

**ATTACHMENT Z:**

**ADDENDUM 7**



King County

**CHILDREN AND FAMILY JUSTICE CENTER  
CONTRACT NUMBER C00863C13**

**Addendum Number 7**

Proposers are hereby notified that the solicitation documents of said Contract have been amended as hereinafter set forth:

Ref.	Page or Drawing	Location and Description of Change
		<b>PART A – REQUEST FOR PROPOSAL</b>
7.1	2	<b>DELETE</b> “PART G - Draft Contract and General Conditions” and <b>REPLACE</b> with  “ <b>PART G – DESIGN-BUILD AGREEMENT</b> ”
		<b>PART G – DESIGN BUILD CONTRACT</b>
7.2	Part G	<b>DELETE</b> “PART G – DRAFT DESIGN BUILD CONTRACT” and <b>REPLACE</b> with:  DESIGN-BUILD AGREEMENT, dated March 20, 2014. See attached.
		<b>Part H - Division 1 General Requirements</b>
7.3	01 11 00 - 3	Section 01 11 00, paragraph 1.7.1 <b>DELETE</b> “...Article 6.6...” and <b>REPLACE</b> with “...Article 1...”
7.4	01 11 00 - 4	Section 01 11 00, paragraph 1.8.1 <b>DELETE</b> “Article 6.6” and <b>REPLACE</b> with “Article 7”
7.5	01 11 00 - 4	Section 01 11 00, paragraph 1.10.1 <b>DELETE</b> “...Article 5...” and <b>REPLACE</b> with “...Article 7.5...”
7.6	01 11 00 - 4	Section 01 11 00, paragraph 1.10.2 <b>DELETE</b> “...Article 5 of the Contract per day as fixed, agreed, liquidated damages...” and <b>REPLACE</b> with: “...Article 7.5.3 of the Contract for actual damages...”
7.7	01 31 00 - 2	Section 01 31 00, paragraph 1.3.1 <b>DELETE</b> “...Article 2...” and <b>REPLACE</b> with: “...Article 3.2...”

**Attached To This Addendum:**

- DESIGN-BUILD AGREEMENT, dated March 20, 2014.

This Addendum shall be attached to and form a part of the Contract Documents. All Proposers are reminded to acknowledge this Addendum on Form C of the RFP.

Date: March 21, 2014

*Darren R. Chernick*

Darren R. Chernick  
Contract Specialist

# **CHILDREN AND FAMILY JUSTICE CENTER Design Build Contract**

**Contract C00863C13**

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**Part G**

**Design-Build Agreement**  
Addendum 7

**March 2014**



**King County**

Department of Executive Services  
**Facilities Management Division**

**DESIGN-BUILD  
AGREEMENT**

**By and  
Between**

**KING COUNTY  
(Owner)**

**and**

**[\_\_\_\_\_] \_\_\_\_\_ (Design-Builder)**

**for the**

**KING COUNTY CHILDREN AND FAMILY  
JUSTICE CENTER**

**CONTRACT NO. C00863C13**

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## DESIGN-BUILD AGREEMENT

**THIS DESIGN-BUILD AGREEMENT** ("Agreement") for the King County Children and Family Justice Center is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2014 between King County, WA (the "Owner") and \_\_\_\_\_, a [corporation, joint venture] organized and existing under the laws of the State of \_\_\_\_\_ and authorized to do business in the State of Washington ("Design-Builder"). Owner and Design-Builder are referred to herein individually as a "Party" and, collectively, as the "Parties".

### **RECITALS**

**WHEREAS**, on or about August 23, 2013, Owner issued a Request for Qualifications ("RFQ") for the design and construction of the King County Children and Family Justice Center in Seattle, WA ("Project"); and

**WHEREAS**, on or about November \_\_\_\_, 2013, after evaluating the Statements of Qualifications submitted in response to the RFQ, Owner invited three proposers to submit Proposals ("Proposals") in response to Owner's Request for Proposals; and

**WHEREAS**, on or about December 13, 2013, Owner issued the Request for Proposal to the proposers, which Request for Proposal contained electronic, downloadable materials (collectively the "Request for Proposal Documents"); and

**WHEREAS**, on or about April 4, 2014, Design-Builder submitted its Proposal in response to the Request for Proposal; and

**WHEREAS**, after evaluating Design-Builder's Proposal in accordance with the procedures and criteria set forth in the Request for Proposal, Owner determined that Design-Builder was the top ranked finalist and the Owner's interests would be best-served by negotiating with Design-Builder and attempting to reach agreement on the terms of a design-build contract; and

**WHEREAS**, Owner and Design-Builder successfully concluded the negotiation process, resulting in Owner issuing a Notice of Intent to Award this Design-Build Agreement to Design-Builder.

**NOW, THEREFORE**, in consideration of the mutual covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, intending to be legally bound, the Parties agree as follows:



**ARTICLE 1**  
**AGREEMENT: INTERPRETATION: DEFINITIONS**

**1.1 Documents Included.** The "Contract" or "Contract Documents" include this Design-Build Agreement between Owner and Design-Builder (this "Agreement"), as modified or amended, and the following documents which are attached hereto or shall be attached hereto in accordance with the provisions of this Agreement (collectively, "Appendices"), and which are specifically incorporated and made a part of the Contract Documents by this reference:

- ☐ Construction Documents prepared and approved in accordance with Section 3.3.6.2
- ☐ Request for Proposal Documents, Parts A-D, and F-H (except Part E Reference Documents) and Appendix A, and any addenda to the Request For Proposal
- ☐ Design-Builder's Proposal, including exhibits thereto (as may be negotiated with Owner)
- ☐ Design-Builder's Statement of Qualifications dated October 17, 2013.
- ☐ Exhibits referenced in this Agreement

**1.2 Entire Agreement.** Those Contract Documents in existence as of the Agreement Date set forth the full and complete understanding of the Parties relating to the subject matter hereof as of the Agreement Date, and supersede any and all negotiations, agreements and representations made or dated prior thereto. Contract Documents may be supplemented, modified or otherwise amended after the Agreement Date by mutual written agreement or otherwise in accordance with the terms of this Agreement.

**1.3 Conflicting Provisions/Order of Precedence.** The Contract Documents are intended to be complementary and a requirement shown in one Contract Document is intended to be as binding as if included in all Contract Documents. In the event of any conflict or inconsistency between or among the Contract Documents, such conflict shall be resolved in accordance with the following order of precedence:

- (1) All written modifications and amendments to this Agreement;
- (2) This Agreement, including all exhibits and attachments, if any;
- (3) Written addenda to the Request for Proposal Documents
- (4) Request for Proposal Documents in the following descending order of precedence:
  - (a) Part B Facility Performance Standards
  - (b) Part C Facility Program
  - (c) Part D Room Data Sheets
  - (d) Division One General Requirements (Division One)
  - (e) Remainder of the RFP, except Part E
- (5) Construction Documents prepared and approved in accordance with Section 3.3.6.2 of this Agreement;
- (6) Design-Builder's Proposal (as may be negotiated with Owner);
- (7) Design-Builder's Statement of Qualifications dated

- October 17, 2013;  
(8) All other Appendices to this Agreement.

Either Party, upon becoming aware of any conflict or inconsistency between or among any of the Contract Documents, shall promptly notify the other Party in writing of such conflict or inconsistency, with the resolution of such conflict or inconsistency to be made by Owner and provided to Design-Builder in writing.

#### **1.4 Rules of Interpretation.**

**1.4.1 Terminology.** Unless otherwise required by the context in which any term appears:

- (1) Capitalized terms used in this Agreement shall have the meanings specified in this Article or defined elsewhere in this Agreement.
- (2) The singular shall include the plural and the masculine shall include the feminine and neuter.
- (3) References in this Agreement to "Articles," "Sections," or "Appendices" shall be to articles, sections, or appendices of this Agreement, and references to paragraphs shall be to separate paragraphs of the section or subsection in which the reference occurs.
- (4) The words "herein," "hereof," "hereto" and "hereunder" shall refer to this Agreement as a whole and not to any particular section or subsection of this Agreement; the words "include," "includes" or "including" shall mean "including, but not limited to."
- (5) All accounting terms not specifically defined herein shall be construed in accordance with Generally Accepted Accounting Principles in the United States of America, consistently applied.
- (6) Use of the word "and" herein shall be construed in the conjunctive form and shall not be construed to mean "or."
- (7) 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. Wherever in the Contract Documents an article, device, or piece of equipment is referred to in the singular manner, such reference shall apply to as many such articles as are shown on the drawings, or required to complete the installation.

**1.4.2 Headings.** The titles of the articles and sections herein have been inserted as a matter of convenience of reference only, and shall not control or affect the meaning or construction of any of the terms or provisions hereof.

**1.4.3 Joint Responsibility for Drafting.** This Agreement was negotiated and prepared by both Parties with advice of counsel to the extent deemed necessary by each

Party; the Parties have agreed to the wording of this Agreement; and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Agreement or any part hereof.

**1.5 Definitions.** For the purposes of the Contract Documents, the following words and terms shall have the meanings specified below:

**1.5.1 Agreement.** This executed Design-Build Agreement between Owner and Design-Builder. For the purposes of Division One, the terms "Contract and General Conditions" and "General Conditions" mean this Agreement.

**1.5.2 Agreement Date.** The date first set forth in the Preamble to this Agreement.

**1.5.3 Allowance Item.** A stated requirement of the Contract Documents whereby a specified sum of money is incorporated, or allowed, into the Contract Sum to sustain the cost of a stipulated material, assembly, piece of equipment, or other part of the construction contract. This allowance may be used in cases where the particular item or items cannot be fully described in the Contract Documents.

**1.5.4 Allowance Value.** A stated reasonable estimate of cost to be applied to an Allowance Item.

**1.5.5 Appendices.** The documents identified as appendices in Section 1.1.

**1.5.6 Application for Final Payment.** The Application for Payment submitted by Design-Builder after the Certificate of Final Acceptance has been issued and which meets all of the requirements set forth in Section 6.4.1 and Division One.

**1.5.7 Application for Payment.** A written request submitted by Design-Builder for payment of Work completed in accordance with the Contract Documents and approved Schedule of Values, supported by such substantiating data as Owner may require, as more fully described in Division One.

**1.5.8 Certificate of Final Acceptance.** Written certification by Owner that all conditions of Final Acceptance have been met.

**1.5.9 Change of Law.** Any of the following events, to the extent they materially increase Design-Builder's cost to perform the Work or materially adversely impacts Design-Builder's ability to achieve the Substantial Completion Date(s): (a) the enactment, adoption, promulgation, modification or repeal, after the Agreement Date, of any Governmental Rules; or (b) the imposition of any material condition on the issuance or renewal of any Governmental Approval after the Agreement Date; or (c) the failure to issue or renew any Governmental Approval; provided, however, that none of the following shall be a Change of Law: (i) any Governmental Rules issued, enacted, or adopted before the Agreement Date but which does not become effective until after the Agreement Date; (ii) the general requirements contained in any Governmental Approval at the time of application or issuance to comply with future laws, ordinances, codes, rules, regulations, or similar legislation; (iii) a change in applicable national or any other income or gross receipts tax law, enacted or effective after the Agreement Date; or any event identified in (a) through (c) above that was caused by Design-Builder's negligence,

willful misconduct, or failure to comply with its obligations under this Agreement.

**1.5.10 Change Order.** A Change Order may authorize an addition, deletion, or revision in the Work, a change to the Contract Sum, and/or an adjustment to the Contract Time. A Change Order is an executed written order to Design-Builder signed by Owner and Design-Builder representing their full, final, and complete agreement related to the following: (a) the scope of a change in the Work; (b) the amount of any adjustment to the Contract Sum, including all costs related to, resulting from, or affected by such change in Work including, but not limited to, all direct and indirect costs, overhead, profit, and all costs or damages associated with delay, inconvenience, disruption of schedule, impact, dilution of supervision, inefficiency, ripple effect, loss of efficiency or productivity, acceleration of work, lost profits, and any other costs or damages related to any work either covered or affected by the change in the Work, or related in any way, whether direct or indirect, to the acts, events or conditions giving rise to the change; (c) the extent of any adjustment to the Contract Time; and (d) any other amendment to this Agreement or other Contract Documents. A Change Order shall be considered to be a modification to this Agreement.

**1.5.11 Claim.** Design-Builder's exclusive remedy for resolving disputes with Owner regarding the terms of a Cost Proposal, Construction Change Directive, or Contractor Initiated Notice, as more fully set forth in Section 8.6 and Article 11.

**1.5.12 Construction Change Directive (CCD).** A written directive from Owner to Design-Builder to proceed with changed Work when the processing time for an approved Cost Proposal and Change Order would impact the Project.

**1.5.13 Construction Documents.** Documents developed by Design-Builder pursuant to Section 3.3.6.2 describing the requirements for construction of the Work.

**1.5.14 Contingency.** The financial sum set forth in Section 5.8.1.2 which is available for Design-Builder's exclusive use for unanticipated costs it incurs to complete the Work.

**1.5.15 Contract Documents.** This Design-Build Agreement between Design-Builder and Owner and the Appendices referenced in Section 1.1.

**1.5.16 Contract Sum.** The Guaranteed Maximum Price (GMP) payable to Design-Builder as set forth in Section 5.1, as such amount may be adjusted pursuant to the terms of this Agreement.

**1.5.17 Contract Time.** The number of calendar days allotted in the Contract Documents for Design-Builder to achieve Substantial Completion of the Work, including those days allotted for Substantial Completion of Phase 1A, Phase 1B, or any other designated portion of the Work.

**1.5.18 Contractor (Design-Builder) Initiated Notice (CIN).** A document, designated as a Contractor Initiated Notice, prepared by the Design-Builder requesting either (1) a change in Contract Sum; (2) a change in Contract Time; (3) a change in Contract Work; (4) a payment of money or damages; and/or, (5) any other relief arising out or relating to this Contract.

**1.5.19 Cost of the Work.** Means those costs specified in Section 5.5 that are reasonably and actually incurred by Design-BUILDER in the proper performance of the Work.

**1.5.20 Cost Proposal.** A written proposal submitted by the Design-BUILDER setting forth: (a) scope definition and costs related to a change in the Work; (b) details regarding the development of costs proposed for any adjustment to the Contract Sum; and (c) the extent of any adjustment to the Substantial Completion Date(s).

**1.5.21 Day(s) or day(s).** Unless otherwise specified, shall mean calendar day(s).

**1.5.22 Design-BUILDER.** Party entering into this Agreement with Owner in which the party agrees to both design and complete the Work as specified in this Agreement.

**1.5.23 Design Consultant.** A qualified, licensed design professional who is not an employee of Design-BUILDER, but is retained by Design-BUILDER, or employed or retained by anyone under contract with Design-BUILDER or Subcontractor, to furnish design services required under the Contract Documents.

**1.5.24 Design Verification Period.** The time period set forth in Section 3.3.5.1.

**1.5.25 Design Work Product.** All drawings, documents, specifications, and other documents and electronic data furnished by or through Design-BUILDER to Owner under this Agreement.

**1.5.26 Differing Site Conditions.** Means: (1) Subsurface or latent physical conditions at the Site which differ materially from those described or shown in the Contract Documents and not reasonably foreseeable based on the information available to the Design-BUILDER at the time of Proposal submission (Type I), or (2) Unknown physical conditions at the Site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in the construction activities of the character provided for in this Agreement and not reasonably foreseeable based on the information available to the Design-BUILDER at the time of Proposal submission (Type II).

**1.5.27 Equipment and Materials.** All of the equipment, materials, machinery, apparatus, structures, supplies and other goods required by the terms of this Agreement to complete the Work and are incorporated into the Project.

