; (vii) no Lien currently affects the Work nor is there any basis for the filing of a Lien with respect to Work, other than Liens caused solely by Owner's wrongful withholding of amounts due Contractor under the Contract or Liens for the Work included in the Application for Payment; (viii) all amounts due and payable with respect to the Work either have been paid to date or are included in the Application for Payment; and (ix) partial waivers of mechanic's liens totaling the amounts previously paid by Owner to Contractor have been obtained from all Subcontractors and Suppliers in such form as to constitute an effective waiver, under applicable Law, of all Lien rights with respect to the Work.

9.B LIEN RELEASES. GC Section 9.3 is supplemented as follows: Each Application for Payment shall be accompanied by partial releases of mechanic's Liens in the form required or authorized by applicable New Jersey law for Work costing not less than the amount of the Contract Sum (less retention) previously paid by Owner to Contractor and conditional releases of Liens in the form required or authorized by applicable New Jersey law for the payments requested in the Application for Payment. Notwithstanding the foregoing, in no event shall Owner have any obligation to see to the proper disposition or application of monies paid by Owner to Contractor.

9.C MAXIMUM AMOUNT OF EACH APPLICATION FOR PAYMENT. The following is added as GC Section 9.3.1.3: Each Application for Payment (other than the final Application for Payment) shall be in the sum not to exceed one hundred (100%) of the Cost of the Work performed during the preceding month. Contractor shall be entitled to receive the first Four Hundred Fifty Thousand Dollars ($450,000) of the Contractor Fee and any Contractor Fee in excess of such amount shall be withheld by Owner as retention and any unused portion shall be released within thirty (30) days after the date upon which Contractor has achieved Substantial Completion of the entire Work.

9.D PAYMENT FOR MATERIAL. GC Section 9.3.2 is deleted and replaced with the following: Payments will be made on account of Materials only when such Materials have either been (i) incorporated in the Work, or (ii) suitably stored in a bonded warehouse acceptable to Owner and warehouse receipts therefore have been delivered to Owner.

9.E OWNER'S OBLIGATION TO PAY CONTRACTOR. GC Section 9.4 is deleted and GC Sections 9.5.1 and 9.5.2 are modified and supplemented as follows: All Materials, finishes and processes shall be subject to rejection for just cause by Owner. Acceptance or rejection of a Material, finish or process shall be expressed only in writing. Any provision of the Contract Documents to the contrary notwithstanding, Owner also shall have no obligation to pay Contractor amounts otherwise payable under this Contract if (i) any of the following circumstances has occurred, (ii) the occurrence of such circumstances is not solely caused by Owner's wrongful withholding of amounts payable to Contractor under this Contract, and (iii) such circumstances have not been remedied or eliminated to Owner's reasonable satisfaction:

A. Contractor has failed to make any payment due to Contractor's Subcontractors and Suppliers for the material and labor used in the Work; or

B. A claim of Lien has been recorded against Owner's real property, a stop notice has been served on Owner, or funds of Owner have been garnished or attached in connection with the Work unless Contractor has supplied Owner with an acceptable bond; or

C. Reasonable evidence indicates a probability (i) that a claim of Lien will be recorded, a stop notice will be served, or funds of Owner will be garnished or attached, or (ii) that Contractor has otherwise failed to make payments to Subcontractors and Suppliers, unless Contractor has supplied Owner with an acceptable bond; or

D. Owner, in its reasonable good faith judgment, determines that the unpaid amount of the Contract Sum plus the cost of any necessary but pending Change Orders (after payment of the amount requested in the Application for Payment) will not be sufficient to complete the Work in accordance with the Drawings and Specifications, in which case Contractor shall perform so much of the Work at its sole cost as is necessary to insure that the unpaid amount of the Contract Sum plus the cost of any necessary but pending Change Orders will be sufficient to complete the Work before Owner shall be obligated to make any further payments to Contractor; or

F. Contractor has failed to perform an obligation on its part to be performed under the Contract Documents or under any other contract between Contractor and Owner; or

G. Neither Contractor nor its insurance carrier has reimbursed Owner for damage caused to Owner or any other contractor as a consequence of a default by

Contractor or the acts or omissions of Contractor, or its agents, employees, Subcontractors or Suppliers; or

H. Owner, in its reasonable good faith judgment, determines that the Work will not be completed within the Contract Time (as extended by excusable delays) through no fault of Owner or Architect; or

I. Contractor persistently and unreasonably fails to carry out the Work in accordance with the Contract Documents.

Until all of the foregoing circumstances are remedied to Owner's satisfaction, Owner may withhold the amount necessary in Owner's reasonable opinion to protect Owner from the loss that may be occasioned thereby and, if applicable, may demand reimbursement of amounts previously paid by Owner to Contractor as necessary to avoid loss to Owner. When all of the foregoing circumstances are satisfactorily remedied, payments previously withheld by Owner shall be paid to Contractor.

9.F METHOD OF PAYMENTS. GC Section 9.6.1 is deleted. Owner shall have the right to pay Contractor by joint check made payable to Contractor and any Subcontractor or Supplier to whom all or a portion of such funds may be due; provided, however, that (i) Contractor shall have no obligation to make payments by joint check, and (ii) its election to do so in any case shall not constitute an obligation by Owner to any Subcontractor or Supplier to do so in the future nor create any contractual relationship whatsoever between Owner and any Subcontractor or Supplier.

9.G REVIEW OF APPLICATION FOR PAYMENT. GC Section 9.7.1 is deleted and replaced by the following: Owner may review each Application for Payment and may make such exceptions, by written notice to Contractor, as Owner reasonably deems necessary or appropriate under the circumstances then existing. Owner may withhold a payment to Contractor to the extent that it relates to the correction of an exception reasonably taken by Owner. If Contractor disputes any exception to the Application for Payment taken by Owner, Contractor shall nevertheless continue to diligently prosecute the Work and shall notify Owner of its dispute in writing. If Contractor fails to deliver a written statement disputing an exception to an Application for Payment taken by Owner within fourteen (14) days following notice to Contractor of the exception, Contractor shall be conclusively presumed to have accepted Owner's exception to the Application for Payment. Owner shall not be deemed in breach of this Contract by reason of withholding any payment pursuant to any provision of the Contract Documents, provided (i) Owner has acted in good faith, (ii) Architect has approved Owner's action, and/or (iii) the Work in question has been rejected by any governmental authority.

9.H [INTENTIONALLY OMITTED.]

9.I FINAL COMPLETION. GC Section 9.10 is supplemented as follows:

9.I.1 Punch List. Immediately prior to the Substantial Completion of the Work, Contractor shall notify Architect and Owner that the Project is ready for final inspection. Within three (3) working days following Contractor's notice that it believes that the Work is substantially complete, Architect and Owner shall conduct an inspection of the Work and forward to Contractor a "punch-list", indicating items of the Work requiring completion and items of unsatisfactory Work. The omission of an item from the "punch-list" shall not relieve Contractor of its obligation to meet the requirements of this Contract. All items on the "punch-list" (except for minor, corrective items which do not in any way interfere with Owner's use and occupancy of the Work) shall be completed and/or corrected by Contractor to the satisfaction of Architect and Owner prior to submission of the final Application for Payment.

9.I.2 Final Payment. Owner shall have no obligation to pay the unpaid balance of the Contract Sum until (i) the Work and all "punch-list" items have been completed in accordance with this Contract; (ii) Owner has accepted the Work and all "punch-list" items; (iii) Contractor has delivered to Owner a waiver of Lien rights, complying with applicable New Jersey law, conditioned only upon receipt of the funds requested in the final Application for Payment, and executed by Contractor and by each person or entity entitled to record a claim of Lien against Owner's real property (or, if any Subcontractor or Supplier refuses to furnish such waiver, then a Lien bond in form, substance, and amount satisfactory to Owner, protecting Owner from claims of Liens by such persons); (iv) Contractor has delivered to Owner an affidavit in a form satisfactory to Owner stating that the final payment is being requested and that the Lien releases and/or bonds delivered to Owner include and cover all materials, labor, and services for which a Lien could be filed against Owner's real property; and (v) Contractor has delivered to Owner two (2) complete sets of "as-built" drawings including separate "as-built" drawings for all electrical, plumbing and mechanical systems included within the Work which drawings shall be executed by Contractor and all responsible Subcontractors, all guaranties, warranties, shop manuals, operating binders and maintenance binders applicable to the Work and/or

required by the Specifications. The final payment shall be subject to all retention provisions of the Contract Documents. Provided all of the foregoing conditions have been satisfied, except for the completion of minor, corrective "punch-list" items which do not in any way interfere with Owner's use and occupancy of the Work, as distinguished from incomplete items, Owner may withhold from the final payment an amount equal to twice the cost of correction of all such items until the last of the items has been corrected. If Contractor fails to make such corrections within thirty (30) days after the final payment, then Owner may make the corrections and deduct the costs from the amount withheld therefor.

10.A HAZARDOUS MATERIALS. GC Section 10.1.4 is deleted and GC Sections 10.1.2 and 10.1.3 are supplemented. Wherever used in GC Sections 10.1.2 and 10.1.3, the words, "asbestos or polychlorinated biphenyl (PCB)" are replaced with "hazardous materials not disclosed by the Contract Documents and not placed at the Project sites by Contractor or Subcontractor or any person under the control of either of them." Contractor and each Subcontractor (i) shall not cause or permit any hazardous material to be brought upon the Project sites or used in the Work without the prior written consent of Owner, and (ii) shall comply with all Laws regarding the use, storage, transportation, exposure of employees to, and disposal of hazardous materials. Owner shall use reasonable efforts to notify Contractor in writing of any and all hazardous materials brought upon the Project Site, at any time prior to the Substantial Completion of the entire Work, by Owner or its employees or agents. As used in this paragraph, the term "hazardous material" shall mean any hazardous or toxic substance, material or radioactive material which is or becomes regulated by any local, federal, governmental authority.

10.B PROTECTION OF PERSONS AND PROPERTY. GC Section 10.2 is supplemented and modified as follows: Contractor assumes all risk of loss of, or damage to, its materials or equipment and the materials and equipment of its Subcontractors, Suppliers, and employees due to theft or vandalism or malicious mischief and shall furnish any watchman's services reasonably required to protect the Work. Until incorporated into the Work, all materials ordered by Contractor or any of its Subcontractors which are delivered to the Project sites shall be the responsibility of Contractor and its Subcontractors, who shall provide for the care, protection, and security for such materials, and shall bear the risk of loss with respect to such materials, until they are incorporated into the Work.

11.A CONTRACTOR'S INSURANCE. GC Section 11.1 and Section 11.2 are deleted and replaced by the following: 11.1 Contractor's Liability Insurance.

Contractor shall at his expense, procure and maintain insurance on all of his operations, in insurance companies with a Best's Insurance Rating of A- or better or otherwise acceptable to Owner, as follows:

(a) Workers' Compensation and Employers Liability Insurance. Workers' Compensation insurance shall be provided as required by any applicable law or regulation. Employers Liability insurance shall be provided in amounts not less than $1,000,000 each accident for bodily injury by accident, $1,000,000 policy limit for bodily injury by disease and $1,000,000 each employee for bodily injury by disease.

If there is an exposure of injury to Contractor's employees under the U.S. Longshoremen's and Harbor Workers' Compensation Act, the Jones Act or under laws, regulations or statutes applicable to maritime employees, coverage shall be included for such injuries or claims.

(b) General Liability Insurance. Contractor shall carry Commercial General Liability insurance covering all operations by or on behalf of Contractor providing insurance for bodily injury liability and property damage liability for the limits of liability indicated below for:

(1) premises and operations;

(2) products and completed operations;

(3) contractual liability insuring the obligations assumed by Contractor in this Agreement;

(4) broad form property damage (including completed operations);

(5) explosion, collapse and underground hazards; and

(6) personal injury liability (with deletion of the exclusion for liability assumed under contract).

The limits of liability shall not be less than:

$5,000,000 each occurrence (combined single limit for bodily injury and property damage)

$5,000,000 for personal injury liability

$5,000,000 aggregate for products-completed operations

$5,000,000 general aggregate

The "general aggregate" limit shall apply separately to Contractor's work under the Contract. Contractor shall not obtain a claims made policy without the express prior written consent of Owner.

Owner, its officers, directors and employees shall be named as additional insureds. The policy shall be endorsed to stipulate that the insurance afforded the additional insureds shall apply as primary insurance and that any other insurance maintained by Owner shall be excess only and shall not be called upon to contribute with this insurance.

Coverage for Owner, its officers, directors and employees as additional insureds shall be provided by a policy provision or by an endorsement providing coverage at least as broad as Additional Insured (Form B) endorsement form CG 2010 as published by the Insurance Services Office (ISO).

Contractor shall continue to maintain liability insurance for the products-completed operations hazard for three years following completion of and acceptance of the Work by Owner. Contractor shall furnish Certificates of Insurance annually to Owner at the beginning of each of these subsequent three years as evidence of this required insurance.

(c) Automobile Liability Insurance. (Bodily Injury and Property Damage Liability) including coverage for all owned, hired and non-owned automobiles. The limits of liability shall not be less than $1,000,000 combined single limit for each accident.

(d) Umbrella Liability and/or Excess Liability Insurance. Contractor shall carry Umbrella Liability and/or Excess Liability Insurance for not less than the following limits in excess of the limits provided by Contractor's Commercial General Liability and Auto Liability policies:

$5,000,000 each occurrence (combined single limit for bodily injury and property damage)

$5,000,000 aggregate for products-completed operations

$5,000,000 general aggregate

The "general aggregate" limit shall apply separately to Contractor's work under this Contract.

Owner, its officers, directors, and employees shall be additional insureds under Contractor's Umbrella Liability or Excess Liability policy and the policy shall provide that the insurance afforded such additional insureds shall apply as primary insurance and that any other insurance maintained by Owner will be excess only and will not contribute with this insurance.

(e) The limits of liability required by this paragraph 11.1 may be satisfied by a combination of limits provided by the primary Commercial General Liability and Auto Liability policies plus limits provided by Umbrella or Excess Liability policies.

(f) Certificates of Insurance shall be furnished by Contractor to Owner before any Work is commenced hereunder by Contractor. The Certificate of Insurance shall provide that there will be no cancellation or non-renewal of coverage without thirty (30) days prior written notice to Owner.

The Certificate or Insurance furnished as evidence of Commercial General Liability insurance carried by Contractor shall include a copy of the policy provision or the additional insured endorsement adding Owner as additional insured and providing that such insurance applies as primary insurance and will not call upon other insurance maintained by Owner for contribution.

(g) If Contractor does not comply with the insurance requirements of this paragraph 11.1, Owner may, at his option, provide insurance coverage to protect Owner and Contractor and charge Contractor for the cost of that insurance. The required insurance shall be subject to the approval of Owner, but any acceptance of insurance certificates by Owner shall not limit or relieve Contractor of the duties and responsibilities assumed by it under this Contract.

(h) Subcontractors Insurance. Contractor shall require that each of its subcontractors obtain and maintain at all times during the period Subcontractor is performing Work for Contractor the insurance described in Subsections (a) - (d) above.

11.B [INTENTIONALLY OMITTED.]

11.C.1 OWNER'S INSURANCE. GC Sections 11.3.2, 11.3.3, 11.3.4, 11.3.6, 11.3.9 (first two sentences only), and 11.3.10 (the words "unless one of..." and following to end of paragraph only) are deleted. The words "as fiduciary" are deleted wherever they appear in GC Section 11.3 and the remainder of GC Section 11.3 is supplemented as follows: Owner's insurance (i) shall be placed promptly in the names of the Owner and at the Owner's option, any other person(s)

whom the Owner deems to have an insurable interest in the Owner's real property and/or the Work, or any part thereof, and (ii) shall be payable as the respective interests of said named insureds may appear. The policy shall be retained and held by the Owner and shall not insure against loss, damage, or destruction of any tools, supplies, equipment or temporary structures located in, on or about the Owner's real property, which are the property of Contractor, or any Subcontractor, Supplier, or person directly or indirectly employed by or under contract with Contractor or its Subcontractors and Suppliers. A copy of any policy (or certificate thereof) required of Owner by the Contract Documents shall be delivered to Contractor upon demand.

11.C.2 [INTENTIONALLY OMITTED.]

11.D [INTENTIONALLY OMITTED.]

12.A UNCOVERING WORK. GC Section 12.1 is modified as follows: Contractor shall give Architect and Owner at least twenty-four (24) hours advance notice if uninspected Work will be covered by other Work. Contractor shall pay for the cost of uncovering any Work for Architect's inspection if Contractor failed to give such notice, regardless of whether or not the inspected Work conforms to the Contract Documents.

12.B CORRECTION OF WORK. GC Section 12.2.4 is supplemented as follows: all Work not conforming to the Contractor Documents, including without limitation substitutions not properly approved and authorized shall be considered defective. Contractor shall repair damage to Owner's property caused by any Work furnished by the Contractor, which does not conform to the Specifications or the Contract Documents.

13.A GOVERNING LAW; INTERPRETATION. GC Section 13.1.1 is supplemented as follows. The invalidity of any provision of the Contract Documents (other than the amount of the Contract Sum) shall not impair or affect in any manner whatsoever the validity or enforceability of any other provision of the Contract Documents.

13.B SUCCESSORS AND ASSIGNS. GC Section 13.2.1 (second and third sentences only) are deleted. Without Contractor's consent, Owner and any permitted assignee or successor to Owner hereunder shall have the right to assign the Contract Documents, or any interest therein, to (i) any lender to Owner, (ii) the owner of the fee interest in the Project or (iii) any corporation, partnership or other person which is under common control with Owner or which is controlled by Owner. At its discretion, but only with Contractor's consent (which consent shall not be unreasonably withheld or delayed), Owner and any permitted assignee or successor to Owner, shall have the right to assign the Contract Documents, or any interest therein, to any other successor owner of the Project sites. Contractor shall execute an acknowledgment of any assignment by Owner in a form reasonably requested by Owner. Owner is relying upon the professional standing and ability of Contractor in the performance of the Work. Consequently, Contractor shall have no right to assign the Contract Documents, sublet them as a whole, or assign any monies due or to become due to Contractor under the Contract Documents, without the prior written consent of Owner, which consent may be withheld in Owner's sole discretion. The parties acknowledge that Contractor was known as Marshall Contractors, Inc. prior to its acquisition by Fluor Daniel, Inc. and is now a wholly owned subsidiary of Fluor Daniel, Inc. All of the rights and obligations of Marshall Contractors, Inc. under the Contract Documents and in connection with the Work have been assumed by Contractor and Contractor shall perform and be responsible for all of the Work, including, without limitation, the portion of the Work previously performed by Marshall Contractors, Inc. Contractor represents and warrants to Owner that the financial standing and net worth of Contractor are substantially similar to that of Marshall Contractors, Inc.

13.C LIMITATION ON CONSEQUENTIAL DAMAGES. Notwithstanding anything in the Contract Documents to the contrary, Contractor will not be responsible or held liable to Owner or its affiliates for indirect, incidental, or consequential damages of any nature (collectively, "Consequential Damages"), except for any liquidated damages payable by Contractor to Owner pursuant to Article 14 hereof, which arise out of or relate in any way to the Agreement and the Contract Documents (including any breach thereof) and/or the Work performed by Contractor, which (i) are not covered by the insurance that Contractor is required to carry under the Contract Documents, including, without limitation, Section 11.A hereof, and any other Project-specific insurance actually carried by Contractor, and (ii) exceed Five Hundred Thousand Dollars ($500,000) in the aggregate, it being understood that the liability limitations set forth herein shall not apply to any liquidated damages payable by Contractor to Owner pursuant to Article 14 hereof.

14. LIQUIDATED DAMAGES. CONTRACTOR RECOGNIZES THAT OWNER IS RELYING UPON CONTRACTOR TO COMPLETE THE ENTIRE WORK (EXCEPT FOR THE LABORATORY FURNITURE INSTALLATION) BY THE SCHEDULED SUBSTANTIAL COMPLETION

DATE AS SET FORTH IN THE AGREEMENT. CONTRACTOR ACKNOWLEDGES THAT IN THE EVENT SUCH WORK IS NOT SUBSTANTIALLY COMPLETED BY THE SCHEDULED SUBSTANTIAL COMPLETION DATE, OWNER SHOULD BE ENTITLED TO COMPENSATION FOR THE DETRIMENT RESULTING FROM CONTRACTOR'S FAILURE TO SUBSTANTIALLY COMPLETE THE WORK BY SUCH TIME AND THAT THE CALCULATION OF SUCH DAMAGE WOULD BE EXTREMELY DIFFICULT AND IMPRACTICABLE. THEREFORE, THE PARTIES AGREE TO LIQUIDATE DAMAGES. IF THE ENTIRE WORK (EXCEPT FOR THE LABORATORY FURNITURE INSTALLATION) IS NOT SUBSTANTIALLY COMPLETED BY THE SCHEDULED SUBSTANTIAL COMPLETION DATE, THEN OWNER SHALL BE ENTITLED TO LIQUIDATED DAMAGES, UNTIL SUCH TIME AS SUCH WORK IS SUBSTANTIALLY COMPLETED, IN THE FOLLOWING TIERED AMOUNTS: (I) TWO THOUSAND DOLLARS ($2,000) PER DAY FOR EACH OF THE FIRST SEVEN (7) CALENDAR DAYS THAT THE SUBSTANTIAL COMPLETION OF SUCH WORK IS DELAYED BEYOND THE SCHEDULED SUBSTANTIAL COMPLETION DATE, (II) FIVE THOUSAND DOLLARS ($5,000) PER DAY FOR EACH OF THE NEXT SEVEN CALENDAR DAYS (I.E., THE EIGHTH (8TH) THROUGH FOURTEENTH (14TH) CALENDAR DAYS FOLLOWING THE SCHEDULED SUBSTANTIAL COMPLETION DATE) THAT SUCH WORK IS DELAYED BEYOND THE SCHEDULED SUBSTANTIAL COMPLETION DATE, AND (III) TEN THOUSAND DOLLARS ($10,000) PER DAY FOR EACH CALENDAR DAY THEREAFTER (I.E., THE FIFTEENTH (15TH) CALENDAR DAY AND EACH CALENDAR DAY THEREAFTER FOLLOWING THE SUBSTANTIAL COMPLETION DATE) THAT SUCH WORK IS DELAYED BEYOND THE SCHEDULED SUBSTANTIAL COMPLETION DATE. ALL OF THE FOREGOING LIQUIDATED DAMAGES ARE CUMULATIVE. FOR EXAMPLE, IF THE SCHEDULED SUBSTANTIAL COMPLETION DATE IS DECEMBER 19, 1997, AND ALL OF THE WORK (EXCEPT FOR THE LABORATORY FURNITURE INSTALLATION) IS NOT SUBSTANTIALLY COMPLETED UNTIL JANUARY 9, 1998, THEN OWNER WOULD BE ENTITLED TO LIQUIDATED DAMAGES FROM THE CONTRACTOR IN THE AMOUNT OF $119,000 ($14,000 + $35,000 + $70,000). BOTH PARTIES ACKNOWLEDGE AND AGREE THAT SUCH AMOUNTS ARE PRESENTLY REASONABLE SUMS CONSIDERING ALL OF THE CIRCUMSTANCES EXISTING AS OF THE EXECUTION OF THIS ADDENDUM, INCLUDING THE RELATIONSHIP OF THE AMOUNT TO THE RANGE OF HARM TO OWNER THAT REASONABLY COULD BE ANTICIPATED AND THE ANTICIPATION THAT PROOF OF ACTUAL DAMAGES WOULD BE COSTLY OR INCONVENIENT. BY EXECUTING THIS PROVISION AS INDICATED BELOW, EACH PARTY SPECIFICALLY CONFIRMS THE ACCURACY OF THE STATEMENTS MADE ABOVE AND THE FACT THAT EACH PARTY FULLY UNDERSTOOD THE CONSEQUENCES OF THIS LIQUIDATED DAMAGES PROVISION AT THE TIME THIS ADDENDUM WAS MADE.