**1.5.28 Excusable Delay.** Those events defined in Section 10.7.

**1.5.29 Fee.** Design-BUILDER's Fee, which shall be the amount specified in Section 5.4.

**1.5.30 Final Acceptance.** The formal written acceptance issued to Design-BUILDER by Owner after Design-BUILDER has completed the requirements of the Contract Documents and achieved Final Completion as more fully set forth in Section 7.4.

**1.5.31 Final Completion.** Satisfaction of the conditions set forth in Section 7.4.1.

**1.5.32 Final Completion Date.** The date by which Design-BUILDER guarantees to achieve Final Completion of the Project, pursuant to Section 7.2.5.

**1.5.33 GMP Exhibit.** All documents utilized to develop Design-Builder's Guaranteed Maximum Price Proposal (Exhibit \_\_\_\_\_).

**1.5.34 GMP Proposal.** The Guaranteed Maximum Price proposal set forth in Design-Builder's Base Contract Price Proposal Form (RFP) (attached as Form C to the RFP)

**1.5.35 Governmental Approvals.** Any authorizations, consents, approvals, licenses, leases, rulings, permits, certifications, exemptions, or registrations by or with any Governmental Unit.

**1.5.36 Governmental Rules.** Any and all statutes, laws, regulations, ordinances, codes, rules, judgments, orders, decrees, directives, guidance documents, by-laws or requirements, or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Unit.

**1.5.37 Governmental Unit.** Any national, state or local government, any political subdivision thereof, or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative regulatory agency, authority, body or other entity having jurisdiction over the performance of the Work, the Project or the Parties.

**1.5.38 Guaranteed Maximum Price (GMP) or Owner's Budgeted GMP.** The Contract Sum specified in Section 5.1, which will limit the amount to be paid to Design-Builder in accordance with Article 6 and shall be complete compensation for all Work to be performed by Design-Builder under the Contract Documents, subject to increases or decreases by Change Order only as specifically provided in this Agreement.

**1.5.39 Hazardous Materials.** Any substance subject to regulation under the Washington Hazardous Waste Management Act (Ch. 70.105 RCW) and implementing regulations, any "hazardous substance" under the Washington Model Toxics Control Act (Ch. 70.105D RCW) and implementing regulations, and any "hazardous substance" or "hazardous waste" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 USC §§ 9602 et seq.) and implementing regulations, as these laws are amended from time to time; underground storage tanks, whether empty, filled or partially filled with any substance; asbestos; urea formaldehyde foam insulation; PCBs; and any other substance, waste, material or chemical deemed or defined as hazardous, toxic, a pollutant, contaminant, dangerous or potentially dangerous, noxious, flammable, explosive, or radioactive, the removal of which is required or the manufacture, preparation, production, generation, use, maintenance, treatment, storage, transfer, handling, or shipment of which is restricted, prohibited, regulated or penalized by any federal, state, county, municipal or other local governmental statute, regulation, ordinance or resolution as these laws are amended from time to time.

**1.5.40 LEED.** Leadership in Energy and Environmental Design.

**1.5.41 Liquidated Damages.** Delay damages payable to Owner pursuant to Section 7.5.

**1.5.42 Notice.** A written notice delivered to the designated representative of the applicable party (e.g., Owner's Representative and Design-Builder's Project Manager).

**1.5.43 Notice to Proceed.** Formal written notice that defines the date on which the Contract

Time begins to run provided by Owner to Design-Builder pursuant to Section 7.1.

**1.5.44 Notice to Proceed Date.** The date that Design-Builder receives the Notice to Proceed.

**1.5.45 Overhead.** Charges that may be incurred or allocated in support of this Agreement but are not part of the cost of directly performing a physical construction activity of the Work. Overhead includes site or field overhead and home office overhead.

**1.5.45.1 Site or Field Office Overhead.**

Site or field office overhead costs are those indirect costs that are necessary for the prosecution of the Work, and include, but are not limited to the following: (a) Project superintendence, including salaried staff with higher level responsibilities, such as planning the day's or week's tasks; allocating labor and equipment; or managing materials; (b) the work of support staff related to administration of the Project; (c) the lease or rental rates and maintenance of Project jobsite facilities, such as office trailers and storage facilities; (d) equipment assigned to the Project for the duration, such as superintendents' vehicles, surveyors' vehicles, computers, and yard equipment (overhead equipment); (e) services, such as utilities, office equipment, communications (such as email, internet, phones, facsimile, mail courier service, copying) petty cash, office supplies, sanitary provisions, and safety supplies; (f) hand and other small tools provided by Design-Builder for its workforce's use; and (g) travel, meal and lodging costs associated with Project superintendence and support staff.

**1.5.45.2. Home Office Overhead.**

Home office overhead costs are those costs that include all general home office expenses, and include but are not limited to the following:(a) officer and office salaries and related payroll taxes and benefits; (b) costs of home office occupancy and maintenance; (c) all home office support services, such as utilities, office machines, computers, and related items and support; (d) business taxes; and licenses; and (e) and all such other costs necessary to operate the business entity. Home office overhead includes unabsorbed home office overhead.

**1.5.45.3. Other Overhead Costs.**

Regardless of whether treated as site or field overhead or as home office overhead, costs of any and all bonds, insurance(s), and taxes associated with this Agreement not specifically reimbursed at the actual cost under Section 5.5. are to be considered as Overhead. All such items as those identified above in subsection 1. and subsection 2. are to be treated as Overhead for this purpose no matter how the Design-Builder chooses to account for them in its books of account. Under no circumstances shall Owner pay Design-Builder for direct or allocated costs or charges for officer bonus and profit sharing, project personnel bonuses, charitable contributions, income taxes, or any costs relating to illegal activity.

**1.5.46 Owner.** King County, a municipal corporation and home rule charter county of the state of Washington.

**1.5.47 Owner's Design-Build Consultant.** The firm engaged by Owner and identified to Design-Builder in accordance with Section 2.5.

**1.5.48 Owner's Project Criteria.** The Owner's performance and programming criteria

identified in the RFP, including Part B, "Facility Performance Standards", Part C, "Facility Program", and Part D, "Room Data Sheets".

**1.5.49 Owner's Representative.** The individual designated by Owner pursuant to Section 2.3, who shall have the responsibility and authority specifically delegated to such individual by Owner and made known in writing to Design-Builder. The Owner's Representative may be referred to as the Project Representative elsewhere in the other Contract Documents.

**1.5.50 Owner's Separate Contractors.** Those contractors identified in Section 2.4.

**1.5.51 Performance Guarantee.** Design-Builder's guarantee for energy, operations, and performance set forth in Section 3.14.

**1.5.52 Performance Guarantee Period.** The time period for performance assurance and measurement and verification, which shall be for three (3) years from the date of Notice to Proceed with Construction of Phase 1B.

**1.5.53 Prior Occupancy.** Owner's use of all or parts of the Project before Substantial Completion as more fully described in Section 7.3.4.

**1.5.54 Project.** The King County Children and Family Justice Center, located in Seattle, WA.

**1.5.55 Project Manager or Design-Builder's Representative.** The Project Manager designated by Design-Builder and made known in writing to Owner, who shall be authorized to act on behalf of Design-Builder as more fully set forth in Section 3.2.1. The Project Manager may also be referred to as the Design-Builder's Representative.

**1.5.56 Project Schedule.** The specified Critical Path Method (CPM) schedule identified in Section 25.1 and Division One, updated pursuant to the Contract Documents.

**1.5.57 Proposal.** Design-Builder's response to the RFP.

**1.5.58 Punchlist.** The list of minor or incidental Work, submitted by Design-Builder and approved by Owner, which remains to be completed after Substantial Completion, and updated thereafter as herein provided, which shall be only those items of Work: (a) that do not preclude the Project from operating or functioning as it was designed and intended to operate; (b) the absence of which does not create any occupational hazard or hazard to the Work; and (c) the completion of which will not unreasonably interrupt or interfere with Owner's ability to occupy and conduct its operations.

**1.5.59 Request for Proposal.** The Design-Build Request for Proposal for the King County Children and Family Justice Center, No. C00863C13.

**1.5.60 Retainage.** Funds withheld by Owner pursuant to RCW 60.28.011 and Section 6.3.3.

**1.5.61 Savings.** The amount by which the sum of the Design-Builder's Cost of the Work and Fee is less than the GMP, as such GMP may have been adjusted over the course of the



Project.

**1.5.62 Schedule of Values.** A written breakdown allocating the total Contract Sum to each principal category of work.

**1.5.63 Not Used.**

**1.5.64 Site.** The location of the Project to be constructed by the Design-Builder pursuant to this Agreement.

**1.5.65 Subcontractor.** Any person or entity, including any vendor or Design Consultant, with whom Design-Builder has entered into any contract to perform any part of the Work, and shall specifically include any person, entity, or subconsultant and supplier at any tier with whom any Subcontractor has further contracted any part of the Work.

**1.5.66 Substantial Completion.** The stage in the progress of the Work of Phase 1A or Phase 1B, as applicable, or designated portion of the Work where: (a) Owner has full and unrestricted use and benefit of the Work for the purpose intended; (b) all systems and parts of the Work are functional as required by the Contract Documents; (c) all utilities are connected and operating normally; (d) only minor incidental work or correction or repair remains to complete all Contract requirements; and, (e) Design-Builder has provided all occupancy permits and easement releases.

**1.5.67 Substantial Completion Date(s).** The dates by which Design-Builder guarantees to achieve Substantial Completion, pursuant to Section 7.2.

**1.5.68 Value Engineering Change Proposal ("VECP").** A proposal developed and documented by Design-Builder which: (a) would modify or require a change in a requirement of any Contract Document; and (b) reduces the cost of the Project without impairing essential functions or characteristics of the facility (including service life, economy of operation, ease of maintenance, desirability and safety) as determined by Owner, in its sole discretion, and provided that it is not based solely upon a change in quantities.

**1.5.69 Work.** All administrative, design, procurement, supply, installation, construction, supervision, management, testing, labor, equipment and materials and other duties and services set forth in and performed in accordance with the requirements of this Agreement, including the Project Criteria, and, to the extent not covered by this Agreement, in accordance with customarily accepted design, construction, and operations standards for governmental office facilities in the United States necessary to provide a complete, fully functional, and operational project. **Base Work** shall mean the Work for which the Design-Builder has proposed to complete as part of the original GMP (Section 5.5.1-5.5.23) and shall not include any additive Change Order Work.

## **ARTICLE 2** **RESPONSIBILITIES OF** **OWNER**

**2.1 Owner's Responsibilities.** Owner shall be responsible for the following matters and

actions:

**2.1.1 Access to Site.** Provide reasonable rights of ingress and egress to and from the Site for Design-Builder and all Subcontractors, subject to Section 3.5.5 below and Site access requirements in Division One. The Site shall be available to Design-Builder for all aspects of the Work on the Notice to Proceed Date.

**2.1.2 Not Used.**

**2.1.3 Owner's Governmental Approvals.** Obtain, or cause to be obtained, City of Seattle zoning amendments and a Mitigated Determination of Non-Significance, all of which shall be the only Governmental Approvals Owner will be responsible for obtaining, or causing to be obtained, under the Contract Documents. Owner shall provide, or cause to be provided, reasonable cooperation and assistance to Design-Builder in obtaining Governmental Approvals for which Design-Builder is responsible. Owner's reasonable cooperation and assistance to Design-Builder shall not relieve Design-Builder of its obligations to obtain the Governmental Approvals for which Design-Builder is responsible.

**2.1.4 Relevant Information for Design-Builder.** Provide, or cause to be provided, information reasonably requested by Design-Builder that is within Owner's possession or control to enable Design-Builder to fulfill its obligations pursuant to the Contract Documents.

**2.1.5 Not Used.**

**2.1.6 Other Items of Owner Supply.** Provide the other items of equipment, materials, and services specifically identified in the Contract Documents as being the responsibility of Owner.

**2.1.7 Payment Obligations to Design-Builder.** Pay to Design-Builder the Contract Sum pursuant to the terms of this Agreement.

## **2.2 Authority**

**2.2.1 County Executive or Designee.** Unless the Owner, in writing, indicates otherwise, the authority to (1) commit to or bind the Owner to any Change Orders or change in Contract Work, Contract Sum and/or Contract Time; or (2) sign the Contract or Change Orders rests solely in the King County Executive or its designee.

## **2.3 Owner's Representative.**

**2.3.1 Notice of Delegation.** The Owner shall provide the Design-Builder with a written Notice of delegation of authority, which identifies the person who has authority to sign Change Orders and/or bind the Owner to changes in the Work, Contract Sum, and Contract Time. In the event the Owner's Representative is no longer assigned to the Contract, the County shall notify the Design-Builder in writing of the change providing the name of the new Owner's Representative and effective date of the change.

**2.3.2 Authority of Owner's Representative.** The Owner's Representative shall have the authority to administer the Contract. Administration of the Contract by the Owner's Representative includes but is not limited to:

1. Receiving all correspondence and information from the Design-Builder;
2. Issuing Construction Change Directives;
3. Issuing Request for Change Proposals, as provided in Section 8.2;
4. Responding to requests for information directed to the Owner by the Design-Builder;
5. Reviewing the Schedule of Values, Project Schedules, Submittals, testing and inspection reports, substitution requests, and other documentation submitted by the Design-Builder;
6. Negotiating Request for Change Proposals, Contractor Initiated Notices and Change Orders;
7. Recommending Change Orders for approval by the King County Executive or its designee;
8. Issuing decisions with respect to Contractor Initiated Notices and Claims;
9. Processing payment requests submitted by the Design-Builder, and recommending payment;
10. Monitoring the quality of the Work, rejecting noncompliant Work, and recommending acceptance of the Work;
11. Transmitting executed Change Orders, amendments, and other Contract correspondence to the Design-Builder, and
12. Performing all other contract administrative functions.

**2.3.3 Correspondence, Questions and Documentation.** All correspondence, questions, and/or documentation shall be submitted to the Owner's Representative.

**2.4 Owner's Separate Contractors.** Owner is responsible for all work performed on the Project or at the Site by separate contractors under Owner's control. Owner shall require its separate contractors to cooperate with, and coordinate their activities with Design-Builder so as not to interfere with, Design-Builder's ability to timely to complete the Work consistent with the Contract Documents.

**2.5 Engagement of Owner's Design-Build Consultant.** Owner has retained a construction management firm, OAC Services, Inc., to assist Owner in carrying out designated project management and oversight services for which Owner is responsible. The Owner's Design-Build Consultant will assist the Owner's Representative to represent Owner, but has no authority to bind Owner to an adjustment in the Contract Sum or Contract Time.

### **ARTICLE 3** **RESPONSIBILITIES OF DESIGN-BUILDER**

#### **3.1 Design-Builder's General Obligations.**

**3.1.1 Obligation to Perform the Work.** Design-Builder shall fully perform all the Work in accordance with and subject to the terms and conditions of the Contract Documents.

**3.1.2 Responsibility for Subcontractors.** Design-Builder shall be responsible to Owner for all acts and omissions of Design-Builder, any Subcontractor, and their respective employees, agents and representatives.

**3.1.3 Incorporation Into Subcontractor Contracts.** Design-Builder shall incorporate all obligations and understandings of the Contract Documents into all subcontracts and require that such obligations and understandings flow down to all subcontracts of any tier.