CONTRACTOR'S INITIALS SJB

OWNER'S INITIALS DCY

[Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have executed this Addendum intending to be bound thereby.

| CONTRACTOR | OWNER |
| --- | --- |
| ADP MARSHALL, INC. | VIVUS, INC. |
| By: /s/ S. JAMES BUSAM | By: /s/ DAVID C. YNTEMA |
| Printed Name: S. James Busam | Printed Name: David C. Yntema |
| Title: Senior Vice President | Title: Chief Financial Officer |
| Date: December 18, 1997 | Date: December 19, 1997 |

EXHIBIT 10.33

INNOVEX INC.

AND

VIVUS, INC.

SALES FORCE

SERVICES AGREEMENT

This Sales Force Services Agreement ("Agreement"), effective as of February 1, 1998, is by and between Vivus, Inc., with offices at 605 East Fairchild Drive, Mountain View, CA 94043 ("Vivus") and, Innovex Inc., whose principal office is at 10 Waterview Boulevard, Parsippany, NJ 07054 ("Innovex").

WHEREAS, Vivus, a corporation organized and existing under the laws of Delaware is engaged, in research, development, manufacture and marketing of pharmaceutical products;

WHEREAS, Innovex, a corporation organized and existing under the laws of Delaware, is a Contract Pharmaceutical Organization (C.P.O.), providing integrated pharmaceutical services; and

WHEREAS, Vivus desires to acquire and Innovex desires to provide sales force services on the terms and conditions contained in this Agreement;

NOW THEREFORE, in consideration of the following covenants, promises and obligations, Vivus and Innovex agree:

1.0 DEFINITIONS

When used in this Agreement, the following terms and phrases shall have the meanings identified below:

1.1 "Affiliate" shall mean any corporation or business entity controlled by, controlling, or under common control with (e.g., controlled by a party which controls a party to this Agreement) a party to this Agreement. For this purpose, "control" shall mean direct or indirect beneficial ownership of at least fifty percent (50%) of the voting stock or income interest in such corporation or other business entity, or such other relationship as, in fact, constitutes actual control.

1.2 "Product" shall mean MUSE (alprostadil) or any other product whose sales promotion is assigned to Innovex by mutual agreement with Vivus.

1.3 "Project Operations Manual" shall mean a document produced by Innovex and reasonably acceptable to Vivus, containing the objectives and targets for the Services, and reporting and administrative standards.

2.0 SERVICES

2.1 Vivus retains Innovex as an independent contractor for the sole purpose of providing the sales force services on the terms and conditions of this Agreement, including the responsibilities and obligations set forth in Schedules I and III (the "Services"). Vivus and Innovex are not partners, not co-employers and not agents for one another, and

neither company has the power to exercise control over the activities of the other company's employees. Innovex Personnel (as defined in Section 4.1) shall not have the authority to make any commitments whatsoever on behalf of Vivus except for the Services directly permitted by this Agreement.

2.2 Vivus reserves the right to solicit orders from and sell directly to any customer and all distributors or other intermediaries.

3.0 COMPENSATION AND EXPENSES

3.1 As compensation for the Services performed, Vivus shall pay Innovex in the manner and amounts specified in Schedule V. If the scope of the Services, or the time necessary to perform the Services changes, the compensation to be paid by Vivus will be adjusted as mutually agreed upon in writing by Vivus and Innovex.

3.2 All invoices are strictly net of any taxes imposed on services, and payment in full of all invoices must be made within thirty (30) days of the date of the invoice.

- If the method of payment is by direct transfer to the Innovex bank account, the wire transfer instructions are as follows:

  Innovex Inc.
  Accounting Number: [*]
  ABA Number: [*]
  Branch Banking & Trust Co., Raleigh, NC

- Innovex Federal Employment ID Number is [*]

- Payments by check should be mailed to the Innovex Lockbox

  Innovex, Inc.
  P.O. Box 890062
  Charlotte, NC 28289-0062

[*] Certain information on this page has been omitted and filed separately with the Commission. Confidential treatment has been requested with respect to the omitted portions.

- Payments by check may be remitted via Federal Express to Innovex's Lockbox as follows:

  Innovex Inc.
  Branch Banking & Trust Co.
  1251 Arrowpine Drive
  Charlotte, NC 28273
  Attn: Wholesale Lockbox Dept. (Box 890062)

3.3 Vivus and Innovex agree that if payment is not made within thirty (30) days of the date of the invoice, Interest shall accrue on a daily basis at [*]. If there is a rational basis for Vivus to dispute the amount of an invoice, or any portion thereof, no interest shall accrue on the amount in dispute until thirty days after the dispute is resolved. If the period of non-conforming payment [*], Innovex may, at its sole discretion and without prejudice to any other rights or remedies, [*] notice of intent to suspend the Services which specifically references this Section 3.3, and if the non-conforming payment continues [*].

4.0 PERSONNEL

4.1 For the purposes of this Agreement, any individual who is authorized to perform any part of the Services on behalf of Innovex is considered Innovex Personnel ("Innovex Personnel").

4.2 In the event that any Innovex Personnel providing any of the Services referred to in this Agreement should be employed by Vivus or an Affiliate then a fee may be payable to Innovex as provided in Schedule V.

5.0 CONFIDENTIAL INFORMATION

5.1 Innovex and Vivus agree that any information relating to the technology, research, products, legal affairs, marketing plans, business affairs, contracts or finances of the other or Affiliates or of any suppliers, agents, distributors, licensees or customers of the other which is (a) marked as confidential, (b) otherwise represented by the disclosing party as confidential either before or within a reasonable time after its disclosure, or (c) otherwise represents proprietary or confidential information shall be Confidential Information ("Confidential Information"). Innovex and Vivus agree; (i) to hold Confidential Information in strict confidence and disclose it only on a need-to-know basis to Affiliates, subcontractors and employees who are under a written obligation to maintain the confidentiality of the information; (ii) to make or copy materials containing Confidential Information only as reasonably required in connection with this Agreement; and (iii) to deliver to the disclosing party or destroy any materials, or copies

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of materials, containing Confidential Information when they are no longer needed in connection with the Agreement.

5.2 The obligations of the parties in Section 5.1 shall not extend to any Confidential Information:

- which can be shown by written documentation to have been known by the recipient prior to its receipt from the other;

- which is public or lawfully becomes generally available to the public through no fault of the party;

- which is lawfully acquired from a third party without being made subject to an obligation of confidence by the third party;

- which by mutual written agreement is released from the confidentiality provisions of this Agreement; or

- which is required to be disclosed under any statutory, regulatory or judicial requirement, and in that event, confidentiality will be preserved and protected to the extent possible; additionally, notice will be provided to the other party prior to any such disclosure.

The obligations of Innovex and Vivus under Section 5.2 of this Agreement shall survive the termination or expiration of this Agreement for a period of five (5) years.

5.3 It is expressly agreed that neither party transfers to the other party by operation of this Agreement any patent right, copyright or other proprietary right either party owns as of the commencement date of this Agreement. Vivus and Innovex agree that [*].

6.0 INDEMNIFICATION

6.1 Vivus shall indemnify, defend and hold harmless Innovex, its Affiliates and its and their respective directors, officers, employees and agents (each, an "Innovex Indemnitees") against all losses, claims, actions, damages, liabilities, costs and expenses (including reasonable attorneys' fees and court costs) (collectively, "Losses") [*]. Notwithstanding the foregoing, Vivus shall not be required to indemnify Innovex for any Losses to the extent they arise from the negligence or willful misconduct of Innovex.

6.2 Innovex shall indemnify, defend and hold harmless, Vivus, its Affiliates and its and their respective directors, officers, employees and agents against Losses [*]. Notwithstanding the

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foregoing, Innovex shall not be required to indemnify Vivus for any losses to the extent they arise from the negligence or willful misconduct of Vivus.

6.3 The party seeking indemnification hereunder (the "Indemnified Party") shall: (a) give the party obligated to indemnify (the "Indemnifying Party") prompt notice of any such claim or lawsuit (including a copy thereof) served upon Indemnified Party; and (b) cooperate fully with Indemnifying Party and its legal representatives in the investigation of any matter the subject of indemnification; and (c) shall not unreasonably withhold its approval of the settlement of any claim, liability or action by Indemnifying Party covered by this Indemnification provision; provided however, that Indemnified Party's failure to comply with its obligations under this provision shall not constitute a breach of this Agreement nor relieve Indemnifying Party of its indemnification obligations hereunder, except to the extent, if any, that Indemnifying Party's defense of the affected claim, action or proceeding was actually and materially impaired thereby.

6.4 Neither Vivus nor Innovex, nor their respective Affiliates, directors, officers, employees or agents shall be liable to the other for any special, incidental, indirect or consequential damages, including, but not limited to the loss of opportunity, use, revenue or profit, in connection with this Agreement or the Services performed hereunder, even if such damages shall have been foreseeable; provided, however, this provision in no way relieves or affects the indemnification obligations of either Vivus or Innovex with respect to claims brought by third parties.

6.5 Innovex shall not be liable to Vivus for claims or losses [*].

6.6 The obligations of Innovex and Vivus under Section 6 shall survive the termination of the Agreement.

7.0 INSURANCE

Innovex and Vivus shall [*]. Neither party shall do or omit to do any act, matter or thing which could prejudice or render voidable any such insurance. Innovex and Vivus shall, upon request by the other, provide a certification evidencing the insurance or any renewal. Each party shall notify the other party of any cancellation of or material change in any such insurance arrangements, if possible, prior to cancellation or material change, but in any event, as soon as possible.

8.0 IMPROPER ACTIVITIES

If either party shall in its reasonable judgment determine that any of the personnel, employees or subcontractors performing obligations pursuant to this Agreement are being used for purposes or are involved in any activity including but not limited to conduct which is unethical, illegal, immoral

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or which may harm the other party's standing or reputation, then that party shall give notice to the other specifying the purpose or activity of the complaint and requiring that the other cease such activity. The offending party shall use its best efforts to cease such activity immediately after having received notice and in every instance such cessation shall take place within seven days after having received notice. Cessation of the activity and/or termination of the offending personnel, employee or subcontractor will generally be a reasonable response to such a complaint.

9.0 TERM & TERMINATION

9.1 The initial term of this Agreement will begin on the date first above written and continue until [*]. Vivus will have the option to extend the term of the Agreement for up to [*] upon the terms set forth herein by giving Innovex written notice of Vivus's exercise of the option to extend, no later than [*].

9.2 Either party may terminate this Agreement by written notice at any time if the other party defaults in the performance of its material obligations under this Agreement. In the event of such default, the party declaring the default shall provide the defaulting party with written notice setting forth the nature of the default, and the defaulting party shall have [*] to cure the default. If the defaulting party fails to cure the default within the foregoing time periods, the other party may terminate this Agreement by written notice to the defaulting party, which notice shall be effective upon receipt.

9.3 Vivus may terminate this Agreement [*].

9.4 Either party may terminate this Agreement by written notice to the other party, effective upon receipt with no right to cure the default, if the other party files a petition for bankruptcy, reorganization or arrangement under any state statute, or makes an assignment for the benefit of creditors or takes advantage of any insolvency statute or similar statute, or if a receiver or trustee is appointed for the property and assets of the party and the receivership proceedings are not dismissed within sixty (60) days of such appointment.

9.5 Termination of the Agreement for whatever reason shall not affect the accrued rights of either Innovex or Vivus arising under or out of this Agreement and all provisions which expressly or by implication survive this Agreement shall remain in full force and effect.

10.0 FORCE MAJEURE

Innovex and Vivus shall be excused for the period of any delay in the performance of any obligations under this Agreement when prevented from performing such obligations by cause or causes beyond their reasonable control, including, without limitation, strike, lockout or other labor

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disturbance (other than a strike, lockout or other labor disturbance involving Innovex Personnel), flood, riot, insurrection, civil commotion, fire, accident, act of war (whether war is declared or not), embargo, delay of carrier, inability to obtain material, failure of power or natural source of supply, act, injunction, or restraint of government, act of God or any other casualty. The party affected thereby shall give the other party prompt written notice specifying the extent to which its performance will likely be affected. The party affected shall exert reasonable efforts to eliminate, cure or overcome any such cause and resume performance as soon as practicable.

11.0 RETURN OF MATERIALS

Innovex shall within sixty (60) days of termination or expiration of this Agreement, at the request of Vivus, destroy or return all materials belonging to Vivus, including the materials discussed in Section 5.3, other than those which Innovex has a legal obligation to keep.

12.0 NOTICES

All notices under this Agreement shall be in writing and shall be deemed duly given when received, if personally delivered or sent by facsimile transmission, or one business day after the date mailed by overnight courier, and addressed to the parties at the following addresses:

If to Vivus send to:

Vivus, Inc.
605 East Fairchild
Mountain View, CA 94043
Attention:Julian Gangolli, Vice President, Marketing
Phone: (650) 934-5200
Fax: (650) 934-5211

with a copy in the case of disputes or legal matters to:

Robert Brownell
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
Phone: (650) 493-9300
Fax: (650) 493-6811

If to Innovex send to:

Innovex, Inc.
10 Waterview Boulevard
Parsippany, NJ 07054
Attention: David Stack, President
Phone: (973) 257-4570
Fax: (973) 257-4581

with a copy in the case of disputes or legal matters to:

L. Stephen Garlow
General Counsel
Innovex Inc.
11250 Corporate Avenue
Lenexa, KS 66219
Phone: (913) 752-8620
Fax: (913) 752-8699

or to such other destination as either party may hereafter notify the other party in accordance with this section.

13.0 ASSIGNMENT

Neither party may assign this Agreement without the prior written consent of the other party, except that either party may assign this Agreement without consent to a successor in interest to substantially all of the business of that party to which the subject matter of this Agreement relates.

14.0 WARRANTIES & REPRESENTATIONS

14.1 Each party warrants and represents to the other that it has the full right and authority to enter into this Agreement and that it is not aware of any impediment that would inhibit its ability to perform its obligations under this Agreement.

14.2 Innovex and Vivus agree to undertake all of their respective obligations under this Agreement in conformance with generally accepted business standards, and in material conformance with all applicable local, state and federal laws and regulations, as amended, including employment laws, tax laws, and the Federal Equal Employment Opportunity Act, the Fair Labor Standards Act, the Food Drug and Cosmetics Act and the Prescription Drug Marketing Act.

14.3 Vivus warrants and represents that it has no knowledge of the existence of any U.S. patent owned or controlled by anyone other than Vivus or an Affiliate which covers the Product and would prevent Vivus from making, using, or selling the Product or would prevent Vivus or Innovex from promoting or detailing the Product.

14.4 Vivus acknowledges that Innovex will require documents, data, records, resources, direction and cooperation by Vivus in order to properly perform the Services. Innovex is not responsible for errors, delays, or other consequences to the extent such errors, delays, or other consequences arise solely from the failure of Vivus to provide such documents, data, records, resources, direction or cooperation.

14.5 Innovex acknowledges its responsibility to and will (i) maintain all necessary personnel and payroll records for Innovex Personnel; (ii) compute wages and withhold applicable Federal, State, and local taxes and Federal FICA payments for Innovex Personnel; (iii) remit employee withholdings to the proper governmental authorities and make employer contributions for Federal FICA and Federal and State unemployment insurance payments for Innovex Personnel; (iv) pay net wages and fringe benefits, if any, directly to Innovex Personnel; and (v) provide for liability and Workers' Compensation insurance coverage for Innovex Personnel.

15.0 ADVERSE DRUG EXPERIENCE OR PRODUCT COMPLAINTS

If Innovex Personnel become aware of any adverse drug experience reports or product complaints involving the use of any Vivus product, whether or not related to the Product under this Agreement, they shall immediately inform Vivus in accordance with Vivus procedures. When Vivus communicates information concerning adverse drug experience reports to its own sales force, such information shall be communicated to Innovex and Innovex Personnel, in a manner consistent with the Vivus SOPs.

16.0 ARBITRATION

Resolution of disputes concerning any aspect of the Services or the Agreement, excluding termination, shall be accomplished by good faith negotiations between Vivus and Innovex, within thirty (30) days of notice. If necessary, thereafter, resolution of such disputes shall be accomplished, at written request of either party to the other party, by binding arbitration, which shall not interfere with the timely rendering of the Services. Arbitration will be pursuant to the Rules of Conciliation and Arbitration of the American Arbitration Association, using a three-person panel of arbitrators, one (1) to be designated by Vivus, one (1) by Innovex, and a third to be agreed upon by the other two (2) arbitrators. If the two party-appointed arbitrators are unable to agree on a third arbitrator within thirty (30) days after the second arbitrator is appointed, the third arbitrator shall be selected by the American Arbitration Association.

18.0 TERMINATION OF PREVIOUS CONTRACT

Innovex and Vivus hereby mutually agree and acknowledge that the Sales Force Services Agreement between the parties, dated October 31, 1997, shall be deemed terminated as of January 31, 1998.

19.0 GENERAL PROVISIONS

19.1 This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to the principles of conflict of laws.

19.2 Neither party's waiver of the other's breach of any term, covenant or condition contained in this Agreement shall be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition in this Agreement.

19.3 If any part or parts of this Agreement are held to be invalid, the remaining parts of the Agreement will continue to be valid and enforceable.

19.4 The headings of this Agreement are used only as a matter of convenience, and in no way define, limit, construe or describe the scope or intent of any section of this Agreement.

19.5 The entire contents of Attachment A and all the Schedules attached hereto shall be incorporated herein by this reference, as if fully set forth in this Agreement.

19.6 Except for the Sales Force Services Agreement between the parties dated October 31, 1997, this Agreement, and the materials incorporated herein by reference, constitute the entire agreement of the parties and supersedes all prior contracts, agreements and understandings relating to the same subject matter between the parties. The parties intend this Agreement to be a complete statement of the terms of their agreement, and no change or modification of any of the provisions of this Agreement shall be effective unless it is in writing and signed by a duly authorized representative of the party against which it is to be enforced.

19.7 This Agreement may be executed in several counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument.

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IN WITNESS WHEREOF, Innovex and Vivus have executed this Agreement, effective as of the date first above written.

INNOVEX INC.

By: /s/ DAVE STACK Date: 3/16/98

Dave Stack
President, General Manager

VIVUS, INC.

By: /s/ JULIAN S. GANGOLLI Date: 3/13/98

Julian S. Gangolli
Vice President, Marketing and Sales

SCHEDULE I

INNOVEX RESPONSIBILITIES & OBLIGATIONS

VIVUS SALES PROJECT

1. Innovex will provide Innovex Personnel according to the following schedule which is subject to any adjustments mutually agreed upon between the parties:

- [*] Territory Representatives, as follows:
  - [*] employed on [*].
  - [*].
- [*] District Managers [*].
- [*] Associate Project Manager, [*].
- [*] Project Manager, [*].

The parties may agree in writing to increase or decrease the number of Territory Representatives and District Managers on the same terms and conditions herein.

2. [*]

3. Innovex will be responsible for the following:

- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]

4. [*]

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SCHEDULE II

VIVUS RESPONSIBILITIES & OBLIGATIONS

VIVUS SALES PROJECT

1. Vivus will be responsible [*]

2. Vivus will provide [*]. Vivus will be responsible [*].

3. Vivus shall use all reasonable endeavors to ensure that [*].

4. [*]

- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]

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SCHEDULE III

MUTUAL OBLIGATIONS

VIVUS SALES PROJECT

1. Vivus retains Innovex as an independent contractor for the sole purpose of providing the sales force services on the terms and conditions of this Agreement, including the responsibilities and obligations set forth in Schedules I and III (the "Services"). Vivus and Innovex are not partners, not co-employers, and not agents of one another, and neither company has the power to exercise control over the activities of the other company's employees.

2. [*]

   a. [*]

   b. [*]

   c. [*]

   d. [*]

   e. [*]

3. Innovex and Vivus [*]

4. Innovex and Vivus will agree [*]

5. As a general rule, [*]

6. Computer Hardware and Software.

   a. [*]

   b. [*]

   c. [*]

7. Transfer of Innovex Personnel.

   a. [*]

   b. [*]

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c. [*]

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SCHEDULE IV

ROLE DEFINITIONS

VIVUS SALES PROJECT

1. Territory Representative

RESPONSIBILITIES AND DUTIES:

- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]

SKILLS:

- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]

2. District Manager

- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]

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- [*]
- [*]
- [*]
- [*]

3. Project Manager

- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]

4. Associate Project Manager

- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]
- [*]

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SCHEDULE V

FEES

VIVUS SALES PROJECT

1. Fees. Vivus shall pay to Innovex the following Fees in connection with the Services from [*].

a. [*]

- [*]
- [*]
- [*]

[*]

[*]

b. [*]

c. [*]

[*]

d. [*]

2. [*]

3. [*]

4. [*]

5. [*]

6. [*]

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ATTACHMENT A
INNOVEX SALES FORCE EXPENSE ALLOCATION
FEBRUARY 1, 1998
PROJECT # 8165

| CATEGORY | INNOVEX DIRECT | BILLABLE (PASSTHROUGH) | VIVUS DIRECT |
|---|---|---|---|
| Auto Costs: monthly allowance, mileage, parking and tolls | [*] | [*] | [*] |
| Back office, infrastructure | [*] | [*] | [*] |
| Call Reporting and Sample Accountability System | [*] | [*] | [*] |
| Drug Screens | [*] | [*] | [*] |
| Equipment for Innovex Personnel: Computer (hardware/software); detail bags, business cards | [*] | [*] | [*] |
| Field Supplies: postage, stationery, phone charges | [*] | [*] | [*] |
| Forms, reports specially requested by Vivus | [*] | [*] | [*] |
| Insurance: employment, workers comp., E&O, CGL | [*] | [*] | [*] |
| Medical and other benefits | [*] | [*] | [*] |
| Meetings: 1) initial training 2) Vivus national, regional & district; product launches | [*] | [*] | [*] |
| Payroll Taxes | [*] | [*] | [*] |
| Promotional literature and aids, including distribution | [*] | [*] | [*] |
| Promotional marketing expenses (the cost of which has been preapproved by Vivus in writing) | [*] | [*] | [*] |
| Recruiting (database screening, ad placement): re-recruiting | [*] | [*] | [*] |
| Salaries and Variable Incentive Compensation | [*] | [*] | [*] |
| Sales data, territory alignment, mapping and optimization | [*] | [*] | [*] |
| Samples, including distribution to Reps | [*] | [*] | [*] |
| Severance | [*] | [*] | [*] |
| Travel Expenses (air, hotel & meals) | [*] | [*] | [*] |

* Interviewee, final interview expenses
* Training
* Project Manager, APM, DM, NSD, Reps

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# FINANCIAL STATEMENTS

SELECTED FINANCIAL DATA
IN THOUSANDS, EXCEPT PER SHARE AND EMPLOYEE DATA

Selected Quarterly Financial Data (unaudited)

| | Quarter Ended | | | |
|---|---|---|---|---|
| 1997 | March 31 | June 30 | September 30 | December 31 |
| Net income | $ 9,554 | $ 9,958 | $ 11,259 | $ 5,846 |
| Net income per diluted common and equivalent share | $ 0.27 | $ 0.28 | $ 0.31 | $ 0.17 |
| Common stock prices | | | | |
| High | $ 39.06 | $ 25.88 | $ 38.13 | $ 40.56 |
| Low | $ 18.75 | $ 15.31 | $ 22.81 | $ 9.94 |
| 1996 | | | | |
| Net income (loss) | $ (6,235) | $ (3,745) | $ 2,662 | $ (9,209) |
| Net income (loss) per diluted common and equivalent share | $ (0.23) | $ (0.14) | $ 0.07 | $ (0.28) |
| Common stock prices | | | | |
| High | $ 15.63 | $ 16.38 | $ 20.38 | $ 19.00 |
| Low | $ 11.88 | $ 13.00 | $ 14.44 | $ 14.50 |

The Company's common stock is traded over-the-counter on The Nasdaq Stock Market under the symbol "VVUS." As of December 31, 1997, there were approximately 608 shareholders of record. The Company has not paid any dividends since its inception and does not intend to pay any dividends in the foreseeable future.