### **3.2 Design-Builder's Representative and Key Personnel.**

**3.2.1 Design-Builder's Representative.** Design-Builder shall designate, by written notice to Owner on or before the Notice to Proceed, an individual ("Project Manager") who shall be authorized to act on behalf of Design-Builder, with whom Owner may consult at all reasonable times, who shall have full supervision over the completion of the Work, who shall be designated to act as the primary point of contact with Owner regarding all matters relating to the Work, and who shall have full authority to bind Design-Builder except to the extent such authority is limited as described in such notice. If the Project Manager's authority is limited, the notice will identify such persons within Design-Builder's organization who do have full authority to bind Design-Builder for all purposes under the Contract Documents. Design-Builder may, at any time by written notice to Owner, change the persons, if any, previously identified as having authority beyond that of the Project Manager. Any changes in the Project Manager shall require Owner's prior written approval.

**3.2.2 Project Management: Key Personnel.** Design-Builder shall provide management for the Work in accordance with the organization chart set forth in the Statement of Qualifications and RFP Proposal, a final, conformed copy of which is attached hereto as Exhibit \_\_\_\_ (Key Personnel). Design-Builder acknowledges that the experience and skill of the Key Personnel was an important factor in determining the responsibility of the Design-Builder and continues to be an important factor to successful and timely completion of the Project. Except in the event that a Key Personnel individual is no longer employed (or otherwise under the direction and control) by the Design-Builder, none of the Key Personnel may be withdrawn from the Project without prior written approval of Owner. Design-Builder will provide Owner with at least thirty (30) days written notice of an intent to withdraw any Key Personnel and shall provide Owner a copy of the resume of any proposed replacement Key Personnel for Owner's review and acceptance.

### **3.3 Design Services.**

**3.3.1 General.** Design-Builder has full responsibility for the design of the Project in accordance with the Contract Documents. Design-Builder shall, consistent with applicable state licensing laws, provide through qualified, licensed design professionals employed by Design-Builder, or procured from qualified, independently-licensed Design Consultants, those design services necessary for Design-Builder to perform and complete the Work consistent with the Contract Documents. Such design services include, without limitation, those architectural and engineering services required for the preparation of Construction Documents and any other design submittal required under the Contract Documents.

**3.3.2 Licenses.** Any design professional performing design, engineering, architecture, or landscape architecture services on the Project shall be appropriately licensed as required

by the laws of the State of Washington.

**3.3.3 Standard of Care.** The standard of care for all design services performed by or through Design-Builder on the Project shall be the care and skill ordinarily used by members of the design profession on projects of similar size, nature and complexity, practicing under similar conditions at the same time and locality of the Project. Notwithstanding the preceding sentence, Design-Builder agrees that if the Contract Documents contain performance standards for any aspect of the Work, the design services shall be performed to achieve such standards notwithstanding the standard of care set forth in the preceding sentence.

**3.3.4 Design Consultants Not Third Party Beneficiaries.** No Design Consultant is intended to be, nor shall any Design Consultant be deemed to be, a third party beneficiary of this Agreement. Owner is intended to be and shall be deemed a third-party beneficiary of all contracts between Design-Builder and any Design Consultant.

**3.3.5 Design Verification and Identification of Scope Issues.**

**3.3.5.1 Design Verification Period.** During the one hundred twenty (120) day period following the Notice to Proceed for Phase 1A ("Design Verification Period"), Design-Builder shall perform the tasks set forth below.

**3.3.5.1.1 Design-Builder Verification.** Design-Builder shall thoroughly review and compare all of the then-existing Contract Documents, including the RFP and any incorporated documents and the Proposal, to verify and validate Design-Builder's proposed design concept for the entire Project, and identify any errors, omissions, inconsistencies, constructability problems, Site conditions or any other defects or concerns of any kind (collectively referred to as "Scope Issues") that may affect Design-Builder's ability to complete its proposed design concept within the Contract Sum and Substantial Completion Date(s). If Design-Builder finds any Scope Issues, it shall notify Owner in writing of such findings within the Design Verification Period. Upon such notice, the Parties shall promptly meet and confer to discuss the resolution of such issues. If a Scope Issue could not have reasonably been identified by Design-Builder prior to the Agreement Date, and if resolution of the issue materially impacts Design-Builder's price or time to perform the Work, Design-Builder may submit a Contractor Initiated Notice, and Owner shall have the right to act upon such request, in accordance with Article 8. Notwithstanding anything to the contrary in the Contract Documents or as a matter of law, Design-Builder shall have the burden of proving that the alleged Scope Issue could not have been reasonably identified prior to the Agreement Date and that such Scope Issue materially impacts its price or time to perform the Work.

**3.3.5.1.2 Owner Confirmation of Design Concept.** Design-Builder shall meet with Owner, including any stakeholders identified by Owner, to review, confirm, clarify or refine Design-Builder's proposed design concept for the entire Project. This may include subjects and activities such as, space planning, pricing, selection of alternates or value engineering to finalize the conceptual design.

**3.3.5.2 Design-Builder's Assumption of Risk of Scope Issues.** Except for those changes made pursuant to Section 3.3.5.1.2, the Parties acknowledge that

the purpose of the Design Verification and Reconciliation Period is to enable Design-Builder to identify those Scope Issues, if any, that could not reasonably be identified prior to the Agreement Date. By executing this Agreement, Design-Builder acknowledges that the Design Verification Period is a reasonable time to enable Design-Builder to identify Scope Issues that will materially impact Design-Builder's price or time to perform the Work. Following completion of the Design Verification Period, with the sole exception of those Scope Issues identified during the Design Verification Period and identified to Owner in accordance with Section 3.3.5.1 or changes agreed to in accordance with this Section 3.3.5.2, the Parties agree as follows:

- (1) Design-Builder shall assume and accept all risks, costs, and responsibilities of any Scope Issue arising from or relating to the Contract Documents, including but not limited to conflicts within or between the RFP Documents and Proposal;
- (2) Design-Builder shall be deemed to have warranted that the Contract Documents existing as of the end of the Design Verification Period are sufficient to enable Design-Builder to complete the design and construction of the Project without any increase in the Contract Sum or extension to the Substantial Completion(s); and
- (3) Owner disclaims any responsibility for, and Design-Builder waives its right to seek any increase in the Contract Sum or extension to the Substantial Completion Date(s) for, any Scope Issue associated with any of the Contract Documents.

### **3.3.6 Design Development Services.**

**3.3.6.1 Interim Design Submissions.** Upon receiving written authorization from Owner to proceed, Design-Builder shall prepare and submit to Owner all interim design submissions for the Work as required by and in accordance with Division One. On or about the time of the scheduled design submissions, Design-Builder and Owner shall meet and confer about the submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any significant changes or deviations from the Contract Documents, or, if applicable, previously submitted design submissions. Minutes of the meetings will be maintained by Design-Builder and provided to all attendees for review. Following a design review meeting, Owner shall review the interim design submissions and respond in a time that is consistent with the turnaround times agreed upon by the Parties and set forth in the Project Schedule. If the Design-Builder is required to resubmit an interim design submission, the Owner shall note any exceptions and, or inform Design-Builder if further refinement of the interim design submissions is required.

**3.3.6.2 Construction Documents.** After Owner's review of the interim design submissions is complete, Design-Builder shall prepare and submit to Owner Construction Documents setting forth in detail drawings, specifications, and such other materials describing the requirements for construction of the Work pursuant to the Project Criteria. The Construction Documents shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in design

review meetings. The Parties shall have design review meetings as needed to discuss, and Owner shall review the Construction Documents and respond, in accordance with the procedures set forth in Section 3.3.6.1 above and Division One. Once all of Owner's exceptions have been resolved, Design-Builder shall proceed with procurement and construction in accordance with those reviewed Construction Documents for that portion of the Work covered by the Construction Documents, as may be allowed by Section 3.3.6.4.

**3.3.6.3 Owner's Review.** Owner's review of interim design submissions and the Construction Documents is for the purpose of mutually establishing a conformed set of Construction Documents compatible with the requirements of the Work, including the Project Criteria. Neither Owner's review nor approval of any interim design submissions and/or Construction Documents shall be deemed to transfer any design liability from Design-Builder to Owner, and Design-Builder shall remain responsible for meeting all obligations required under the Contract Documents.

**3.3.6.4 Design-Builder's Ability to Proceed with Procurement and Construction.** Subject to written agreement with Owner and to the extent not prohibited by the Contract Documents, Design-Builder may prepare design submittals and Construction Documents for a portion of the Work to permit procurement and construction to proceed on that portion of the Work prior to completion of the Construction Documents for the entire Work.

**3.3.6.5 Electronic Files.** All design submissions of Design-Builder shall be forwarded to Owner in electronic and hard-copy format pursuant to the requirements of the Contract Documents.

#### **3.4 Site Conditions.**

**3.4.1 Inspection of Site Conditions Prior to Agreement Date.** Subject to the Design Verification Period in Section 3.3.5, Design-Builder has, as of the Agreement Date, ascertained the nature and location of the Work, the character and accessibility of the Site, the existence of obstacles to construction, the availability of facilities and utilities, the location and character of existing or adjacent work or structures, the surface and subsurface ground and soil conditions, and other general and local conditions (including labor) which might affect its performance of the Work or the cost thereof.

**3.4.2 Reference Documents.** Owner has made available to the Design-Builder Site-related Reference Documents identified in Part E of the RFP. As discussed in the RFP, Reference Documents contained within this list are being made available solely as additional information to the Design-Builder. Such reference materials are not to be considered Contract Documents and do not relieve the Design-Builder of its duties and responsibilities under this Contract nor constitute any representation or warranty by the Owner as to the Site or geotechnical conditions or other matters related to the Project. Design-Builder acknowledges that any reliance on these reference materials shall be at the Design-Builder's own technical and commercial risk.

**3.4.3 Inspection of Site Conditions After the Notice to Proceed.** Design-Builder will, after the Notice to Proceed, undertake such testing, inspections and investigations as may be necessary to perform its obligations under the Contract Documents, including

additional geotechnical evaluations. If Design-Builder intends to conduct additional geotechnical evaluations to supplement or corroborate the information contained in the Reference Documents, it shall do so during the Design Verification Period.

**3.4.4 Assumption of Risk for Site Conditions During Construction**. Based on the Site investigations and other inquiries made by the Design-Builder prior to the execution of this Agreement and during the Design Verification Period of the Project, the Design-Builder assumes the risk of all reasonably ascertainable surface and subsurface or reasonably ascertainable latent physical conditions encountered by the Design-Builder during the construction of the Project that may affect the Design-Builder's excavation, or the Design-Builder's construction costs and/or schedules. The Design-Builder agrees that any such surface or subsurface or latent physical conditions revealed during excavation or construction that is considered reasonably ascertainable will not be considered a Differing Site Condition. If the Design-Builder believes that a material or obstacle discovered during excavation, demolition and/or construction was not known or reasonably ascertainable and a Differing Site Condition exists which impacts Contract Sum and/or Contract Time, the Design-Builder shall follow the procedures in Section 3.4.5.

**3.4.5 Differing Site Conditions**. If Design-Builder encounters a Differing Site Condition, Design-Builder shall immediately provide written notice to Owner of such condition. Design-Builder shall provide such immediate notice before the Differing Site Condition has been disturbed or altered. If Design-Builder seeks an adjustment in the Contract Time or Contract Sum, then not more than fourteen (14) days after Design-Builder's initial written notice, Design Builder shall submit a Contractor Initiated Notice to Owner as provided in Section 8.6. Owner shall investigate the alleged Differing Site Conditions and respond to Design-Builder in accordance with the procedures in Section 8.6. Design-Builder shall not disturb the condition until receipt of written authorization from the Project Representative that work can resume at the location of the alleged Differing Site Condition. Design-Builder shall continue with performance of all other Work.

**3.5 Construction-Related Services**. Except as otherwise expressly set forth in the Contract Documents, Design-Builder shall provide the equipment and materials, personnel and supervision, tools, equipment and materials and the services required, and shall be responsible for completing the Work in accordance with the terms of the Contract Documents. In furtherance of the foregoing (and not as a limitation thereof), Design-Builder shall:

**3.5.1 Handling of Equipment and Materials**. Provide for the handling of equipment and materials and construction equipment and materials, including, as necessary, inspection, expediting, shipping, unloading, receiving, customs clearance and transportation to the Site and storage until Substantial Completion, provided, however, that such responsibility shall continue after Substantial Completion as required for Design-Builder to perform its Punchlist and warranty obligations.

**3.5.2 Quality of Equipment and Material**. Ensure that all equipment and materials incorporated into the Work shall be new (unless otherwise agreed by Design-Builder and Owner), of the most suitable grade for the purpose intended, and shall meet the requirements of the Contract Documents and all applicable Governmental Approvals. References in the RFP Documents to equipment and materials, articles or patented processes by trade name, make or catalog number, shall be regarded as establishing a standard of quality expected by Owner. Unless stated otherwise in the Project Criteria,



Design-Builder may use equipment and materials, articles, or patented processes that are equal to those named in the RFP Documents, subject to the prior written approval of Owner, which approval shall not be unreasonably withheld. Design-Builder shall use equipment and materials for which spare parts or replacements (or reasonable substitutes) are commercially available and obtainable under normal circumstances without undue delay or difficulty.

**3.5.3 Construction Means, Methods.** Be solely responsible for all construction means, methods, techniques, sequences, procedures, safety and security programs in connection with the performance of the Work, irrespective of approval or consent of Owner's Representative, and take full responsibility for the adequacy, stability and safety of all Site operations.

**3.5.4 Care, Custody and Control/Risk of Loss of Design-Builder.** Have full responsibility for care, custody, and control of the Work (including all equipment and materials in connection therewith, whether incorporated therein or located on or off the Site) and bear the risk of loss of the Work in each case until Substantial Completion.

**3.5.5 Site Security.** Procure, supervise, and provide the security measures at the Site set forth in the Contract Documents.

**3.5.6 Construction Utilities and Facilities at Site.** As further described in Division One, cause to be provided, power, communication system, water (including potable water), waste water lines and sewer lines required for the performance of the Work and provide, within the Site, temporary roads, office furniture, telephone facilities, secretarial services, drinking water and sanitary facilities to be used by Design-Builder and/or Subcontractors in the performance of the Work. Such obligations shall include obtaining and registering all required easements and obtaining all required Governmental Approvals for power lines, telephone lines, gas lines, waste water lines, sewer lines and lines for other utilities, whether on or off the Site. Design-Builder also shall install and maintain all meters required to measure the amount of each activity used for the purpose of determining charges. Prior to the date of Final Acceptance, Design-Builder shall remove all temporary connections, distribution lines, meters, and associated equipment and materials.

**3.5.7 Maintenance of Site.** As further described in Division One, keep the Site free on a daily basis from accumulation of waste materials, rubbish, and other debris resulting from performance of the Work by depositing same in waste receptacles furnished by Design-Builder, which receptacles shall be removed and replaced on an as-needed basis. Design-Builder shall make special provisions, in accordance with applicable Governmental Rules, for storing and removing any Hazardous Materials waste generated during construction. Within thirty (30) days after the Substantial Completion Date for Phase 1A or Phase 1B, as applicable, Design-Builder shall remove from the portion of the Site for that phase, in conformity with applicable Governmental Rules, all such waste materials, rubbish and other debris, as well as all tools, construction equipment and materials, machinery and surplus material (other than surplus material acquired by Owner and other than materials, tools and construction equipment necessary to complete Punchlist items). Before Final Completion, after completion of the Punchlist items, Design-Builder shall remove all remaining waste and rubbish generated during performance of Punchlist work, and all remaining materials, tools and construction equipment, and leave the Site in neat, clean and usable condition. If Design-Builder fails to clean up as provided herein, and after reasonable notice from Owner, Owner may do so and the cost thereof shall be

charged to Design-Builder.

**3.5.8 Access to Work.** Provide Owner, Owner's Design-Build Consultant, and Owner's Representative access to the Work in progress wherever located.