Selected Financial Data

| | Year Ended December 31, | | | | |
|---|---|---|---|---|---|
| | 1997 | 1996 | 1995 | 1994 | 1993 |
| Product revenue | $ 129,337 | $ -- | $ -- | $ -- | $ -- |
| Milestone revenue | 9,000 | 20,000 | -- | -- | -- |
| Total | $ 138,337 | $ 20,000 | $ -- | $ -- | $ -- |
| Income (loss) before taxes | $ 39,801 | $ (16,527) | $ (22,811) | $ (14,864) | $ (7,775) |
| Net income (loss) | $ 36,617 | $ (16,527) | $ (22,811) | $ (14,864) | $ (7,775) |
| Net income (loss) per diluted share | $ 1.03 | $ (0.55) | $ (0.85) | $ (0.63) | $ (0.40) |
| Shares used in per share computation | 35,559 | 29,833 | 26,914 | 23,488 | 19,656 |
| Financial position at year end: | | | | | |
| Total assets | $ 150,669 | $ 96,532 | $ 44,049 | $ 43,021 | $ 24,732 |
| Accumulated deficit | $ (29,537) | $ (66,154) | $ (49,627) | $ (26,816) | $ (11,952) |
| Stockholders' equity | $ 123,930 | $ 89,780 | $ 41,181 | $ 40,307 | $ 23,435 |
| Additional information: | | | | | |
| Working capital | $ 54,888 | $ 60,388 | $ 19,878 | $ 21,656 | $ 16,010 |
| Capital expenditures | $ 32,268 | $ 3,682 | $ 3,148 | $ 787 | $ 1,007 |
| Common shares outstanding | 33,168 | 32,454 | 26,952 | 23,448 | 4,656 |
| Number of employees | 215 | 95 | 38 | 28 | 15 |

See notes to consolidated financial statements.

## MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

### Overview

VIVUS, Inc. (the Company) was incorporated in 1991 to develop products for the treatment of erectile dysfunction. In November 1996, the Company obtained regulatory marketing clearance by the U.S. Food and Drug Administration (FDA) to manufacture and market its first product, MUSE((R)) (alprostadil), in the United States. The Company commenced product shipments to wholesalers in December 1996 and commercially introduced MUSE (alprostadil) in the United States through its direct sales force beginning in January 1997. Furthermore, the Company received FDA clearance in December 1996 for ACTIS((R)), an adjustable elastomeric venous flow control device designed for those patients who suffer from venoocclusive dysfunction (commonly referred to as venous leak syndrome). The Company commenced commercial sales of ACTIS in the United States in July 1997.

The Company has entered into international marketing agreements with Astra AB ("Astra") and Janssen Pharmaceutica International ("Janssen") under which Astra and Janssen will purchase MUSE (alprostadil) for resale in various international markets. In November 1997, the Company obtained regulatory marketing clearance by the Medicines Control Agency (MCA) to market MUSE (alprostadil) in the United Kingdom. The Company began selling MUSE (alprostadil) to Astra in the fourth quarter of 1997. Astra began selling MUSE (alprostadil) in the United Kingdom in February 1998. In addition, applications for regulatory approval to market MUSE (alprostadil) have been submitted in several other countries. These applications will be subject to rigorous approval processes, and there can be no assurance such approvals will be granted in a timely manner, if at all.

The Company is subject to a number of risks including its ability to scale-up its manufacturing capabilities and secure an adequate supply of raw materials, its ability to successfully market, distribute and sell its products, its reliance on a single therapeutic approach for the treatment of erectile dysfunction, and intense competition. There can be no assurance that the Company will be able to achieve profitability on a sustained basis. Accordingly, there can be no assurance of the Company's future success.

The Company has limited experience in manufacturing and selling MUSE (alprostadil) in commercial quantities. Since the commercial launch of MUSE (alprostadil) in January 1997, the Company has experienced product shortages due to higher than expected demand and difficulties encountered in scaling up production of MUSE (alprostadil). The Company leased 90,000 square feet of space in New Jersey in which it has constructed additional manufacturing and testing facilities. The Company has filed for regulatory approvals of the facility with both the FDA and MCA. In March 1998, the MCA authorized the Company to begin commercial production and shipment of MUSE (alprostadil) from its new facility. In addition, the Company has negotiated a long-term lease for a site in Ireland for construction of a European manufacturing operation. Until the Company receives the required approvals for its new New Jersey facility, domestic and certain international markets will need to be supplied from its current facility within the Paco Pharmaceutical Services, Inc. ("Paco") facility. There can be no assurance such approvals will be granted in a timely manner, if at all. If international sales increase as anticipated, product available for the domestic market may be reduced and gross margins will be adversely impacted. If the Company encounters further difficulties with its current manufacturing facility or delays in regulatory approvals of its new manufacturing facility, capacity constraints could continue for an extended period of time, which would have a material adverse effect on the Company's business, financial condition and results of operations.

Because of the production capacity constraints, the Company did not initiate significant MUSE advertising programs in 1997 and experienced declining demand for MUSE (alprostadil) in late 1997. In anticipation of receiving regulatory approvals of its new manufacturing facility and because of available inventories at the wholesale level, the Company launched its first domestic direct-to-consumer advertising campaign in January 1998. This campaign includes major television, newspaper and magazine placements. In February 1998, the FDA notified the Company that it objected to, among other things, the prominence and balance of side effect

information relative to efficacy information in certain written materials and the Company's television advertisements. The Company has ceased running its television advertisements and requested a meeting with the FDA to discuss necessary changes to the Company's television advertisements. There can be no assurance that the Company's domestic sales and marketing efforts will be successful at increasing the demand for MUSE (alprostadil). In addition, there can be no assurance that the Company's capacity constraints will not prevent the Company from supplying any increased demand.

Results of Operations

YEARS ENDED DECEMBER 31, 1997 AND 1996

Product revenue of $129,337,000 and cost of goods sold of $38,288,000 were recorded in 1997 compared with none in 1996. Product revenue and related cost of sales in 1997 were primarily the result of the commercial launch of MUSE (alprostadil) in the United States. Product gross margin for 1997 was 70% which includes the effect of reduced cost of sales related to expensed materials of $4.7 million. International sales commenced in the fourth quarter of 1997. Because of revenue sharing arrangements with the Company's international partners, international sales result in lower gross margin as compared to domestic sales. International revenue in 1998 is expected to compose a greater proportion of total revenue which will have the effect of lowering gross margins. This impact may be offset by production efficiencies at the new manufacturing facility.

Milestone revenue of $9,000,000 was recorded in 1997 compared with $20,000,000 in 1996, a decrease of 55%. In 1997, milestone revenue was recorded as a result of signing the international marketing agreement with Janssen ($5 million) in January 1997, expanding the Janssen agreement ($2 million) in October 1997, and an Astra milestone payment associated with clearance from the MCA to market MUSE (alprostadil) in the United Kingdom ($2 million) in November 1997. In 1996, milestone revenue was recorded as the result of signing the international marketing agreement with Astra ($10 million), and upon filing the application for marketing authorization in the United Kingdom ($10 million).

Research and development expenses in 1997 were $12,123,000 compared with $28,279,000 in 1996, a decrease of 57%. This decrease resulted primarily from 1996 having higher pre-launch manufacturing costs, higher expenses associated with the preparation and filing of the Company's new drug application for MUSE (alprostadil) and a $5.8 million charge related to the issuance of 400,000 shares of common stock to ALZA Corporation to maintain exclusive rights to certain patents and patent applications beyond 1998.

Selling, general and administrative expenses in 1997 were $47,931,000 compared with $11,733,000 in 1996, an increase of 309%. This increase resulted primarily from the addition of a direct sales force, higher product marketing expenses and costs associated with adding personnel to support the growth of the Company's operations and commercial launch of MUSE (alprostadil). The Company currently employs approximately 75 sales representatives who call upon urologists and other specialists. Effective February 1998, the Company entered into a Sales Force Services Agreement with Innovex Inc. ("Innovex"). Pursuant to this agreement, Innovex will provide approximately 200 additional contract sales representatives, the substantial majority of whom will be calling upon primary care physicians. Due to this sales force expansion, as well as the Company's direct-to-consumer advertising campaign and addition of personnel to support the Company's operations, selling, general and administrative expenses are expected to increase significantly in 1998.

During the fourth quarter of 1997, the Company recorded the settlement of a lawsuit with a former consultant. Payment of the $5.1 million settlement was made on January 5, 1998.

Interest income in 1997 was $4,856,000 compared with $3,485,000 in 1996, an increase of 39%. The increase resulted from higher average invested cash balances primarily due to higher cash flows from operating activities which were partially offset by property and equipment purchases.

The provision for income taxes in 1997 was $3,184,000 compared with none for 1996. The increase is the result of having pre-tax income primarily due to

product revenue in 1997 as compared to a net loss in 1996. The effective tax rate computation for 1997 includes the effect of operating losses carried forward from prior years which have been fully utilized in 1997. Therefore, the Company expects that its effective tax rate will increase in future periods.

YEARS ENDED DECEMBER 31, 1996 AND 1995 In May 1996, the Company completed a marketing agreement with Astra AB (Astra) where Astra will purchase the Company's products for resale in Europe, South America, Central America, Australia and New Zealand. In consideration for execution of the marketing agreement, Astra paid the Company $10 million in June 1996. In September 1996, the Company received a $10 million milestone payment from Astra upon filing an application for marketing authorization for MUSE (alprostadil) in the United Kingdom. The Company recorded these receipts as revenue in the consolidated statement of operations during 1996. The Company began generating revenues from product sales in January 1997. No product revenues were recorded in 1996 or 1995.

Research and development expenses in 1996 were $28,279,000 compared with $21,313,000 in 1995, an increase of 33%. This increase resulted primarily from a $5.8 million charge related to the issuance of 400,000 shares of common stock in May 1996 to ALZA Corporation to maintain exclusive rights to certain patents and patent applications beyond 1998. In addition, higher pre-launch manufacturing costs were partially offset by lower clinical and regulatory expenses.

General and administrative expenses in 1996 were $11,733,000 compared with $4,389,000 in 1995, an increase of 167%. This increase resulted primarily from higher product marketing and market research expenses, hiring and training the U.S. sales force, and additional personnel and increased facilities costs to support the growth of the Company's operations.