**3.5.9 Notification of Excavation.** Before commencing any excavation, notify Owner's Representative and shall provide notice of the scheduled commencement of excavation to all owners of underground facilities or utilities, through locator services. The term "excavation" for purposes of the preceding sentence means an operation in which earth, rock, or other material on or below the ground is moved or otherwise displaced by any means, except the tilling of soil less than twelve (12) inches in depth for landscape purposes.

**3.5.10 Protection of Existing Structures, Equipment, Vegetation.** Protect from damage all existing structures, equipment, improvements, utilities, and vegetation at or near the Site. Design-Builder shall only remove trees when specifically authorized to do so, and shall protect vegetation that will remain in place. Design-Builder shall repair any damage, including that to the property of a third party, resulting from failure to comply with the requirements of the Contract Documents or failure to exercise reasonable care in performing the Work. If Design-Builder fails or refuses to repair the damage promptly, Owner may have the necessary work performed and charge the cost to Design-Builder.

**3.5.11 Cooperation with Owner's Separate Contractors.** Reasonably cooperate with Owner's Separate Contractors and carefully adapt scheduling and performance of the Work in accordance with these Contract Documents to reasonably accommodate the work performed by Owner's Separate Contractors.

**3.5.12 Maintaining Documents at Site.** Keep on the Site in such form as required by Owner, a copy of all Contract Documents, reviewed shop drawings, Governmental Approvals, and any other documents specified in Division One.

**3.5.13 Testing and Inspections.** Make arrangements for all such tests, inspections, and Government Approvals as are necessary or required to ensure that the Work conforms to the requirements of the Contract Documents, with the testing agency designated by the Owner, or with the appropriate Governmental Unit. Design-Builder shall: (a) give Owner timely notice of when and where tests and inspections are to be made; and (b) maintain complete inspection records and make them available to Owner.

### **3.6 Responsibility for Health, Safety and First Aid.**

**3.6.1 Responsibility for Safety.** Design-Builder shall be fully responsible for the safety (the term "safety" as used in this Section 3.6 being deemed to include working conditions that either are free from known health hazards or provide safeguards against such health hazards) of all persons employed by Design-Builder, Subcontractors, their agents or invitees, or any other person who enters the Site for any purposes relating to Design-Builder's performance of its obligations under the Contract Documents. Design-Builder shall have the right to refuse entry onto the Site by, or to direct removal from the Site of, any employees, agents or invitees of Owner or Owner's Design-Build Consultant who fail to comply with Design-Builder's safety requirements at the Site. Design-Builder promptly shall notify Owner of any incidents in which such refusal or

removal occurs.

**3.6.2 Compliance with Safety and Health Rules.** Design-Builder shall take all measures to ensure that the employees, agents and invitees of itself and all Subcontractors, while engaged in the Work comply with and adhere to: (a) all applicable Governmental Rules, including those promulgated by WISHA, relating to safety and health; and (b) Design-Builder's accident prevention program and safety procedures and rules for the Work. For these purposes, Design-Builder shall:

- (1) Follow WISHA regional directives and provide safety programs that will require an accident prevention and hazard analysis plan for Design-Builder and each Subcontractor on the Site.
- (2) Provide adequate safety devices and measures, including but not limited to, the appropriate safety literature, notice, training, permits, placement and use of barricades, signs, signal lights, ladders, scaffolding, staging, runways, hoist, construction elevators, shoring, temporary lighting, grounded outlets, wiring, hazardous materials, vehicles, construction processes, and equipment required by Chapter 19.27 RCW, State Building Code (International Building, Electrical, Mechanical, Fire, and Plumbing Codes); Chapter 212-12 WAC, Fire Marshal Standards, Chapter 49.17 RCW, WISHA; Chapter 296-155 WAC, Safety Standards for Construction Work; Chapter 296-65 WAC; WISHA Asbestos Standard; WAC 296-62-071, Respirator Standard; WAC 296-62, General Occupation Health Standards, WAC 296-24, General Safety and Health Standards, Chapter 49.70 RCW, and Right to Know Act.
- (3) Post all Governmental Approvals in a conspicuous location at the Site.
- (4) Provide any additional measures that Owner determines to be reasonable and necessary for ensuring a safe environment in areas open to the public; provided, however, that nothing in this Agreement shall be construed as imposing a duty upon Owner to prescribe safety conditions relating to employees, general public, or agents of Design-Builder, or as constituting any express or implied assumption of control or responsibility over Site safety.

**3.6.3 Safety Program.** Prior to conducting any work at the Site, and in accordance with Division One and any other requirements of the Contract Documents, the Design-Builder shall prepare and provide to the Owner a written Site specific safety program demonstrating the methods by which all applicable safety requirements of this Contract will be met. The Design-Builder shall ensure its Subcontractors have a written "safety program" or formally adopt the Design-Builder's Site specific safety program. Owner's review of such programs shall not be deemed to constitute approval or acceptance thereof and shall not relieve or diminish the Design-Builder's sole responsibility for Site safety.

**3.6.4 Restriction to Site.** Design-Builder shall confine to the Site the activities of its employees, agents and invitees, and those employees, agents and invitees of all Subcontractors and prohibit such personnel from entering upon any other properties or facilities of Owner except as specifically authorized by Owner's Representative.

**3.6.5 Preventative Measures.** Design-Builder shall take all reasonable measures to prevent injury to persons or damage to any property on the Site, or in the vicinity thereof, as a result of Design-Builder's or Subcontractors' performance of the Work, whether or not a hazardous or potentially hazardous condition exists due to the prosecution of the Work or due to work or activities being performed by Owner or others. Such reasonable measures shall include: (a) prevention of fires; (b) furnishing of temporary construction fences, flagmen, warning signs, and barricades; (c) elimination of excessive dust or smoke emission; (d) protection of overhead utility lines, underground pipes, conduit, or cables; and (e) protection of existing Work or work in progress by Owner or others.

**3.6.6 First Aid.** Design-Builder shall arrange to supply first aid to anyone who may be injured in connection with the Work.

**3.6.7 Safety Coordinator.** Design-Builder shall designate a Safety Coordinator at the Site. The Safety Coordinator shall be on the Site at all times that any Work is being performed and shall have no additional responsibilities other than safety. The Safety Coordinator shall be responsible for safe working conditions and compliance with all applicable Governmental Rules relating to safety and health

**3.6.8 Breach of Safety Obligations.** Failure of Design-Builder to perform the obligations set forth in this Section 3.6 may be deemed by Owner to constitute a material default under Section 15.1.6.

### **3.7 Hazardous Materials.**

**3.7.1 Design-Builder's Responsibilities.** Design-Builder is responsible for any Hazardous Materials encountered at the Site, including but not limited to hazardous building materials and contaminated soil and groundwater. Design-Builder shall review existing information to become familiar with Hazardous Materials at the Site and shall be responsible for all subsequent investigations necessary to perform the Work, including but not limited to further characterization of building materials and soil and groundwater as needed to determine management and disposal options.

**3.7.2 New Hazardous Materials; Notice and Plan.** Upon encountering any new Hazardous Materials not previously identified in the existing information made available by the Owner before the Agreement Date, Design Builder will stop Work immediately in the affected area and stop any Work that may hinder or preclude investigation and remediation of the Hazardous Materials. Design-Builder will give Notice to the Owner as soon as possible and, if required by Government Rules, all government or quasi-government entities with jurisdiction over the Project or Site. Design-Builder will then propose a plan to the Owner detailing the proposed handling of the new Hazardous Materials, for the Owner's approval. In the event the new Hazardous Material encountered occurs in the form of a sudden release of liquid or gas from a tank, pipeline, or similar storage or conveyance feature, Design-Builder shall take immediate emergency actions as needed to stop and contain such release and insure safety of workers and the public. Except for such emergency actions, Design-Builder shall not conduct any remediation actions or otherwise remove or disturb the Hazardous Materials until receipt of an Owner-approved plan.

**3.7.3 Handling.** Upon receipt of an Owner-approved plan under Section 3.7.2, Design-

Builder shall take the necessary measures and retain qualified professionals required to ensure that the Hazardous Materials encountered as part of the Work are handled in accordance with the Owner-approved plan and all applicable Government Rules.

**3.7.4 Design-Builder Liability.** Owner is not responsible for Hazardous Materials introduced to the Site by Design-Builder, whether part of the Work or otherwise, Subcontractors or anyone for whose acts they may be liable. To the fullest extent permitted by law, Design-Builder shall indemnify, defend and hold harmless Owner and Owner's officers, directors, employees and agents from and against all claims, losses, damages, liabilities and expenses, including attorneys' fees and expenses, arising out of or resulting from those Hazardous Materials introduced to the Site by Design-Builder, Subcontractors or anyone for whose acts they may be liable.

**3.7.5 Duty to Cooperate.** With respect to Hazardous Materials that are part of the Work or otherwise introduced to the Site by Design-Builder, Design-Builder shall comply with all applicable regulatory authorities, including but not limited to any statute, regulation or regulatory agency regarding such Hazardous Materials. Design-Builder agrees to work cooperatively with Owner and regulatory agencies with jurisdiction over the Project to properly handle, dispose of, and/or remediate any Hazardous Materials.

### **3.8 Environmental Work Plans.**

**3.8.1 Work Plans.** The Design-Builder shall prepare and submit to the Owner's Representative such environmental work plans as may be required by the Contract Documents, including but not limited to, a Hazardous Material Work Plan and a Soil Management Plan.

### **3.9 Labor.**

**3.9.1 Hours of Labor.** Design-Builder shall comply with all applicable provisions of RCW Chapter 49.28.

**3.9.2 Notice to Owner of Labor Disputes.** If Design-Builder has knowledge that any actual or potential labor dispute is delaying or threatens to delay timely performance of the Work, Design-Builder immediately shall give notice, including all relevant information, to Owner.

**3.9.3 Project Labor Agreement (PLA).** This Contract is subject to the terms and conditions contained in the Project Labor Agreement for the King County Children and Family Justice Center Project. The PLA is attached hereto and incorporated into the Contract as Exhibit \_\_\_\_\_. Design-Builder agrees to comply with all terms and conditions contained in the PLA.

### **3.10 Subcontractors.**

**3.10.1 Responsibility.** Design-Builder shall use Subcontractors who are experienced and qualified, and meet the requirements of the Contract Documents. Design-Builder shall schedule, supervise, and coordinate the operations of all Subcontractors. No subcontracting of any of the Work shall relieve Design-Builder from its responsibility for the performance of the Work in accordance with the Contract Documents.

**3.10.2 Subcontract Requirements.** Design-Builder shall require each Subcontractor to comply with all Contract Document requirements applicable to the Subcontractor's scope of work. Each subcontract also shall provide for an assignment by Design-Builder to Owner, provided that:

- (1) The assignment is effective only after termination by Owner for default pursuant to Article 15 and only for those subcontracts which Owner accepts by notifying the Subcontractor in writing; and
- (2) After the assignment is effective, Owner will assume all future duties and obligations toward the Subcontractor which Design-Builder assumed in the subcontract.
- (3) The assignment is subject to the prior rights of the surety, if any, obligated under any bond provided in accordance with the Contract Documents.
- (4) As to Design Consultants, Design-Builder shall ensure that the contracts of all Design Consultants of any tier are subject to the right of Owner to receive an assignment of such contract, regardless of who is in privity of contract with such Design Consultant.

**3.10.3 Subcontractor Identification.** Before submitting the first Application for Payment, Design-Builder shall furnish in writing to Owner the names, addresses, telephone numbers, and Tax Identification Numbers (TIN) of all then-known Subcontractors, except those supplying materials with a value of less than \$2,500, under contract with Design-Builder at such time. Design-Builder shall supplement such form(s) on a monthly basis for those Subcontractors (except those supplying materials with a value of less than \$2,500) who are contracted with Design-Builder after the first Application for Payment. Design-Builder shall not use any Subcontractor to whom Owner has a reasonable objection, including failure to meet the requirements of Division One, and shall obtain Owner's written consent before making any substitutions or additions to Subcontractors previously identified to Owner.

### **3.11 Governmental Rules and Governmental Approvals.**

**3.11.1 Governmental Rules.** Subject to the terms and conditions of the Contract Documents, Design-Builder shall comply and shall cause all Subcontractors, employees, agents and representatives to comply with all applicable Governmental Rules in connection with the performance of Design-Builder's obligations under the Contract Documents. Design-Builder agrees to indemnify, defend, and hold Owner harmless from and against all fines, penalties, related costs and expenses arising from violations of such Governmental Rules by Design-Builder or any Subcontractors, employees, agents or representatives in connection with the performance of Design-Builder's obligations under the Contract Documents, and to take all reasonable actions to enforce compliance with this provision.

**3.11.2 Governmental Approvals.** Except for those Governmental Approvals specifically identified in Section 2.1.3 as being Owner's responsibility, Design-Builder shall pay for and obtain all Governmental Approvals required to perform the Work in accordance with the

Contract Documents. Design-Builder shall submit copies of each Governmental Approval to Owner's Representative and shall post Governmental Approvals at the Site, as required by Governmental Rules. Prior to Final Acceptance, the approved, signed Governmental Approvals shall be delivered to Owner.

**3.12 Assistance to Owner.** Design-Builder shall provide information reasonably requested by Owner to enable Owner to fulfill its obligations under the Contract Documents. This obligation shall include providing such assistance as is reasonably requested by Owner in dealing with any Governmental Unit in matters relating to the Work and the Project.

**3.13 LEED Energy & Sustainability Performance Requirements.** Design-Builder shall meet all LEED Energy & Sustainability Performance Requirements contained in Division One and the Project Criteria. Design-Builder shall maintain LEED rating checklist throughout the design-build process and provide all the LEED consulting services required to obtain the targeted LEED rating. The Design-Builder shall submit and coordinate all documentation on LEED to the United States Green Building Council for the Project.

**3.14 Performance Guarantee.** Design-Builder shall provide Owner with a Performance Guarantee for the Project as set forth herein.

**3.14.1 Scope.** Design-Builder shall guarantee the performance of all building systems, environmental controls, and building elements that are related to providing energy efficiencies so that the energy efficiencies established in Section 3.14.3 are achieved.

**3.14.2 Performance Guarantee Period.** Measurement and verification of overall building energy performance shall occur annually for three (3) years from the date of Notice to Proceed with Construction of Phase 1B.

**3.14.3 Measurement and Verification Plan.** Design-Builder shall submit a plan for measurement and verification (M&V Plan) acceptable to Owner which shall establish and guarantee the achievement of targeted building energy performance benchmarks for each building on the Project. The plan shall cover how the Performance Guarantee is administered, reviewed and measured during the Performance Guarantee Period.

Performance validation shall be measured annually by evaluating whether the building meets the designated performance criteria identified in the M&V Plan. Such measures, at a minimum, shall include:

- (1) the M&V Plan results and annual reports over the stipulated performance period; and
- (2) the building energy use performance target as compared to actual metered utility usage at or near the end of the one-year period.

If at the end of any of the first two years a building does not meet the designated energy performance criteria identified in the M&V Plan, Design-Builder shall identify and implement steps to satisfy the criteria when measured at the end of the succeeding year at no cost to Owner.

**3.14.4 Financial Guarantee.** Prior to Notice to Proceed with Construction of Phase 1B,

Design-Builder shall deposit five hundred thousand dollars (\$500,000.00) (Financial Guarantee) in escrow with a bank acceptable to Owner. The Financial Guarantee is equivalent to the approximate value of the estimated energy operations savings for the first year. Release of the Financial Guarantee amount to Design-Builder, plus any interest earned, shall be contingent upon the final confirmation that the energy use performance benchmarks for the building have been achieved as verified pursuant to the M&V Plan conducted at the end of year three of the Performance Guarantee Period.

If the actual energy operations savings as presented in the M&V findings and recommendations for year three is equal to or better than the guaranteed energy performance benchmarks, the entire Financial Guarantee shall be released to the Design-Builder. If the actual energy operations savings for year three is less than the guaranteed energy performance benchmarks, the entire Financial Guarantee amount shall be released to Owner.

Nothing in this section is intended to supersede Design-Builder's obligations to comply with the requirements of the warranty or any extended warranty provided under this Contract.

**3.15 Design-Builder's Performance and Payment Bonds.** Concurrently with execution of this Agreement, Design-Builder shall provide Owner a performance and payment bond in the principal amount of one hundred percent (100%) of the Contract Sum plus Sales Tax. The bond shall be in a form acceptable, and with an acceptable surety. The costs for such bond shall be included in the Contract Sum.

#### **ARTICLE 4** **DESIGN-BUILDER'S REPRESENTATIONS AND WARRANTIES: LICENSES**

**4.1 Representations and Warranties of Design-Builder.** Design-Builder makes the following representations and warranties to Owner, each of which is true and correct as of the Agreement Date:

**4.1.1 Due Organization, Power and Authority.** Design-Builder is a corporation duly organized, existing, and in good standing in the State of Washington. Design-Builder possesses all requisite power and authority to enter into and perform this Agreement. Design-Builder has all legal power and authority to own and use its properties and to transact the business in which it is engaged and holds or expects to obtain in a timely manner all material franchises, licenses, and permits required therefor.

**4.1.2 Binding Obligation.** Design-Builder's execution, delivery, and performance of this Agreement have been duly authorized by, and are in accordance with, its articles of incorporation and by-laws; this Agreement has been duly executed and delivered for it by the signatories so authorized; and this Agreement constitutes Design-Builder's legal, valid, and binding obligation.

**4.1.3 No Existing Breach or Default.** Design-Builder is not currently in breach of, in default under, or in violation of, and the execution and delivery of this Agreement and the performance of its obligations hereunder will not constitute or result in any breach of, default under or violation of, any applicable Governmental Rules of any Governmental Unit, or the provisions of Design-Builder's articles of incorporation or by-laws, or any franchise or license, or any provision of any indenture or any evidence of indebtedness or



security therefor, lease, contract, license or other agreement by which it is bound, except for such breaches, defaults or violations as will not, either individually or in the aggregate, result in a material adverse effect on the ability of Design-Builder to perform its obligations hereunder.

**4.1.4 No Pending Litigation.** No suit, claim, action, arbitration, or legal, administrative or other proceeding is pending or, to the best knowledge of Design-Builder, threatened against Design-Builder that could affect the validity or enforceability of this Agreement, the ability of Design-Builder to fulfill its commitments hereunder in any material respect, or that would result in any material adverse change in the business or financial condition of Design-Builder.

**4.1.5 Design-Builder Qualified to Perform the Work.** Design-Builder has full experience and proper qualifications to perform the Work and to construct the Project.

**4.1.6 Evaluation of Conditions Affecting the Work.** Design-Builder has carefully examined the RFP Documents, including any Addenda issued to such documents, and any and all conditions that could in any way affect its performance of the Work, including:

- (1) visiting the Site and becoming familiar with and satisfying itself as to the general, local, and Site conditions that may affect the cost, progress, or performance of the Work, including the impact that required security measures may have on ingress and egress to the Site;
- (2) becoming familiar with and satisfying itself as to all Governmental Rules that may affect the cost, progress, or performance of the Work; and
- (3) determining that the RFP Documents were sufficient to indicate and convey understanding of all terms and conditions for the performance of the Work and sufficient to enable Design-Builder to commit to the Contract Sum and Contract Time.

By representing that it has evaluated the above-referenced conditions, Design-Builder confirms that it will complete the Work within the Contract Sum and on or before the Contract Time. Design-Builder assumes the risk of any and all such conditions set forth above, and agrees that it shall not submit a Contractor Initiated Notice for such conditions, subject to Design-Builder's rights under Section 3.3.5 and Section 3.4 above.

**4.2 Licenses.** Design-Builder shall be registered or licensed as required by Governmental Rule.

## **ARTICLE 5**

### **CONTRACT SUM AND TAXES**

**5.1 Contract Sum/Guaranteed Maximum Price.** The Contract Sum shall be the Guaranteed Maximum Price of \_\_\_\_\_ (\$\_\_\_\_\_). Owner will pay Design-Builder up to this amount for Work performed in accordance with Article 6. The Contract Sum consists of the Design-Builder's Fee (as described in Section 5.4), the Cost of the Work (as described in Section 5.5), the Contaminated Media (soil and groundwater) Allowance (as described in Section 5.6.1 and Division One), and Contingency (as described in Section 5.8.1.2). The Contract Sum shall be complete

compensation for all Work to be performed by Design- Builder under the Contract Documents, and is subject to increases or decreases by Change Order only as specifically provided in this Agreement.

**5.2 Taxes.** The Contract Sum shall include all taxes imposed by law and properly chargeable to the Project, including: (a) withholding, payroll and any other employee-related taxes on employees of Design-Builder or Subcontractors; (b) taxes based on the income or revenues of Design-Builder or Subcontractors; (c) taxes related to construction consumables; and (d) taxes levied by any Governmental Unit upon the services and labor provided by Design-Builder in connection with the Work, including Washington State Business and Occupation Tax.

**5.3 Washington State Sales Tax.** Notwithstanding Section 5.2 above, the Contract Sum does not include Washington State Sales Tax (WSST). Owner will include applicable WSST in progress payments, and Design-Builder shall pay the WSST to the Department of Revenue and shall furnish proof of payment to Owner upon Owner's request.

**5.4 Design-Builder's Fee.**

**5.4.1 Fee.** Design-Builder's Fee shall be: \_\_\_\_\_ percent (\_\_\_\_%) of the Cost of the Work. Design-Builder agrees that this Fee is a reasonable payment for profit.

**5.4.2 Change Order.** Design-Builder's Fee will only be included in a Change Order for an adjustment in the Contract Sum or Contract Time as provided in Article 9.

**5.5 Cost of the Work.** The Cost of the Work shall include only the following:

**5.5.1** Actual wages of employees of Design-Builder, as verified by certified payroll reports, performing the Work at the Site or, with Owner's agreement, at locations off the Site.

**5.5.2** Actual wages or salaries of Design-Builder's supervisory and administrative personnel, as verified by certified payroll reports, engaged in the performance of the Work and who are located at the Site. Supervisory and administrative personnel include IT support, accounting staff, safety manager, supervision and management staff assigned to the Project and working at the Site. The cost of each member of the supervisory and administrative personnel at the Site shall be chargeable as an item of the cost of Work in any given month provided that, in no event, shall any member's actual monthly compensation exceed that member's monthly salary (for salaried personnel), with increases, if any, subject to the approval of the Owner's Representative.

**5.5.3** Actual wages or salaries of Design-Builder's personnel stationed at Design-Builder's principal or branch offices, as verified by certified payroll reports, but only to the extent said personnel are identified in Exhibit \_\_\_\_\_ and performing the function set forth in said exhibit, and actually doing work on the Project.

**5.5.4** Costs actually incurred and paid by Design-Builder for employee benefits, premiums, taxes (including, but not limited to, Federal Insurance Compensation Act (FICA), Federal Unemployment Tax Act (FUTA), and State Unemployment Tax Act (SUCA)), insurance, industrial insurance, contributions and assessments required by law, collective

bargaining agreements, or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under Sections 5.5.1 through 5.5.3.

**5.5.5** The reasonable cost of travel, accommodations and meals, necessarily and directly incurred by Design-Builder's personnel in connection with the performance of the Work and where the travel required is more than 250 miles from the Site and/or involves overnight accommodation. Costs do not include housing costs or allowances and related subsistence costs for Design-Builder's employees on the Project. For all travel expenses, Design-Builder must provide documentation identifying the purpose of the trip so that it is clear the travel expenses are a required expense for the Project. Airfare must be at the lowest available coach rates. Food and lodging for business travel will be paid at actual costs, not to exceed the applicable federal per diem rate for the location (see <http://www.gsa.gov/portal/category/21287>). The Owner will not reimburse costs for alcohol, entertainment, or business development. All travel by Design-Builder personnel that involves air travel or overnight stay must be approved in advance by the Owner's Representative. This will be accomplished by providing Notice to the Owner's Representative stating the destination, purpose of the trip, who is traveling, and the expected duration of the trip. The Owner will respond within twenty-four (24) hours to such requests.

**5.5.6** Payments properly made by Design-Builder to Subcontractors and Design Consultants for performance of portions of the Work, including any insurance and bond premiums incurred by Subcontractors and Design Consultants. All Design Consultants and their corresponding rates (including associated Overhead and profit) shall be listed in Exhibit \_\_\_\_ to this Agreement.

**5.5.7** All price escalation for labor, equipment, material, design and engineering services provided as part of the Work over the lifetime of the Project.

**5.5.8** Costs, including transportation, inspection, testing, storage and handling, of materials, equipment and supplies incorporated or reasonably used in completing the Work.

**5.5.9** Costs (less salvage value) of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by the workers that are not fully consumed in the performance of the Work and which remain the property of Design-Builder, including the costs of transporting, inspecting, testing, handling, installing, maintaining, dismantling and removing such items.

**5.5.10** Costs of removal of debris and waste from the Site.

**5.5.11** The reasonable costs and expenses incurred in establishing, operating and demobilizing the Site office in accordance with Division One.

**5.5.12** Reasonable rental charges and the costs of transportation, installation, minor repairs and replacements, dismantling and removal of temporary facilities, machinery, equipment and hand tools not customarily owned by the workers, which are provided by Design-Builder at the Site, whether rented from Design-Builder or others, and incurred in the performance of the Work.

**5.5.13** Premiums for insurance and bonds required by this Agreement or the performance of the Work. All insurance and bond premiums incurred by Design Builder, Subcontractors and Design Consultants are to be identified in Exhibit \_\_\_\_\_ in order to be considered a Cost of the Work.

**5.5.14** All fuel and utility costs incurred in the performance of the Work.

**5.5.15** Tariffs or duties incurred in the performance of the Work, but not including sales, use or similar taxes.

**5.5.16** **Not Used.**

**5.5.17** Costs for permits, royalties, licenses, tests and inspections incurred by Design-Builder as a requirement of the Contract Documents.

**5.5.18** The cost of defending suits or claims for infringement of patent rights arising from the use of a particular design, process, or product required by Owner, paying legal judgments against Design-Builder resulting from such suits or claims, and paying settlements made with Owner's consent.

**5.5.19** Deposits which are lost, except to the extent caused by Design-Builder's negligence.

**5.5.20** Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property.

**5.5.21** Accounting and data processing costs related to the Work.

**5.5.22** Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner.

**5.5.23** \_\_\_\_\_% of the Cost of the Work as defined in the preceding sections of this Section 5.5, which is agreed to represent reasonable compensation for all elements of Field or Site Office and Home Office Overhead not otherwise included above.

## **5.6**     **Allowance Items and Allowance Values: Proposal Alternates.**

**5.6.1** **Allowances.** Allowance Items, and their corresponding Allowance Values, are described in Division One. The Contaminated Media (soil and groundwater) Allowance is included within the GMP. All other Allowance Items are not included within the initial GMP, and it is intended that they will be added to the GMP by Change Order, at a later date.

**5.6.2** **Determination of Items and Values.** Design-Builder and the Owner will work together collaboratively to review the Allowance Items and Allowance Values to determine that the Allowance values constitute reasonable estimates for the Allowance items. Design-Builder and the Owner will continue working closely together during the preparation of the design to develop Construction Documents consistent with the Allowance Values.

**5.6.3 Written Authorization Required.** No work shall be performed on any Allowance Item without Design-Builder first obtaining in writing advanced authorization to proceed from Owner.

**5.6.4 Proposal Alternates.** Proposal alternates are described in Form D of the Request for Proposal. Alternates are not included within the initial GMP. It is intended that, if selected by Owner, an alternate will be added to the GMP by Change Order.

## **5.7 Non-Reimbursable Costs.**

**5.7.1** The following shall not be deemed as Cost of the Work:

**5.7.1.1** Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Sections 5.5.

**5.7.1.2** Overhead and general expenses, except as provided for in Section 5.5, or which may be recoverable for changes to the Work.

**5.7.1.3** The cost of Design-Builder's capital used in the performance of the Work.

**5.7.1.4** Any costs that would cause the GMP, as adjusted in accordance with the Contract Documents, to be exceeded.

**5.7.1.5** Costs not actually incurred by the Design-Builder. The Owner shall receive the full benefit of all trade discounts, rebates or refunds received by the Design-Builder from any source in regard to the cost of the Work.

**5.7.1.6** Costs due to negligent, defective or nonconforming Work of the Design-Builder, Subcontractors, and 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, repair or replacement of the Work, including insurance deductibles paid on account thereof.

**5.7.1.7** Any cost not specifically and expressly described in Section 5.5.

## **5.8 The Guaranteed Maximum Price (GMP).**

### **5.8.1 GMP.**

**5.8.1.1** Design-Builder represents, warrants, and guarantees that it shall not exceed the GMP. Documents used as a basis for the GMP shall be identified in an exhibit to this Agreement (Exhibit \_\_\_\_\_ "GMP Exhibit Documents"). Design-Builder does not guarantee any specific line item provided as part of the GMP, and has the sole discretion to apply payment due to overruns in one line item to savings due to underruns in any other line item. Design-Builder agrees, however, that it shall be responsible for paying all costs of completing the Work which exceed the GMP, as adjusted in accordance with the Contract Documents.

**5.8.1.2** The GMP includes a Contingency in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) which is available for Design-Builder's exclusive use for unanticipated costs it incurs on the Work. By way of example, and not as a limitation, such costs may include: (a) trade buy-out differentials; (b) overtime or acceleration; (c) correction of negligent, defective, damaged or nonconforming Work, design errors or omissions, however caused; (d) Subcontractor defaults, terminations and reprourement of services; (e) those events under Article 10 of this Agreement that result in an extension of the Contract Time but do not result in an increase in the Contract Sum; (f) schedule recovery costs; (g) detail resolution refinements (e.g., minor items required to complete a detail that may have not been perfectly clear in the Construction Documents); (h) utility coordination difficulties; and (i) items missed in development of the GMP, but which are required expressly or by necessary implication by the Contract Documents for a complete Project. The Contingency is not available to Owner for any reason, including changes in scope or any other item which would enable Design-Builder to increase the GMP under the Contract Documents. Design-Builder shall provide Owner notice of all anticipated charges against the Contingency, and shall provide Owner as part of the monthly status report required by Section 25.7 of this Agreement an accounting of the Contingency, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three (3) months. Design-Builder agrees that with respect to any expenditure from the Contingency relating to a Subcontractor default or an event for which insurance or bond may provide reimbursement, Design-Builder will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company. Design-Builder agrees that if Design-Builder is subsequently reimbursed for said costs, then said recovery will be credited back to the Contingency.

**5.8.2 Savings.** Any and all Savings shall revert one hundred percent (100%) to Owner prior to final reconciliation and invoicing. In determining whether there are savings (or the final GMP has been exceeded) the total Cost of the Work, calculated according to Section 5.5.1 through Section 5.5.22, shall be decreased by the total amount of Change Orders and the resulting number shall be marked up by home office overhead according to Section 5.5.23 and Fee according to Section 5.4. Then the total amount of Change Orders shall be added back and the total compared to the final GMP.