Interest income in 1996 was $3,485,000 compared with $2,891,000 in 1995, an increase of 21%. The increase resulted from higher average invested cash balances associated with the $57,468,000 in net proceeds received from the stock offering in June 1996.

Liquidity and Capital Resources In 1997, the Company achieved a positive cash flow from operations for the first year since inception. In prior years, the Company had financed operations primarily from the sale of common stock. The Company has raised $152,334,000 to date through the sale of stock. Cash and available-for-sale securities totaled $91,696,000 at the end of 1997 compared with $84,325,000 at the end of 1996. The Company maintains its current excess cash balances in a variety of interest-bearing financial securities such as U.S. government securities, high-grade corporate debt and certificates of deposit. Principal preservation, liquidity and safety are the primary investment objectives.

Cash provided by operations in 1997 was $42,594,000 compared with cash used of $10,379,000 in 1996. The increase for 1997 is primarily due to net income of $36,617,000.

Accounts receivable at December 31, 1997 were $11,791,000 compared with none at the end of 1996. This increase is entirely the result of product sales in 1997.

Inventories were $9,084,000 at December 31,1997 as compared to $4,540,000 at December 31, 1996. The increase resulted primarily from increased purchases of raw materials and a lower inventory reserve at the end of 1997.

Current liabilities were $26,739,000 at December 31, 1997 compared with $6,752,000 at December 31, 1996, an increase of $19,987,000. This increase was primarily due to increased sales and marketing expenses, the settlement of a lawsuit and other increases associated with the growth in operations of the Company.

Capital expenditures in 1997 were $32,268,000 compared with $3,682,000 in 1996, an increase of $28,586,000. Capital expenditures were higher in 1997 primarily due to construction of the Company's new manufacturing facility in Lakewood, New Jersey, the purchase of additional manufacturing equipment for use

at the Company's dedicated manufacturing operation within the Paco facility, also in Lakewood, New Jersey, and the completion of the Company's new corporate headquarters and research and development laboratory facility located in Mountain View, California. Capital expenditures over the next two years are likely to increase as they are expected to include additional expenditures associated with the manufacturing facilities in New Jersey and a new manufacturing facility in Europe.

The Company repurchased 336,700 shares of its common stock at a cost of $7,716,000 in 1997 compared with none in 1996. The Company repurchased an additional 1,663,300 shares of its common stock in January and February 1998 at a cost of $23,584,000.

The Company expects to incur substantial additional costs, including expenses related to its manufacturing facilities in New Jersey and a new manufacturing facility in Europe, expenses related to marketing and sales of MUSE (alprostadil), including expenses associated with expanding its sales force by approximately 200 sales representatives and a direct-to-consumer marketing campaign, new product preclinical and clinical costs, ongoing research and development activities and general corporate purposes. The Company anticipates that its existing capital resources will be sufficient to support the Company's operations through the commercial introduction of MUSE (alprostadil) internationally, but may not be sufficient for the introduction of any additional future products. Accordingly, the Company anticipates that it may be required to issue additional equity or debt securities and may use other financing sources including, but not limited to, corporate alliances and lease financing to fund the future development and possible commercial launch of its future products. The sale of additional equity securities would result in additional dilution to the Company's stockholders. The Company's working capital and additional funding requirements will depend upon numerous factors, including: (i) the level of resources that the Company devotes to sales and marketing capabilities; (ii) the level of resources that the Company devotes to expanding manufacturing capacity; (iii) the activities of competitors; (iv) the progress of the Company's research and development programs; (v) the timing and results of preclinical testing and clinical trials; (vi) technological advances; and (vii) continued profitability.

Management's discussion and analysis of financial condition and results of operations contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended. Actual results could differ materially from those projected in the forward-looking statements as a result of the factors set forth above. The discussion of those factors is incorporated herein by this reference as if said discussion was fully set forth at this point.

CONSOLIDATED BALANCE SHEETS
IN THOUSANDS

| | December 31, 1997 | December 31, 1996 |
|---|---|---|
| Assets | | |
| Current assets: | | |
| Cash | $ 6,161 | $ 555 |
| Available-for-sale securities | 52,955 | 60,710 |
| Accounts receivable (net of allowance for doubtful accounts of $137 at December 31, 1997) | 11,791 | -- |
| Inventories | 9,084 | 4,540 |
| Prepaid expenses and other assets | 1,636 | 1,335 |
| Total current assets | 81,627 | 67,140 |
| Property and equipment | 36,462 | 6,332 |
| Available-for-sale securities, non-current | 32,580 | 23,060 |
| Total | $ 150,669 | $ 96,532 |
| Liabilities and Stockholders' Equity | | |
| Current liabilities: | | |
| Accounts payable | $ 6,574 | $ 3,324 |
| Accrued and other liabilities | 20,165 | 3,428 |
| Total current liabilities | 26,739 | 6,752 |
| Commitments (Notes 8 and 9) | | |
| Stockholders' equity: | | |
| Common stock; $.001 par value; shares authorized -- 200,000 at December 31, 1997 and 1996; shares outstanding -- December 31, 1997, 33,168 December 31, 1996, 32,454 | 33 | 32 |
| Paid in capital | 153,336 | 156,173 |
| Unrealized gain on securities | 98 | 77 |
| Deferred compensation | -- | (348) |
| Accumulated deficit | (29,537) | (66,154) |
| Total stockholders' equity | 123,930 | 89,780 |
| Total | $ 150,669 | $ 96,532 |

See notes to consolidated financial statements.

CONSOLIDATED STATEMENTS OF OPERATIONS
IN THOUSANDS, EXCEPT PER SHARE DATA

| | Year Ended December 31, | | |
|---|---|---|---|
| | 1997 | 1996 | 1995 |
| Revenue: | | | |
| Product | $129,337 | $ -- | $ -- |
| Milestone | 9,000 | 20,000 | -- |
| Total revenue | 138,337 | 20,000 | -- |
| Cost of goods sold | 38,288 | -- | -- |
| Gross margin | 100,049 | 20,000 | -- |
| Operating expenses: | | | |
| Research and development | 12,123 | 28,279 | 21,313 |
| Selling, general and administrative | 47,931 | 11,733 | 4,389 |
| Settlement of lawsuit | 5,050 | -- | -- |
| Total operating expenses | 65,104 | 40,012 | 25,702 |
| Income (loss) from operations | 34,945 | (20,012) | (25,702) |
| Interest and other income | 4,856 | 3,485 | 2,891 |
| Income (loss) before taxes | 39,801 | (16,527) | (22,811) |
| Provision for income taxes | 3,184 | -- | -- |
| Net income (loss) | $ 36,617 | $(16,527) | $(22,811) |
| Net income (loss) per share: | | | |
| Basic | $ 1.11 | $ (0.55) | $ (0.85) |
| Diluted | $ 1.03 | $ (0.55) | $ (0.85) |
| Shares used in per share computation: | | | |
| Basic | 32,996 | 29,833 | 26,914 |
| Diluted | 35,559 | 29,833 | 26,914 |

See notes to consolidated financial statements.

CONSOLIDATED STATEMENTS OF STOCKHOLDERS' EQUITY
IN THOUSANDS, EXCEPT PER SHARE DATA

| | Common Stock and Paid In Capital | | Unrealized Gain (Loss) | Deferred | Accumulated |
|---|---|---|---|---|---|
| | Shares | Amount | on Securities | Compensation | Deficit |
| BALANCES, December 31, 1994 | 23,448 | $ 68,698 | $(339) | $(1,236) | $(26,816) |
| Sale of common stock at $7.25 per share for cash (net of issuance costs of $1,732) | 3,340 | 22,483 | | | |
| Sale of common stock through employee stock purchase plan | 31 | 172 | | | |
| Exercise of common stock options for cash | 133 | 132 | | | |
| Unrealized gain on securities | | | 453 | | |
| Amortization of deferred compensation | | | | 445 | |
| Net loss | | | | | (22,811) |
| BALANCES, December 31, 1995 | 26,952 | 91,485 | 114 | (791) | (49,627) |
| Issuance of common stock at $14.56 per share for patent rights | 400 | 5,821 | | | |
| Sale of common stock at $13.38 per share for cash (net of issuance costs of $4,057) | 4,600 | 57,468 | | | |
| Sale of common stock through employee stock purchase plan | 20 | 226 | | | |
| Exercise of common stock options for cash | 482 | 1,205 | | | |
| Unrealized loss on securities | | | (37) | | |
| Amortization of deferred compensation | | | | 443 | |
| Net loss | | | | | (16,527) |
| BALANCES, December 31, 1996 | 32,454 | 156,205 | 77 | (348) | (66,154) |
| Warrants exercised, net | 166 | -- | | | |
| Sale of common stock through employee stock purchase plan | 34 | 486 | | | |
| Exercise of common stock options for cash | 851 | 4,254 | | | |
| Repurchase of common stock for cash | (337) | (7,716) | | | |
| Stock compensation costs | | 140 | | 348 | |
| Unrealized gain on securities | | | 21 | | |
| Net income | | | | | 36,617 |
| BALANCES, December 31, 1997 | 33,168 | $153,369 | $ 98 | $ -- | $(29,537) |

See notes to consolidated financial statements.

CONSOLIDATED STATEMENTS OF CASH FLOWS
IN THOUSANDS

| | Year Ended December 31, | | |
|---|---|---|---|
| | 1997 | 1996 | 1995 |
| Cash flows from operating activities: | | | |
| Net income (loss) | $ 36,617 | $ (16,527) | $ (22,811) |
| Adjustments to reconcile net income (loss) to net cash provided by (used for) operating activities: | | | |
| Depreciation and amortization | 2,138 | 1,238 | 708 |
| Stock compensation costs | 488 | 443 | 445 |
| Issuance of common stock for patent rights | -- | 5,821 | -- |
| Changes in assets and liabilities: | | | |
| Accounts receivable | (11,791) | -- | -- |
| Inventories | (4,544) | (4,540) | -- |
| Prepaid expenses and other assets | (301) | (698) | (63) |
| Accounts payable | 3,250 | 2,971 | (298) |
| Accrued and other liabilities | 16,737 | 913 | 452 |
| Net cash provided by (used for) operating activities | 42,594 | (10,379) | (21,567) |
| Cash flows from investing activities: | | | |
| Property and equipment purchases | (32,268) | (3,682) | (3,148) |
| Investment purchases | (323,609) | (177,074) | (146,338) |
| Proceeds from sale and maturity of securities | 321,865 | 131,818 | 147,202 |
| Net cash used for investing activities | (34,012) | (48,938) | (2,284) |
| Cash flows from financing activities: | | | |
| Sale of common stock | -- | 57,468 | 22,483 |
| Exercise of common stock options | 4,254 | 1,205 | 132 |
| Sale of common stock through employee stock purchase plan | 486 | 226 | 172 |
| Repurchase of common stock | (7,716) | -- | -- |
| Net cash provided by (used for) financing activities | (2,976) | 58,899 | 22,787 |
| Net increase (decrease) in cash | 5,606 | (418) | (1,064) |
| Cash: | | | |
| Beginning of year | 555 | 973 | 2,037 |
| End of year | $ 6,161 | $ 555 | $ 973 |
| Non-cash investing and financing activities: | | | |
| Unrealized gain (loss) on securities | $ 21 | $ (37) | $ 453 |
| Supplemental cash flow disclosure: | | | |
| Income taxes paid | $ 1,653 | $ -- | $ -- |

See notes to consolidated financial statements.

Note 1. Business and Significant Accounting Policies

Business -- VIVUS, Inc. was incorporated in California in 1991 to develop products for the treatment of erectile dysfunction. The Company was reincorporated in Delaware in 1996.

The Company obtained clearance from the U.S. Food and Drug Administration ("FDA") to manufacture and market MUSE (alprostadil) in the United States in November 1996 and clearance to market MUSE (alprostadil) in the United Kingdom from the Medicines Control Agency ("MCA") in November 1997. The Company is currently seeking marketing clearance in other countries. The Company commenced product shipments to wholesalers in December 1996 and commercially introduced MUSE (alprostadil) in the United States through its direct sales force beginning in January 1997.

The Company is subject to a number of risks including its ability to scale-up its manufacturing capabilities and secure an adequate supply of raw materials, its ability to successfully market, distribute and sell its products, its reliance on a single therapeutic approach for the treatment of erectile dysfunction, and intense competition. Accordingly, there can be no assurance of the Company's future success.

Revenue Recognition -- Product revenue is generally recognized upon shipment. While there were product shipments in December 1996, the Company did not recognize product revenue nor the associated cost of sales on these shipments until 1997 because of extended rights-of-return privileges which were granted to customers during this initial selling period.

The Company primarily sells its products through the wholesale channel in the United States. Product shipments are generally to distribution centers throughout the U.S. for the larger wholesalers. During 1997, five of these wholesalers accounted for 24%, 18%, 14%, 13%, and 11% of total product revenue.

The Company recognized revenue of $9 million and $20 million in the years ended December 31, 1997 and 1996 respectively as a result of achieving certain milestones related to its international marketing agreements. The amounts recognized are not refundable and do not involve any significant future performance obligations.

Principles of Consolidation -- The consolidated financial statements include VIVUS, Inc., VIVUS International Limited, a wholly-owned subsidiary, and VIVUS Ireland Limited, VIVUS UK Limited and VIVUS BV Limited, wholly-owned subsidiaries of VIVUS International Limited. All significant intercompany transactions and balances have been eliminated.

Cash and Cash Equivalents -- The Company considers all highly liquid debt instruments purchased with an original maturity of 90 days or less to be cash equivalents.

Inventories -- Inventories are stated at the lower of cost (first-in, first-out basis) or market. Cost includes material and conversion costs. Pending FDA marketing clearance, which was obtained in November 1996, the Company expensed to research and development all raw material purchases prior to October 1, 1996. Certain of these expensed raw material costs benefited 1997 by reducing cost of sales by $4.7 million. The remaining balance of $5.4 million at December 31, 1997 will benefit future periods by reducing cost of sales.

Available-for-Sale Securities -- The Company accounts for available-for-sale securities in accordance with Statement of Financial Accounting Standards No. 115, "Accounting for Certain Investments in Debt and Equity Securities." Available-for-sale securities represent debt securities that are stated at fair value. The difference between amortized cost (cost adjusted for amortization of premiums and accretion of discounts which are recognized as adjustments to interest income) and fair value, representing unrealized holding gains or losses, are recorded as a separate component of stockholders' equity until realized. The Company's policy is to record debt securities as available-for-sale because the sale of such securities may be required prior to maturity. Any gains and losses on the sale of debt securities are determined on a specific identification basis.

Property -- Property and equipment are stated at cost. For financial reporting, depreciation and amortization are computed using the straight-line method over estimated useful lives of three to seven years.

Income Taxes -- The Company accounts for income taxes in accordance with Statement of Financial Accounting Standards No. 109, "Accounting for Income Taxes," which requires an asset and liability approach for financial reporting of income taxes.

License Agreements -- The Company has obtained rights to patented technologies related to its initial product MUSE (alprostadil) under several licensing agreements. These agreements generally required milestone payments during the development period and royalties on product sales. Royalties on product sales are included in cost of goods sold in 1997. Milestone payments are included in research and development expense in 1997 and prior years.

Research and Development -- Research and development costs are expensed as incurred.

Net Income (Loss) Per Share -- The Company has adopted Statement of Financial Accounting Standards No. 128 ("SFAS 128"), "Earnings per Share" which replaced Accounting Principles Board Opinion No. 15 ("APB 15"). SFAS 128 requires a dual presentation of basic and diluted earnings per share. Basic earnings per share is based on the weighted average number of common shares outstanding during the periods. Diluted earnings per share is based on the weighted average number of common and common equivalent shares, which represent shares that may be issued in the future upon the exercise of outstanding stock options and warrants. Diluted earnings per share is computed similarly to earnings per share previously reported pursuant to APB 15 and, for the Company, diluted earnings per share amounts are the same as amounts previously reported under APB 15. The computation of basic and diluted earnings per share for the years ended December 31, 1997, 1996 and 1995 is as follows:

| (In thousands, except per share data) | 1997 | 1996 | 1995 |
|---|---|---|---|
| Net income (loss) | $ 36,617 | $ (16,527) | $ (22,811) |
| Net income (loss) per share-- Basic | $ 1.11 | $ (0.55) | $ (0.85) |
| Common equivalent shares: | | | |
| Options | (0.07) | -- | -- |
| Warrants | (0.01) | -- | -- |
| Net income (loss) per share-- Diluted | $ 1.03 | $ (0.55) | $ (0.85) |
| Shares used in the computation of net income (loss) per share-- Basic | 32,996 | 29,833 | 26,914 |
| Common equivalent shares: | | | |
| Options | 2,215 | -- | -- |
| Warrants | 348 | -- | -- |
| Diluted shares | 35,559 | 29,833 | 26,914 |

Options to purchase 286,500 shares at prices ranging from $24.81 to $37.38 which were outstanding at December 31, 1997 are not included in the computation of diluted EPS for 1997 because the option prices were greater than the average market price of common shares.

Use of Estimates -- The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosures of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

Recently Issued Accounting Pronouncements -- In June 1997, the Financial Accounting Standards Board ("FASB") issued Statement of Financial Accounting Standards ("SFAS") No. 130, "Reporting Comprehensive Income," which establishes standards for the reporting and

display of comprehensive income and its components in general purpose financial statements. In June 1997, the FASB issued SFAS No. 131, "Disclosures About Segments of an Enterprise and Related Information," which establishes annual and interim reporting standards for business segments of a company and related disclosures. Both SFAS No. 130 and SFAS No. 131 are effective for fiscal years beginning after December 15, 1997. The Company believes that the adoption of these new pronouncements will not have a material effect on the financial statements.

Reclassifications -- Reclassifications have been made to the prior years' Consolidated Financial Statements to conform to the fiscal 1997 presentation.

Note 2. Available-for-Sale Securities The fair value and the amortized cost of available-for-sale securities at December 31, 1997 and 1996 are presented in the table that follows. Fair values are based on quoted market prices obtained from an independent broker. For each category of investment securities, the table presents gross unrealized holding gains and losses.

As of December 31, 1997:

| (In thousands) | Amortized Cost | Fair Market Value | Unrealized Holding Gains | Unrealized Holding Losses |
|---|---|---|---|---|
| U.S. government securities | $36,255 | $36,276 | $ 148 | $ (127) |
| Corporate debt | 49,182 | 49,259 | 79 | (2) |
| Total | $85,437 | $85,535 | $ 227 | $ (129) |

As of December 31, 1996:

| (In thousands) | Amortized Cost | Fair Market Value | Unrealized Holding Gains | Unrealized Holding Losses |
|---|---|---|---|---|
| U.S. government securities | $55,441 | $55,488 | $ 84 | $ (37) |
| Corporate debt | 28,252 | 28,282 | 32 | (2) |
| Total | $83,693 | $83,770 | $ 116 | $ (39) |

The contractual maturities of these securities as of December 31, 1997 are as follows:

| (In thousands) | Amortized Cost | Fair Market Value |
|---|---|---|
| Less than 1 year | $52,961 | $52,955 |
| From 1 to 2 years | 32,476 | 32,580 |
| Total | $85,437 | $85,535 |

Note 3. Inventories
Inventories are recorded net of reserves of $5.4 million and $10.1 million as of December 31, 1997 and 1996, respectively, and consist of:

| (In thousands) | 1997 | 1996 |
|---|---|---|
| Raw materials | $8,603 | $1,893 |
| Work in process | 190 | 344 |
| Finished goods | 291 | 2,303 |
| Total | $9,084 | $4,540 |

Note 4. Property
Property and equipment as of December 31 consists of:

| (In thousands) | 1997 | 1996 |
|---|---|---|
| Machinery and equipment | $ 10,247 | $ 4,763 |
| Computers and software | 2,884 | 1,859 |
| Furniture and fixtures | 781 | 535 |
| Construction in progress | 27,067 | 1,554 |
| | 40,979 | 8,711 |
| Accumulated depreciation and amortization | (4,517) | (2,379) |
| Property and equipment, net | $ 36,462 | $ 6,332 |

Note 5. Accrued and Other Liabilities
Accrued and other liabilities as of December 31 consist of:

| (In thousands) | 1997 | 1996 |
|---|---|---|
| Settlement of lawsuit | $ 5,050 | $ -- |
| Sales and marketing expenses | 4,913 | 711 |
| Manufacturing expenses | 2,619 | 1,086 |
| Employee compensation and benefits | 2,308 | 392 |
| Research and clinical expenses | 1,579 | 347 |
| Income taxes | 1,531 | -- |
| Other | 2,164 | 892 |
| | $20,165 | $ 3,428 |

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
YEARS ENDED DECEMBER 31, 1997, 1996, AND 1995

Note 6. Stockholders' Equity

Common Stock -- The Company's Board of Directors approved a stock repurchase program in May 1997 whereby the Company could purchase up to two million shares of its common stock. As of December 31, 1997, the Company had repurchased 336,700 shares at a cost of $7,716,000. During January and February 1998, the Company repurchased 1,663,300 additional shares of its common stock at a cost of $23,583,990.

In June 1997, the Company effected a two-for-one common stock split. All common stock data in the accompanying consolidated financial statements for all years presented have been adjusted to reflect this stock split.

Preferred Stock-- The Company is authorized to issue 5,000,000 shares of undesignated preferred stock. Such shares of preferred stock may be issued by the Company in the future, without stockholder approval, upon such terms as the Company's Board of Directors may determine.

Stock Warrants -- In connection with the issuance of convertible preferred stock in 1993, the Company issued warrants exercisable for up to 528,600 shares of common stock at an exercise price of $4.31 per share. In June 1997, 203,590 warrants were exercised and the Company issued 165,928 net shares based on the market price on June 23, 1997. The remaining 325,010 warrants outstanding as of December 31, 1997 expire in 1999.

Note 7. Stock Option and Purchase Plans

Stock Option Plans -- Under the 1991 Incentive Stock Plan (the Plan), the Company may grant incentive or non-statutory stock options or stock purchase rights (SPRs). Up to 7,800,000 shares of common stock have been authorized for issuance under the Plan. The Plan allows the Company to grant incentive stock options (ISOs) and nonstatutory stock options (NSOs) to employees, directors and consultants at not less than the fair market value (for an ISO) of the stock at the date of grant (110% of fair market value for individuals who control more than 10% of the Company stock; otherwise, not less than 85% of fair market value for an NSO), as determined by the Board of Directors. Under the Plan, 25% of the options generally become exercisable after one year and 2.0833% per month thereafter. The term of the option is determined by the Board of Directors on the date of grant but shall not be longer than ten years. The Plan allows the Company to grant SPRs to key employees and consultants at not less than 85% of the fair market value of the stock at the date of grant, as determined by the Board of Directors. Sales of stock under SPRs are made pursuant to restricted stock purchase agreements containing provisions established by the Board of Directors. The Company has a right to repurchase the shares at the original sale price, which expires at a rate to be determined by the Board of Directors. As of December 31, 1997, no SPRs have been granted under the Plan.