## **ARTICLE 6**

### **PAYMENT TERMS**

#### **6.1 Schedule of Values.**

**6.1.1 Submittal.** Within fourteen (14) Days after the Agreement Date, and in accordance with Division One, Design-Builder shall submit to Owner for review a detailed Schedule of Values with breakdown allocating the total Contract Sum to each principle category of work, in such detail as requested by Owner. The Schedule of Values will: (a) subdivide the Work into its respective parts; (b) include values for all items comprising the Work; (c) contain appropriate amounts for demobilization, record drawings, and any other requirements for Project close-out; and (d) be used by Owner as the basis for progress payments. Payment for Work shall be made only for and in accordance with those items

included in the Schedule of Values.

**6.1.2 Owner Review.** Owner will timely review and approve the Schedule of Values or provide Design-Builder with a written explanation of why the Schedule of Values was not approved. Unless otherwise specified in the Contract Documents, Owner shall use reasonable efforts to review the Schedule of Values within thirty (30) Days of Owner's receipt of the Design-Builder's submittal of its Schedule of Values. Owner and Design-Builder shall timely resolve any differences so as not to delay the Design-Builder's submission of its first Application for Payment.

**6.1.3 Effect of Acceptance.** Owner's acceptance of the Schedule of Values shall not relieve the Design-Builder from its sole responsibility for the accuracy of the Schedule of Values and its compliance with all Contract requirements. The Design-Builder shall revise the Schedule of Values as necessary to accurately reflect Change Orders.

**6.1.4 Current Status.** Each Application for Payment shall include a current status of the Schedule of Values. No Application for Payment will be considered until the current status of the Schedule of Values has been submitted and accepted.

**6.1.5 Conformance with Project Schedule.** The items and activities, which the Design-Builder identifies within its Schedule of Values, shall be specifically referenced within, and conform and be consistent with, the activities set forth within the Project Schedule.

## **6.2 Applications for Payment.**

**6.2.1 Form of Application.** On or about the first day of each month, the Design-Builder shall submit to Owner an Application for Payment. Each application shall be in a format as specified in Division One and shall include such documentation or information as required in Division One and the following:

- (a) Current status of the Schedule of Values;
- (b) Project Schedule and the most current updates;
- (c) Affidavits signed by all Subcontractors performing Work to date, stating that each of them has been paid, less earned retainage, as their interests appeared in the last preceding Application For Payment;
- (d) The contract purchase agreement number, CPA # \_\_\_\_\_ (which shall be placed on each Application for Payment submitted by the Design-Builder); and
- (e) Statement by Design-Builder that it has paid prevailing wages as required by Section 23.1.3.

**6.2.2 Failure to Include Required Documentation.** Inclusion of the required documentation is a condition precedent to payment. Design-Builder is not entitled to payment for any Work unless the Application for Payment includes all required documentation. Owner reserves the right to withhold payment pursuant to Section 6.5 if it is subsequently determined that Design-Builder

**6.2.3 Reconciliation; Additional Cost Items.** The application shall correlate the amount requested with the Schedule of Values and with the state of completion of the Work, as measured by the current Project Schedule. In addition to Work performed by the Design-Builder, applications may include (1) the invoiced cost of major materials or equipment (major material or equipment to be identified on the Schedule of Values) suitably stored on the Site, and (2) with Owner's consent, up to 75% of the invoiced cost of major materials or equipment suitably stored off the Site if the Owner's interest in those major materials or equipment is protected through insurance and the Design-Builder provides documentation of such insurance.

### **6.3 Progress Payments.**

**6.3.1 Payment.** Owner shall make progress payments, in such amounts as Owner determines are properly due, within thirty (30) days after receipt of an accepted, properly executed Application for Payment. Owner shall notify Design-Builder in accordance with Chapter 39.76 RCW if an Application for Payment does not comply with the requirements of the Contract Documents or if payment will be withheld.

**6.3.2 Prompt Payment of Subcontractors.** Design-Builder shall ensure that Subcontractors are promptly paid as required by RCW 39.04.250.

**6.3.3 Retainage.** Owner shall retain five percent (5%) of the amount of each progress payment due under an Application for Payment. No retention shall be held for design and engineering services. Pursuant to RCW 60.28.011 and RCW 39.08.030, claims or "liens" by Subcontractors against the retained fund or the retainage bond must be in writing and submitted to the Owner's Representative at the address given for notices in this Contract, for filing with the Project documents. The Owner's Representative will maintain a copy of all claims "liens" against the retainage in the Project document.

**6.3.4 Undisputed Amounts.** Notwithstanding anything to the contrary in the Contract Documents, Owner shall pay Design-Builder all undisputed amounts in an Application for Payment within the times required by the Contract.

**6.3.5 Payment for Punchlist.** Design-Builder's right to be paid for the Punchlist is set forth in Section 7.3.1.4.

**6.3.6 Title to Work Covered by Progress Payments.** Title to all Work and materials covered by a progress payment shall pass to Owner at the time of such payment free and clear of all liens, claims, security interests, and encumbrances. Passage of title shall not, however, relieve Design-Builder from any of its duties and responsibilities for the Work or materials, or waive any rights of Owner to insist on full compliance by Design-Builder with the Contract Documents.

### **6.4 Final Payment.**

**6.4.1 Application for Final Payment.** Upon submitting a notice of Final Completion to Owner pursuant to Section 7.4, Design-Builder shall be entitled to submit an Application for Final Payment, which application, in addition to any other information required by the Contract Documents, shall include the following:



- (1) Submittal by Design-Builder and all Subcontractors of Affidavits of Wages Paid in accordance with state law;
- (2) Design-Builder's release of claims against Owner, except for Claims specifically described in the release document and submitted in accordance with Article 11;
- (3) Design-Builder certification that all Subcontractors have been paid and there are no outstanding liens;
- (4) Right of way, easement and property releases; and,
- (5) All reports identified in the Affidavit and Certificate of Compliance with the King County Code 12.16.

**6.4.2 Payment.** Within thirty (30) days after receipt of an acceptable Application for Final Payment, Owner shall pay to Design-Builder the unpaid balance of the Contract Sum, reduced by any amounts owed by Design-Builder to Owner pursuant to this Agreement which have not been paid by Design-Builder. Retainage funds shall be released in accordance with Chapter 60.28 RCW.

**6.4.3 Effect of Final Acceptance and Final Payment.**

- (1) Neither Final Acceptance nor Final Payment shall release Design-Builder or its sureties from any obligations under this Contract or the performance and payment bonds, or constitute a waiver of any claims by Owner arising from or related to Design-Builder's performance or failure to perform the Work and to meet all contractual obligations, including but not limited to:
  - a. Unsettled liens, security interests or encumbrances;
  - b. Damaged, non-conforming, or defective Work discovered by Owner;
  - c. Terms of any warranties or guarantees required by the Contract; and,
  - d. Payments made in error.

**6.4.4 Waiver and Release.** Except for those Claims properly preserved and expressly identified in the notice of Final Completion, acceptance of final payment by Design-Builder or any Subcontractor shall constitute a waiver and release to Owner of all claims by Design-Builder, or any such Subcontractor, for:

- (1) Any and all disputes or claims, including but not limited to claims for damages, fines, interest, taxes, attorney fees, or costs, demands, rights, actions or causes of actions, known or unknown, arising out of or in any way related to the Parties' performance under the Contract and/or Project; and
- (2) Any and all known and/or unknown liabilities, obligations, demands, actions, suits, debts, charges, causes of action, requests for money and/or payment under the Contract, outstanding invoices, or claims directly or indirectly arising out of or related to the Contract and/or Project.

**6.5 Owner's Right to Withhold Payment and Offse.**

**6.5.1 Withholding of Payment.** Without waiver of any other available remedies, the Owner has the right to withhold, nullify, or back-charge, in whole or in part, any payment or payments due or that have been paid to the Design-Builder as may be necessary to cover the Owner's costs or to protect the Owner from loss or damage for the following reasons:

1. Failure of the Design-Builder to submit or obtain acceptance of a Progress Schedule, Schedule of Values, and any updated Schedules;
2. Defective or non-conforming Work;
3. Costs incurred by the Owner to correct, repair or replace defective or non-conforming Work, or to complete the Work;
4. Assessment of liquidated damages;
5. Reasonable expectation of claims by third parties resulting from the Design-Builder's or Subcontractor's acts, omissions, fault, or negligence;
6. Deduction in Contract Work;
7. Failure of Design-Builder to repair damaged materials, equipment, property, or Work;
8. Failure of the Design-Builder to provide or obtain review of Submittals;
9. Failure to keep Record Documents up to date;
10. Failure to comply with all applicable federal, state, and local laws, statutes, regulations, codes, licenses, easements, and permits;
11. Failure to obtain and maintain applicable permits, insurance, and bonds;
12. Failure of the Design-Builder to disclose all material facts or accurate information upon which the Owner relied when agreeing to Change Order;
13. Failure to provide Statement of intent to Pay Prevailing Wage and/or Affidavits of Wages Paid;
14. Failure to recognize or obtain relief from Washington State sales tax obligations through resale certificates or similar means.

**6.5.2 Payment Disputes.** If Design-Builder disputes Owner's determination of payments due hereunder, or disputes any offsets or withholding by Owner, Design-Builder shall submit a Contractor Initiated Notice, in accordance with Section 8.6. Pending resolution of any such dispute, Design-Builder shall continue its performance of the Work in accordance with the Contract Documents.

**6.6 Interest.** Payments due and unpaid in accordance with the Contract Documents shall bear interest as specified in Chapter 39.76 RCW.

**6.7 Cost Records.** Design-Builder acknowledges that this Agreement is to be administered on an "open book" arrangement. Design-Builder and Subcontractors shall maintain Project cost records by cost codes and shall contemporaneously segregate and separately record at the time incurred all costs: (1) directly associated with each work activity; and (2) directly or indirectly resulting from any event, occurrence, act, condition or direction for which the Design-Builder receives or seeks an adjustment in the Contract Sum, Contract Time and/or damages, such as delay and impact costs, acceleration costs, loss of productivity or efficiency, and increased or

extended overhead. In addition to the requirements set forth in Article 8 through Article 10, Design-Builder shall only be entitled to extra compensation for any event, occurrence, act, condition or direction and/or the recovery of damages only to the extent that Project cost records are kept in full compliance with all requirements of this Agreement, including the requirement to segregate costs at the time incurred in accordance with this Article.

**6.8 Maintenance and Inspection of Documents.** All Design-Builder and Subcontractor documents and records relating to the Contract shall be open to inspection, audit, and/or copying by the Owner or its designee: (1) during the Contract Time; and (2) for a period of not less than six years after the date of Final Completion of the Project; or if any Claim, audit or litigation arising out of, in connection with, or related to this Agreement is initiated, all documents shall be retained until such Claim, audit, or litigation involving the records is resolved or completed, whichever occurs later. Design-Builder shall guarantee that all Subcontractor documents and records are retained and open to inspection, audit and/or copying. Failure to: maintain and retain sufficient records in full compliance with all requirements of this Agreement; allow Owner to verify all costs or damages; or permit Owner access to the books and records shall constitute a waiver of the rights of the Design-Builder and Subcontractor to any Claim or be compensated for any damages, additional time or money under this Agreement.

**6.8.1 Design-Builder to Provide Facilities and Shall Cooperate.** Inspection, audit, and/or copying of all documents described herein, may be performed by the Owner or its designee at any time with not less than seven (7) days' Notice. However, if an audit or inspection is to be commenced more than sixty (60) days after the date of Final Acceptance of the Project, the Design-Builder will be given twenty (20) days' Notice of the time when the audit or inspection is to begin. Design-Builder, and its Subcontractors, shall provide adequate facilities acceptable to Owner, for the inspection, audit and/or copying during normal business hours. Design-Builder, and all Subcontractors, shall make a good faith effort to cooperate with Owner's auditors.

**6.8.2 Documents.** At a minimum, the following documents, including all machine readable electronic versions, shall be available for inspection, audits, and/or copying:

- (1) Daily time sheets and all daily reports, Supervisor's reports, and inspection reports;
- (2) Collective bargaining agreements;
- (3) Insurance, welfare, and benefits records;
- (4) Payroll registers;
- (5) Earnings records;
- (6) All tax forms, including payroll taxes;
- (7) Material invoices and requisitions;
- (8) Material cost distribution worksheet;
- (9) Equipment records (list of Design-Builder's and Subcontractors' equipment, rates, etc.);
- (10) Contracts, purchase orders and agreements between Design-Builder and each Subcontractor;
- (11) Subcontractors' payment certificates;
- (12) Correspondence, including email, with Subcontractors;

- (13) All meeting notes by and between Design-Builder and Subcontractors and/or any third parties related to the Project;
- (14) Canceled checks (payroll and vendors);
- (15) Job cost reports, including monthly totals;
- (16) Job payroll ledger;
- (17) Certified payrolls;
- (18) General ledger;
- (19) Cash disbursements journal;
- (20) Escrow bid documents, take off sheets, and calculations used to prepare the bid and/or quotes;
- (21) Take off sheets, calculations, purchase orders, vouchers quotes, other financial data to support Cost Proposals, Contractor Initiated Notice, Claims and any other request for damages or additional money or;
- (22) Financial statements for all years during the Contract Time. In addition, the Owner may require, if it deems appropriate, additional financial statements for three (3) years preceding execution of the Contract and 6 years following Final Acceptance of the Contract;
- (23) Depreciation records on all Design-Builder's and Subcontractor's equipment, whether these records are maintained by the Design-Builder and Subcontractors involved, its accountant, or others;
- (24) If a source other than depreciation records is used to develop costs for the Design-Builder's internal purposes in establishing the actual cost of owning and operating equipment, all such other source documents;
- (25) All documents which relate to each and every Claim together with all documents which support the amount of damages as to each Claim;
- (26) Worksheets or software used to prepare the Claim establishing the cost components for items of the Claim including but not limited to labor, benefits and insurance, materials, equipment, Subcontractors, all documents which establish time periods, individuals involved, the hours for the individuals, and the rates for the individuals;
- (27) Worksheets, software, and all other documents used by the Design-Builder (a) to prepare its GMP Proposal or schedule(s) and/or (b) to prepare quotes and bids to the Design-Builder;
- (28) All schedule documents, including electronic versions, planned resource codes, or schedules and summaries, including but not limited to those that support the Design-Builder's request for change in the Contract Time in each Contractor Initiated Notice with specificity;
- (29) All Submittals; and,
- (30) All other documents, including email, related to the Project, Claims, or Change Orders.

## **ARTICLE 7**

### **TIME FOR PERFORMANCE**

**7.1 Commencement of Work.** The Project will be constructed in two phases. Phase 1A includes construction of a new courthouse and detention facility on the north half of the Site. Phase 1B includes demolition of the existing detention facility, after completion of Phase 1A, and construction of a new parking structure on the south half of the Site. Design-Builder shall commence the Work for Phase 1A on the date specified in the Notice to Proceed for Phase 1A ("Phase 1A Date of Commencement"), whereupon Design-Builder shall diligently pursue performance of the Work in accordance with the Contract Documents. Design-Builder shall commence the Work for Phase 1B on the date specified in the Notice to Proceed for Phase 1B ("Phase 1B Date of Commencement"), whereupon Design-Builder shall diligently pursue performance of the Work in accordance with the Contract Documents. Except as provided in Section 7.1.1, Notice to Proceed for Phase 1B shall be issued after Substantial Completion of Phase 1A is achieved and the new detention facility is fully occupied.

**7.1.1.** Notwithstanding Section 7.1, Owner, in its discretion, after consulting with Design-Builder, may further divide the Notice to Proceed issued for Phase 1A Work and 1B Work into separate Notice to Proceed with Design, and Notice to Proceed with Construction. In addition, Owner, in its discretion, after consulting with Design-Builder, may issue Notice to Proceed with Design for Phase 1B, prior to Substantial Completion of Phase 1A.