Under the 1994 Director Stock Option Plan (the Director Option Plan), the Company reserved 400,000 shares of common stock for issuance to nonemployee directors of the Company pursuant to NSOs issued at the fair market value of the Company's common stock at the date of grant. Under the Director Option Plan, non-employee directors will receive an option to purchase 32,000 shares of common stock when they join the Board of Directors. These options vest 25% after one year and 25% annually thereafter. Thereafter, each director shall receive an option to purchase 8,000 shares of the Company's common stock annually upon their reelection. These options are fully exercisable ratably over eight months.

Details of option activity under these plans are as follows:

| | Number of Shares | Weighted Average Exercise Price |
|---|---|---|
| Outstanding, December 31, 1994 | 2,184,768 | $ 2.90 |
| Granted | 1,254,050 | 8.12 |
| Exercised | (132,770) | 1.00 |
| Canceled | (41,416) | 6.72 |
| Outstanding, December 31, 1995 | 3,264,632 | 4.93 |
| Granted | 1,444,746 | 16.40 |
| Exercised | (485,796) | 2.48 |
| Canceled | (25,732) | 10.24 |
| Outstanding, December 31, 1996 | 4,197,850 | 9.13 |
| Granted | 1,289,722 | 22.32 |
| Exercised | (850,550) | 5.00 |
| Canceled | (115,827) | 12.90 |
| Outstanding, December 31, 1997 | 4,521,195 | $13.57 |

| Options Outstanding | | | | Options Exercisable | |
|---|---|---|---|---|---|
| Range of Exercise Prices | Number Outstanding December 31, 1997 | Weighted-Average Remaining Contractual Life | Weighted-Average Exercise Price | Number Exercisable December 31, 1997 | Weighted-Average Exercise Price |
| $ 0.09-$ 6.56 | 938,900 | 6.21 years | $ 3.33 | 817,005 | $ 2.96 |
| $ 6.63-$11.88 | 996,850 | 7.23 years | 8.28 | 596,271 | 7.91 |
| $ 13.50-$16.75 | 1,118,058 | 7.04 years | 15.98 | 380,638 | 15.77 |
| $ 16.88-$21.63 | 1,126,887 | 9.06 years | 20.56 | 66,196 | 18.61 |
| $ 21.94-$37.38 | 340,500 | 8.65 years | 26.29 | 10,000 | 28.81 |
| $ 0.09-$37.38 | 4,521,195 | 7.53 years | $13.57 | 1,870,110 | $ 7.83 |

At December 31, 1997, 2,100,323 options remain authorized and unissued under these plans.

The Company accounts for these plans as prescribed by the Accounting Principles Board Opinion No. 25, "Accounting for Stock Issued to Employees." Accordingly, compensation expense is recognized only if options are granted to someone who is not an employee or director of the Company or if options are granted at a discounted exercise price. Except for compensation discussed in the following paragraph, no compensation cost has been recognized because the exercise price equals the market value of stock on the date of grant.

During 1997, options to purchase 100,000 shares of common stock were granted to research consultants at the fair market value on the date of grant. Compensation costs using the Black-Scholes option pricing model are estimated to be approximately $1.1 million over the option's vesting period of which $140,000 was recorded as expense for the year ended December 31, 1997.

The fair value of each option grant is estimated on the date of grant using the Black-Scholes option pricing model with the following assumptions used for grants: risk-free rates ranging from 5-7% and corresponding to government securities with original maturities similar to the vesting periods; expected dividend yield of 0%; expected lives of .64 years beyond vest dates; and expected volatility of 55% in all years. The weighted average of fair values of options granted during 1997, 1996 and 1995 respectively, were $9.32, $6.76 and $3.42.

Under FASB Statement No. 123 (FASB 123), "Accounting for Stock-based Compensation," the estimated fair value of options is amortized to expense over the options' vesting period. In accordance with the disclosure requirements of FASB 123, if the Company had elected to recognize this expense, income (loss) and income (loss) per share would have been reduced to the following pro forma amounts:

| (In thousands, except per share data) | 1997 | 1996 | 1995 |
|---|---|---|---|
| Pro forma net income (loss) | $ 31,958 | $ (20,039) | $ (23,941) |
| Pro forma net income (loss) per share: | | | |
| Basic | $ 0.97 | $ (0.67) | $ (0.89) |
| Diluted | $ 0.90 | $ (0.67) | $ (0.89) |

Because the FASB 123 method of accounting has not been applied to options granted prior to January 1, 1995, the resulting pro forma amounts may not be representative of that to be expected in future years.

Stock Purchase Plan -- In June 1994, the Company implemented an employee stock purchase plan under which eligible employees may authorize payroll deductions of up to 10% of their base compensation (as defined) to purchase common stock at a price equal to 85% of the lower of the fair market value as of the beginning or the end of the offering period. A total of 400,000 shares were reserved for issuance under the employee stock purchase plan. As of December 31,

1997, 94,896 shares have been issued to employees. During 1997, the weighted average fair market value of shares issued under the employee stock purchase plan was $23.45 per share.

Note 8. License Agreements

The Company has entered into several agreements to license patented technologies that are essential to the development and production of the Company's product. In connection with these agreements, upon meeting certain milestones (as defined) and contingent on the issuance of patents in certain countries, the Company is obligated to (1) pay license fees of $2,575,000 (of which $2,175,000 was paid prior to December 31, 1997 and $400,000 was paid in January 1998); (2) issue 896,492 shares of the Company's common stock (all of which has been issued); and (3) pay royalties on product sales covered by the license agreements (4% of U.S. and Canadian product sales and 3% of sales elsewhere in the world). In 1996, the Company issued an additional 400,000 shares of common stock to maintain exclusive rights to certain patents and patent applications beyond 1998. In connection with this issuance, the Company recorded a charge of $5,821,000 to the consolidated statements of operations. In 1997, the Company recorded royalty expense as cost of goods sold based on product sales.

Note 9. Lease Commitments

The Company leases its principal administrative and research and development laboratory facility under a fifteen year non-cancelable operating lease expiring in 2012. Under the terms of this lease, the Company has posted a $1.75 million letter of credit to secure ongoing performance under the lease. The Company also leases its manufacturing facilities under a five year non-cancelable operating lease expiring in 2002. The Company has the option to extend this lease for two renewal terms of five years each.

Future minimum lease payments under operating leases are as follows:

| (In thousands) | |
|---|---|
| 1998 | $ 1,749 |
| 1999 | 1,778 |
| 2000 | 1,811 |
| 2001 | 1,846 |
| 2002 | 1,282 |
| Thereafter | 14,467 |
| | $22,933 |

Rent expense under operating leases totaled $1,302,000, $560,000, and $342,000 for the years ended December 31, 1997, 1996, and 1995, respectively.

Note 10. Income Taxes

The provision for income taxes consisted of the following components as of December 31, 1997:

| (In thousands) | 1997 |
|---|---|
| Current | |
| Federal | $2,170 |
| State | 1,332 |
| Total current | 3,502 |
| Deferred (prepaid) | |
| Federal | (318) |
| State | -- |
| Total deferred (prepaid), net | (318) |
| Total provision for income taxes | $3,184 |

The provision for income taxes differs from the amount computed by applying the statutory federal income tax rates as follows:

| | 1997 |
|---|---|
| Provision computed at federal statutory rates | 35% |
| State income taxes, net of federal tax effect | 6 |
| Net operating losses utilized | (20) |
| Tax credits utilized | (10) |
| Income not subject to federal and state taxation | (4) |
| Other | 1 |
| Provision for income taxes | 8% |

Deferred income taxes result from differences in the recognition of expenses for tax and financial reporting purposes, as well as operating loss and tax credit carry-forwards. Significant components of the Company's deferred tax assets as of December 31, are as follows:

| (In thousands) | 1997 | 1996 |
|---|---|---|
| Deferred tax assets: | | |
| Net operating loss carryforwards | $ -- | $ 7,870 |
| Research and development credit carryforwards | -- | 2,715 |
| Capitalized research and development expenses | 1,947 | 3,695 |
| Inventory reserve | 3,022 | 4,237 |
| Accruals and other | 648 | 709 |
| Deferred gain | (859) | (1,760) |
| Depreciation | 1,260 | 487 |
| | 6,018 | 17,953 |
| Valuation allowance | (6,018) | (17,953) |
| Total | $ -- | $ -- |

Note 11. Legal Matters

In December 1997, the Company reached a settlement agreement with a former consultant of the Company whereby the former consultant dismissed his claims against the Company and certain of its officers and directors. The Company agreed to pay the former consultant $5.1 million. The Company recorded the settlement in 1997 and paid the $5.1 million on January 5, 1998 in accordance with the agreement.

In February 1998, the Company and certain of its officers and directors were named in class action lawsuits filed in California state court alleging violations of state securities laws. On March 20, 1998, the Company learned that a federal class action had been filed against the Company and certain current and former officers and directors. The lawsuits involve events which allegedly took place between May 15, 1997 and December 9, 1997. The Company believes that the allegations are without merit and intends to vigorously defend these cases. The Company does not believe that resolution of these claims will have an adverse material impact on the operations or financial position of the Company.

In the normal course of business, the Company receives and makes inquiries regarding patent infringement and other legal matters. The Company believes that it has meritorious claims and defenses and intends to pursue any such matters vigorously. The Company is not aware of any asserted or unasserted claims against it, excluding the settlement above, where the resolution would have an adverse material impact on the operations or financial position of the Company.

## REPORT OF INDEPENDENT PUBLIC ACCOUNTANTS

To the Stockholders and
Board of Directors of VIVUS, INC.:

We have audited the accompanying consolidated balance sheets of VIVUS, Inc. (a Delaware corporation) and subsidiaries as of December 31, 1997 and 1996, and the related consolidated statements of operations, stockholders' equity and cash flows for each of the three years in the period ended December 31, 1997. These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of VIVUS, Inc. and subsidiaries at December 31, 1997 and 1996, and the results of their operations and their cash flows for each of the three years in the period ended December 31, 1997, in conformity with generally accepted accounting principles.

/s/ ARTHUR ANDERSEN LLP

San Jose, California
March 20, 1998

EXHIBIT 21.2

# LIST OF SUBSIDIARIES

The following is a list of subsidiaries of VIVUS, Inc.

1. VIVUS International Limited, a wholly owned subsidiary of VIVUS, Inc.

2. VIVUS UK Limited, a wholly owned subsidiary of VIVUS International Limited

3. VIVUS BV Limited, a wholly owned subsidiary of VIVUS International Limited

4. VIVUS Ireland Limited, a wholly owned subsidiary of VIVUS International Limited

EXHIBIT 23.1

CONSENT OF INDEPENDENT PUBLIC ACCOUNTANTS

As independent public accountants, we hereby consent to the incorporation of our report dated March 20, 1998 on the consolidated financials statements of the company for the year ended December 31, 1997, by reference in this Form 10-K, into the Company's previously filed Registration Statement on Form S-8 (File No. 33-80362).

/s/ ARTHUR ANDERSEN LLP
Arthur Andersen LLP

San Jose, California
March 31, 1998

5
1,000

| | |
|---|---|
| 12-MOS | |
| DEC-31-1997 | |
| JAN-01-1997 | |
| DEC-31-1997 | |
| | 6,161 |
| | 52,955 |
| | 11,928 |
| | 137 |
| | 9,084 |
| | 81,627 |
| | 40,979 |
| | (4,517) |
| | 150,669 |
| | 26,739 |
| | 0 |
| | 0 |
| | 0 |
| | 33 |
| | 123,897 |
| 150,669 | |
| | 129,337 |
| | 138,337 |
| | 38,288 |
| | 38,288 |
| | 65,104 |
| | 0 |
| | 0 |
| | 39,801 |
| | 3,184 |
| | 36,617 |
| | 0 |
| | 0 |
| | 0 |
| | 36,617 |
| | 1.11 |
| | 1.03 |

For Purposes of this Exhibit, Primary Means Basic