## **7.2 Substantial Completion and Final Completion.**

**7.2.1 Phase 1A.** Design-Builder guarantees that Substantial Completion of Phase 1A shall be achieved no later than one thousand four hundred (1,400) Days after the Phase 1A Date of Commencement ("Phase 1A Substantial Completion Date"). Substantial Completion of the Phase 1A Work shall be deemed to have occurred when all Phase 1A Work meets the requirements for Substantial Completion, as described in Section 7.3 and Division One.

**7.2.2 Phase 1B.** Design Builder guarantees that Substantial Completion of Phase 1B shall be achieved no later than three hundred sixty-five (365) Days after the Phase 1B Date of Commencement ("Phase 1B Substantial Completion Date"). Owner intends to issue Notice to Proceed with Phase 1B after it completes additional systems and performance testing of the new courthouse and detention center, conducts on-site operations training, and fully occupies the facilities. Owner estimates Phase 1B Date of Commencement will occur approximately ninety (90) Days after Substantial Completion of Phase 1A Work. Substantial Completion of the Phase 1B Work shall be deemed to have occurred when all Phase 1B Work meets the requirements for Substantial Completion, as described in Section 7.3 and Division One.

**7.2.3 Adjustments to the Substantial Completion Date(s).** The Substantial Completion Date(s) for Substantial Completion and Final Completion shall be subject to adjustment in accordance with Articles 8 and 10.

**7.2.4 Performance of the Work.** Design-Builder represents that the Work shall be planned, organized and executed in accordance with the Project Schedule to achieve the Substantial Completion Date(s). Should Owner have a reasonable belief that the Project Schedule or Substantial Completion Date(s) will not be met for causes that do not

constitute an Excusable Delay, Owner has the right, but not the obligation, to so notify Design-Builder, and Design-Builder shall then work additional overtime, engage additional personnel and take such other measures as necessary to complete the Work within the Project Schedule and by the Substantial Completion Date(s). Design-Builder shall bear all costs related to such overtime, additional personnel, and other measures.

**7.2.5 Final Completion of Project.** Design-Builder guarantees that Final Completion of the entire Project shall be achieved no later than ninety (90) Days after the Phase 1B Substantial Completion Date. Final Completion of the Project shall be deemed to have occurred when all Work meets the requirements for Final Completion, as described in Section 7.4 and Division One.

### **7.3 Substantial Completion Procedures.**

#### **7.3.1 Punchlist.**

**7.3.1.1 Design-Builder's Creation of Punchlist.** Design-Builder shall prepare separate Punchlists for Phase 1A and Phase 1B and provide them to Owner together with an estimate of the cost and time to complete and/or correct each Punchlist item.

**7.3.1.2 Owner's Action on Punchlist.** Owner shall notify Design-Builder within ten (10) business days after receipt of the Punchlist for Phase 1A and Phase 1B, as applicable, that it accepts such Punchlist and estimate or shall otherwise state its reasons for disagreement therewith in reasonable detail; provided, however, that: acceptance or rejection thereof shall not relieve Design-Builder of its liability to complete or correct the Punchlist items. If the Parties fail to agree on any aspect of the Punchlist, then: (a) Design-Builder shall be obligated to proceed in accordance with Owner's instructions and interpretations and additions relative to the Punchlist; and (b) submit a Contractor Initiated Notice under Section 8.6.

**7.3.1.3 Condition Precedent to Substantial Completion.** Design-Builder's creation of a Punchlist, and Owner's Approval of such Punchlist, shall be a condition precedent to achieving Substantial Completion for Phase 1A or Phase 1B, as applicable.

**7.3.1.4 Payment of Punchlist Amount.** Owner may withhold an amount equal to one hundred fifty percent (150%) of the estimated value of each Punchlist item. Payment of the estimated amount of the Punchlist shall not be due until Design-Builder has completed all Punchlist items. If Design-Builder fails to complete all Punchlist items within sixty (60) days after the date of Substantial Completion for Phase 1A or Phase 1B, as applicable, Owner may complete, or cause to be completed, any item which Design-Builder has so failed to complete. In such case, Owner may deduct the related cost of such item from the amount withheld with respect to such item and pay the remaining amount withheld, if any, to Design-Builder.

#### **7.3.2 Substantial Completion Certificate.**

**7.3.2.1 Design-Builder's Issuance of Certificate.** When Design-Builder believes

that Substantial Completion of Phase 1A or Phase 1B has occurred, Design-Builder shall issue a Substantial Completion Certificate for that phase, supported by such information required by the Contract Documents.

**7.3.2.2 Owner's Review of Certificate.** Owner shall review and accept or reject the Substantial Completion Certificate issued by Design-Builder within ten (10) business days of its receipt of such certificate, and, if applicable, will specifically identify its reasons for rejection. If Design-Builder accepts the reasons for such rejection, it shall take corrective action and submit a new certificate to Owner. If Design-Builder disagrees with the reasons for the rejection, it shall promptly notify Owner, whereupon Design-Builder and Owner shall meet to attempt to resolve the disagreement. If the disagreement cannot be resolved within five (5) business days, Design-Builder shall act in accordance with the instructions of Owner without prejudice to its rights under Article 11.

**7.3.3 Prior Occupancy.** Owner may, upon written notice thereof to Design-Builder, take possession of or use any completed or partially completed portion of the Work ("Prior Occupancy") at any time prior to Substantial Completion. Unless otherwise agreed in writing, Prior Occupancy shall not: (a) be deemed an acceptance of any portion of the Work; (b) accelerate the time for any payment to Design-Builder; (c) prejudice any rights of Owner provided by any insurance, bond, or the Contract Documents; (d) relieve Design-Builder of the risk of loss or any of the obligations established by the Contract Documents; (e) establish a date for termination or partial termination of the assessment of liquidated damages; or (f) constitute a waiver of claims. Notwithstanding the above, Owner shall be responsible for loss of or damage to the Work resulting from Prior Occupancy.

## **7.4 Final Completion of the Project.**

**7.4.1 Conditions for Final Completion.** Final Completion of the Project shall occur when all of the following have been satisfied:

- (1) the Work is fully and finally complete in accordance with the Contract Documents, including: (i) the completion of all Punchlist items; (ii) all as-built information and other documents required by the Contract Documents have been received and accepted by Owner; and (iii) all special tools, spare parts, operating instructions and manuals, and certificates required by the Contract Documents and all other items to be provided by Design-Builder to Owner hereunder shall have been delivered to Owner free and clear of all liens;
- (2) the Design-Builder has completed all of the requirements, up to and including submittal of a proper application for the LEED Certificate;
- (3) Design-Builder has notified Owner that subsections (1) and (2) have occurred and submitted an Application of Final Payment to Owner; and
- (4) Owner has concurred that subsections (1) and (2) have been satisfied and approved the Application for Final Payment.

**7.4.2 Issuance of Final Acceptance Certificate.** When Owner believes that all conditions in Section 7.4.1 have occurred and all other requirements for Final

Acceptance contained in Division One have been met, Owner shall issue a Final Acceptance Certificate.

## **7.5 Delay Damages.**

### **7.5.1 Liquidated Damages for Late Substantial Completion.**

- (1) **Phase 1A.** If Design-Builder fails to achieve Substantial Completion for Phase 1A by the Substantial Completion Date, Design-Builder shall be liable for the payment of liquidated damages to Owner in the amount of Five Thousand Dollars (\$5,000) per each calendar day of delay until Substantial Completion of Phase 1A is achieved.
- (2) **Phase 1B.** If Design-Builder fails to achieve Substantial Completion for Phase 1B by the Substantial Completion Date, Design-Builder shall be liable for the payment of liquidated damages to Owner in the amount of One Thousand Dollars (\$1,000) per each calendar day of delay until Substantial Completion of Phase 1B is achieved.

**7.5.2 Liquidated Damages Not Penalty.** The Parties acknowledge, recognize and agree on the following:

- (1) that because of the unique nature of the Project, it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by Owner as a result of Design-Builder's failure to achieve Substantial Completion on or before the Substantial Completion Date for Substantial Completion; and
- (2) that any sums which would be payable under this Article 7 are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for the losses that reasonably may be anticipated from such failure.

**7.5.3 Actual Damages for Late Final Completion.** After Substantial Completion of Phase 1B is achieved, actual damages will be assessed for failure to achieve Final Completion by the date for Final Completion. Actual damages will be calculated on the basis of direct consultant, administrative, and other related costs attributable to the Project as a result of such failure.

**7.5.4 Payment of Delay Damages.** Delay Damages shall accrue daily, and Owner may offset these costs against any payment due Design-Builder.

**7.5.5 Default.** If the Design-Builder is in default under Article 15, whether or not the Owner elects to terminate for cause, the Owner may elect to impose liquidated damages or actual damages for delay. The Owner will not be entitled to recover both types of damages for the same delay.

## **ARTICLE 8** **CHANGES**



**8.1 Right to Make Changes.** Owner may, at any time and without notice to Design-Builder's surety, order additions, deletions, revisions, or other changes in the Work. These changes in the Work shall be incorporated into the Contract Documents through the execution of Change Orders. If any change in the Work ordered by Owner causes an increase or decrease in the Contract Sum or the Substantial Completion Date(s), an adjustment shall be made as provided in Articles 8, 9, and 10, and incorporated into a Change Order.

**8.2 Owner Request for Change Proposal (RFP) From Design-Builder.** If Owner desires to order a change in the Work, it may issue an RFP to Design-Builder. Design-Builder shall submit a Cost Proposal as described in Division One within fourteen (14) Days of the request from Owner, or within such other period as mutually agreed in writing. Design-Builder's Cost Proposal shall be full compensation for implementing the proposed change in the Work, including any adjustment in the Contract Sum or Contract Time, and including compensation for all delays in connection with such change in the Work and for any expense or inconvenience, disruption of schedule, or loss of efficiency or productivity occasioned by the change in the Work.

**8.2.1 Cost Proposal Negotiations.** Upon receipt of the Cost Proposal, as provided in Articles 9 and 10, Owner may accept or reject the proposal, request further documentation, or negotiate acceptable terms with Design-Builder. Pending agreement on the terms of the Change Order, Owner may direct Design-Builder to proceed immediately with the proposed Work. Design-Builder shall not proceed with any change in the Work until it has obtained Owner's written approval or Owner's Construction Change Directive as provided in Section 8.3. All Work done pursuant to any Owner-directed change in the Work shall be executed in accordance with the Contract Documents.

**8.2.2 Failure to agree upon terms of Change Order.** If Owner and Design-Builder are unable to reach agreement on the terms of any change in the Work, including any adjustment in the Contract Sum or Contract Time, Design-Builder shall submit a Contractor Initiated Notice under Section 8.6.

**8.3 Construction Change Directives.** The Owner may direct the Design-Builder to proceed with a change in the Work through a written Construction Change Directive (may also be referred to as a Field Directive when the time required to price and execute a Change Order would impact the Project. The Construction Change Directive shall describe and include the following: (a) the scope of work; (b) an agreed upon maximum not-to-exceed amount; (c) any estimated adjustment in Contract Time; (d) the method of final cost determination in accordance with the requirements of Article 9; and (e) the supporting cost data to be submitted in accordance with the requirements of Article 9.

Upon satisfactory submittal by the Design-Builder in accordance with Division One and approval by the Owner of supporting cost data, a Change Order will be executed. The Owner will pay the Design-Builder for Construction Change Directive work only upon satisfactory completion of performed work and execution of a Change Order. If the Design-Builder has been directed to perform Work and the Parties are unable to agree on a Change Order, Owner shall direct Design-Builder to submit a Contractor Initiated Notice under Section 8.6.

**8.4 Owner's Rights to Undertake or Reject Proposed Changes.** Owner shall have the right, at any time and in its sole discretion: (a) to direct Design-Builder to proceed immediately with the proposed change under a Construction Change Directive, pending agreement by the

Parties on the terms of a Change Order; or (b) not to undertake any contemplated change, provided, however, that in such event, if Design-Builder was required to prepare a design as part of the proposed change, then Design-Builder shall be paid the reasonable costs it has incurred in preparing such design.

**8.5 Changes of Law.** Design-Builder may submit a Contractor Initiated Notice in accordance with Section 8.6 to compensate Design-Builder for the effects of any changes in Government Rule enacted after the Agreement Date affecting the performance of the Work. Such effects may include, without limitation, revisions Design-Builder is required to make to the Construction Documents after construction has begun because of changes in Government Rules.

**8.6 Contractor (Design-Builder) Initiated Notices (CIN).** To the extent Design-Builder believes that any act, event or condition arising out of or relating to the Work, including those caused by Owner or anyone for whose acts Owner is responsible: (a) effects an increase in its cost of, or time required for the performance of, any part of the Work, and (b) under the terms of the Contract Documents such act, event or condition entitles Design-Builder to an adjustment to the Contract Sum or Contract Time or other reliefs, then Design-Builder shall comply with the following processes.

**8.6.1 Contractor Initiated Notice.** Design-Builder shall provide Owner with written Notice, in accordance with Section 8.6.2, of any act, event, or condition that Design-Builder believes entitles it to an adjustment in the Contract Sum and/or Contract Time within fourteen (14) days after the occurrence of the act, event, or condition giving rise to the request. For purposes of this part, "occurrence" means when Design-Builder knew, or in its diligent prosecution of the Work should have known, of the act, event, or condition giving rise to the request. If Design-Builder believes it is entitled to an adjustment in the Contract Sum, Design-Builder shall immediately notify Owner and begin to keep and maintain complete, accurate, and specific daily records. Design-Builder shall give Owner access to any such records and, if requested shall promptly furnish copies of such records to Owner.

**8.6.2 Contents of the Initial CIN: Failure to Comply.** Design-Builder shall not be entitled to any adjustment in the Contract Sum or Contract Time for any occurrence of acts, events or conditions or costs that occurred more than fourteen (14) days before Design-Builder's written CIN to Owner.

**8.6.2.1 Contract Sum.** If an adjustment in the Contract Sum is requested, the Notice shall set forth, at a minimum, a description of: (a) the event giving rise to the request for an adjustment in the Contract Sum; (b) the nature of the impacts to Design-Builder and its Subcontractors of any tier, if any; (c) a Cost Proposal of the amount of the adjustment in Contract Sum requested; and (d) the method used in Section 9.1.2 to calculate the adjustment in the Contract Sum.

**8.6.2.2 Contract Time.** If an adjustment in the Contract Time is requested, the Notice shall set forth, at a minimum, a description of: (a) the act, event or condition, giving rise to the request for an adjustment in the Contract Time; (b) the nature of the impacts to Design-Builder and its Subcontractors of any tier, if any; (c) the impact to the Critical Path; and (d) to the extent possible the amount of the adjustment in the Contract Time requested.

Failure to comply with the requirements of this section shall constitute a waiver of Design-Builder's right to an adjustment in the Contract Sum or Contract Time.

**8.6.3 Contents of the Supplemental Notice: Failure to Comply.** Within thirty (30) days after the initial CIN is submitted to Owner, unless Owner agrees in writing to allow an additional period of time, Design-Builder shall supplement the written notice provided in accordance with Section 8.6.2 with additional supporting data, including responding to a directive from Owner to calculate the adjustment in Contract Sum by an alternative method under Section 9.1.2.

**8.6.3.1 Contract Sum.** Such additional supporting data shall include, in addition to any requirements set forth in Division One, the following: (a) the amount of compensation requested, itemized in accordance with the procedure set forth herein; (b) specific facts, circumstances, and analysis that confirms not only that Design-Builder suffered the damages claimed, but that the damages claimed were actually a result of the act, event, or condition complained of and that the Contract Documents provide entitlement to an adjustment to Design-Builder; and (c) documentation sufficiently detailed to permit an informed analysis of the request by Owner. When the request relates to a delay or change in the Contract Time Design-Builder shall also be obligated to comply with all of the requirements of Article 10.

**8.6.3.2 Contract Time.** Such additional supporting data shall include, in addition to any requirements set forth in Division One, the following: (a) the amount of delay claimed, itemized in accordance with the procedure set forth herein; (b) specific facts, circumstances, and analysis that confirms not only that Design-Builder suffered the delay claimed, but that the delay claimed was actually a result of the act, event, or condition complained of, and that the Contract Documents provide entitlement to an adjustment in the Contract Time; (c) supporting documentation sufficiently detailed to permit an informed analysis of the request by Owner; and (d) an acceleration schedule on a fragment basis to demonstrate how such delay can be eliminated.

Failure to comply with the requirements of this section shall constitute a waiver of Design-Builder's right to an adjustment in the Contract Sum or Contract Price.

**8.6.4 Combined Requests for Price and Time Adjustments.** Any requests by Design-Builder for an adjustment in the Contract Sum and in the Contract Time that arise out of the same act(s), event(s), or condition(s) shall be submitted together.

**8.6.5 Owner's Response to Design-Builder's CIN.** Owner will make a written determination on Design-Builder's CIN within thirty (30) days after receiving Design-Builder's supplemental notice and supporting data under Section 8.6.3. However, Owner may request additional information and specify a reasonable time period for receipt of the information, in which case Owner will make a written determination within thirty (30) days following such receipt. If Owner does not make a written determination within the applicable time period, the CIN shall be deemed denied.

**8.7 Fault or Negligence of Design-Builder.** No change in the Contract Sum or Contract Time, including Substantial Completion Date(s), shall be allowed when the basis for the change arises

out of or relates to acts, events or conditions to the extent caused by the fault or negligence of Design-Builder, or anyone for whose acts Design-Builder is responsible

## **8.8 Computation of Adjustments.**

**8.8.1 Contract Sum.** The computation of the value of any Change Order, Design-Builder request for an adjustment under Section 8.6, or any other adjustment to the Contract Sum, shall be determined in accordance with Article 9.

**8.8.2 Contract Time.** The computation of any adjustments to the Contract Time as the result of any Change Order, or of any Design-Builder Contractor Initiated Notice under Section 8.6, or any other event or reason, shall be as set forth in Article 10.

**8.9 Change Order as Full Payment and Final Settlement.** If Owner and Design-Builder reach agreement on the terms of any change in the Work, including any adjustment in the Contract Sum or Contract Time such agreement shall be incorporated in a Change Order. The Change Order shall constitute full payment and final settlement of all adjustments for time and for direct, indirect, and consequential costs or damages, including costs or damages associated with delay, inconvenience, disruption of schedule, impact, dilution of supervision, loss of efficiency or productivity, ripple effect, acceleration of Work, lost profits, related in any way, to any Work, whether direct or indirect, either covered or affected by the Change Order, or related in any way, whether direct or indirect, to the acts, events or conditions giving rise to the change.

**8.10 Duty to Proceed.** No dispute under the Contract Documents, including those relating to the entitlement, cost, or time associated with a contemplated change or Design-Builder request for adjustment under Section 8.6, shall interfere with the progress of the Work and Owner shall continue to satisfy its payment obligations to Design-Builder in accordance with the Contract pending the final resolution of any dispute or disagreement. Design-Builder shall have the duty diligently to proceed with the Work in accordance with Owner's instructions despite any dispute or claim, including those events where the Parties are in disagreement as to whether instructions from Owner constitute a valid claim or change to the Contract Documents and justify adjustments to the Contract Sum or Contract Time. Design-Builder's sole recourse in the event of a dispute will be to pursue its rights under Article 11.

**ARTICLE 9**  
**ADJUSTMENTS TO THE CONTRACT SUM**

**9.1 Change in the Contract Sum – General Application.**

**9.1.1 Contract Sum Changes Only By Change Order.** The Contract Sum shall only be changed by a Change Order. Design-Builder shall include any request for a change in the Contract Sum in its:

- a. Cost Proposal
- b. Contractor Initiated Notice
- c. Claim, provided the related Cost Proposal or Contractor Initiated Notice included a request to adjust the Contract Sum.

**9.1.2 Methods for Calculating Change Order Amount.** The value of any Work covered by a Change Order, or of any request for an adjustment in the Contract Sum, shall be determined by one of the following methods:

- a. **Unit Prices:** By application of unit prices to the quantities of the items involved as determined in Section 9.2.
- b. **Firm Fixed Price:** On the basis of a fixed price as determined in Section 9.3.
- c. **Time and Materials:** On the basis of time and material as determined in Section 9.4.

Regardless of the method selected to calculate the change in the Contract Sum, the Design-Builder agrees that it will be entitled to Overhead and the Design-Builder's Fee on Change Order Work as set forth in this Section 9.1. Under no circumstances shall Design-Builder be entitled to receive Fee beyond the Base Work and that Overhead and profit that is included within the Change Order Work.

**9.1.3 Owner May Direct Method.** When Owner has requested Design-Builder to submit a Cost Proposal, Owner may direct Design-Builder as to which method in Section 9.1.2 to use when submitting its proposal.

**9.2 Unit Price Method.**

**9.2.1** Whenever the Owner authorizes Design-Builder to perform Work on a Unit Price basis, the Owner's authorization shall clearly state the:

- a. **Scope:** Scope of work to be performed;
- b. **Unit Price:** Applicable Unit Price; and,
- c. **Not to Exceed:** Not to exceed amount of reimbursement as established by the Owner.

**9.2.2** The applicable unit price shall include a detailed cost breakdown supporting the Design-Builder's request for reimbursement for all direct and indirect costs required to complete the changed Work, including any additional design or engineering costs as required to complete the Work, including Overhead and profit.

**9.2.3** Design-Builder shall be paid under this method only for the actual quantity of materials incorporated in or removed from the Work and such quantities must be supported by field measurement statements verified by the Owner. The GMP shall be adjusted in accordance with the agreed upon Change Order amount.

### **9.3 Firm Fixed Price Method.**

**9.3.1** The Design-Builder and Owner may mutually agree on a fixed amount as the total compensation for the performance of changed work.

**9.3.2** The Design-Builder shall provide a detailed cost breakdown supporting the Design-Builder's requested adjustment to the Contract Sum and any other financial documentation requested by the Owner's Representative.

**9.3.3** Any adjustments to the Contract Sum using the Firm Fixed Price Method shall include all reasonable direct and indirect costs of the changed Work, including Overhead and profit. Such Overhead and profit shall be calculated in accordance with Section 9.4.9.

**9.3.4** Whenever the Owner authorizes Design-Builder to perform changed Work on a Firm Fixed Price Method, the Owner's authorization shall clearly state:

- a. Scope of changed Work to be performed; and
- b. Total agreed price for performing such changed Work. The GMP shall be adjusted consistent with the total agreed price in the corresponding Change Order.

### **9.4 Time and Materials Method.**

**9.4.1 Owner Authorization.** Whenever the Owner authorizes the Design-Builder to perform Work on a Time and Materials basis, Owner's authorization shall clearly state:

- a. Scope of Work to be performed; and,
- b. A not to exceed amount of reimbursement as established by the Owner.

**9.4.2 Design-Builder's Responsibility.** Design-Builder shall:

- a. Cooperate with the Owner and assist in monitoring the Work being performed;
- b. Substantiate and keep separate records of the additional labor, design and engineering hours, materials and equipment charged to work under the Time and Materials Method by detailed time cards or logs completed on a daily basis before the close of business each working day;
- c. Present the time card and/or log at the close of business each day to the Owner's Representative so that the Owner may review and initial each time card/log for the work done under the Time and Materials Method;
- d. Perform all Work in accordance with this provision as efficiently as possible;
- e. Not exceed any cost limit(s) without the Owner's prior written approval; and
- f. Maintain all records of the work, including all records of the Subcontractors and make such records available for inspection as required in Section 6.8.

**9.4.3 Submission of Costs.** Design-Builder shall submit costs and any additional information requested by the Owner to support Design-Builder's requested price adjustment. Design-Builder shall be responsible for keeping all Change Order costs segregated from the costs for the Base Work as set forth in Article 5.

**9.4.4 Reasonable Costs of the Work.** The Design-Builder shall only be entitled to be paid for reasonable direct and indirect costs of the changed Work actually incurred and documented to Owner's satisfaction. The Design-Builder has a duty to control costs. If the Owner determines that the Design-Builder's costs are excessive or unreasonable, the Owner, at its discretion, shall determine the reasonable amount for payment. Any adjustments to the Contract Sum using the Time and Materials method shall be based on the direct and indirect costs of the Work as defined in Section 9.5 through Section 9.9.

**9.4.5 Labor.** For all labor, the Design-Builder shall be reimbursed for its labor costs in accordance with the applicable provisions of Section 5.5.

**9.4.6 Materials.** The cost of materials resulting from an event or condition shall be calculated in one or more of the following methods, at the Owner's election:

- a. **Invoice Cost.** The Design-Builder may be paid the actual invoice cost of materials including actual freight and express charges and applicable taxes less all available discounts, rebates, and back-charges, notwithstanding the fact that they may not have been taken by the Design-Builder. This method shall be considered only to the extent the Design-Builder's invoice costs are reasonable and the Design-Builder provides copies of vendor invoices, freight and express bills, and other evidence of cost accounting and payment satisfactory to the Owner. As to materials furnished from the Design-Builder's stocks for which an invoice is not available, the Design-Builder shall furnish an affidavit certifying its actual cost of such materials and such other information as the Owner may reasonably require;
- b. **Wholesale Price.** The Design-Builder may be paid the lowest current wholesale price for which the materials are available in the quantities required, including customary costs of delivery and all applicable taxes less all available discounts, rebates, and back-charges; or,
- c. **Owner Furnished Material.** The Owner reserves the right to furnish such materials as it deems advisable, and the Design-Builder shall have no Claim for any costs, overhead or profit on such materials.

**9.4.7 Equipment.** The additional cost, if any, of machine-power tools and equipment usage shall be calculated in accordance with the following rules:

**9.4.7.1 Equipment Rates.** Rates shall be based on the Design-Builder's actual allowable costs incurred or the rates established according to the Rental Rate Blue Book for Construction Equipment, published by Equipment Watch, PRIMEDIA, whichever is less. The Design-Builder's own charge rates may be used if verified and approved by the Owner and based on the Design-Builder's actual ownership and operating cost experience. Rental rates contained in published rate guides may be used if their cost formulas and rate factors are identifiable, reflect the Design-Builder's historical acquisition costs, utilization, and useful life, and do not include replacement cost, escalation contingency reserves, general and administrative expense, or profit. The Rental Rate Blue Book established equipment rate shall be the monthly rental rate for the equipment plus the monthly rental rate for required attachments, divided by 176, multiplied by the appropriate

regional adjustment factor, plus the hourly operating cost. The established equipment rate shall apply for actual equipment usage up to eight hours per day. For all hours in excess of eight hours per day or 176 hours per month, the established equipment rate shall be the monthly rental rate plus the monthly rental rate for required attachments, divided by 352, multiplied by the regional adjustment factor, plus the hourly operating cost.

**9.4.7.2 Transportation.** If the necessary equipment is not already at the Site and it is not anticipated that it would be required for the performance of other work under the terms of the Contract, the calculation shall include a reasonable amount for the costs of the necessary transportation of such equipment.

**9.4.7.3 Standby.** The Design-Builder shall be entitled to standby equipment costs only if (a) the equipment is ready, able, and available to do the Work at a moment's notice; (b) Design-Builder is required to have equipment standby because of an event or condition solely caused by the Owner and (c) the Design-Builder can demonstrate that it could have and intended to use the equipment on other projects/jobs. If entitled to standby costs, the Design-Builder shall be compensated at 50% of the monthly rental rate for the equipment, divided by 176, and multiplied by the appropriate regional adjustment factor, as identified in the Rental Rate Blue Book for Construction Equipment, published by Machinery Information Division of PRIMEDIA Information Inc. Standby shall not be paid during periods of Design-Builder-caused delay, concurrent delay, Force Majeure, during any seasonal shutdown, routine maintenance, down-time or broken equipment, late delivery of equipment or supplies, or other anticipated occurrence specified in the Contract Documents. No payment shall be made for standby on any piece of equipment, which has been used on the Project in any 24 hour period. Standby costs shall not be paid for weekends, holidays, and any time the equipment was not intended to be used on the Project as demonstrated by the Project Schedule.

#### **9.4.8 Subcontractor.**

**9.4.8.1** Direct costs associated with Subcontractors shall exclude overhead and profit markups and shall be calculated and itemized in the same manner as prescribed in Section 9.4.5 through Section 9.4.7 for Design-Builder. Design-Builder shall provide detailed breakdown of Subcontractor invoices.

#### **9.4.9 Overhead and Profit Markup.**

**9.4.9.1** On a change to the Contract Sum by the Design-Builder, the Owner will only pay Overhead, including home office overhead, site or field office overhead, and unabsorbed home office overhead, and profit in accordance to the provisions set forth herein, which are agreed to cover all Overhead and profit, regardless of how the Design Builder chooses to account for various costs in its books of account.

**9.4.9.2** Overhead and profit markups shall not be paid on freight, delivery charges, express charges, or sales tax.

**9.4.9.3** Overhead and profit markup shall be paid by a markup on direct costs and shall not exceed the following:

- a. If the Design-Builder is self-performing work: Design-Builder is limited to the combined Overhead and Fee percentages on the Design-Builder's direct costs as set forth in Section 5.5.23 and Section 5.4.



- b. If a Subcontractor is performing work: Subcontractor is limited to 18% combined overhead and profit markup for the Subcontractor's direct costs and Design-Builder is limited to 7% combined overhead and profit markup on the direct costs of the Subcontractor.
- c. In no event shall the total combined overhead and profit markup for Design-Builder and all Subcontractors of any tier exceed twenty-five percent (25%) of the direct cost to perform the Change Order Work.

**9.5 Direct Costs.**

Direct costs shall include labor (as defined in Section 9.4.5), materials (as defined in Section 9.4.6), equipment, (as defined in Section 9.4.7) and Subcontract costs (as defined in Section 9.4.8.)

**9.6 Deductive Changes to the Contract Sum.**

**9.6.1** A deductive change to the Contract Sum may be determined by taking into account:

- a. Costs incurred and saved by the Design-Builder as a result of the change, if any;
- b. The costs of labor, material, equipment, overhead and profit saved by the change. These costs shall be calculated following as closely as possible with the provisions identified in Article 9; and/or,
- c. At the discretion of the Owner, costs set forth in the documents used by the Design-Builder to develop its Proposal.

**9.6.2** Where the Owner has elected not to correct incomplete or defective Work, the adjustment in the Contract Sum shall take into account:

- a. The decreased value to the Owner resulting from the incomplete or defective Work; and,
- b. The increased future costs which the Owner may incur by reason of the incomplete or defective Work

**9.7 Compensation for Adjustments to the Substantial Completion Date(s).** Design-Builder's rights to seek compensation for the cost of an adjustment to the Substantial Completion Date(s), are set forth in Section 10.3.

**9.8 GMP Adjustment.** The GMP shall be adjusted consistent with the amount of each Change Order.

**ARTICLE 10**  
**ADJUSTMENTS TO CONTRACT TIME**

**10.1 Requests for Contract Time.** The Contract Time shall only be changed by a Change Order. Design-Builder shall include any request for a change in the Contract Time in its:

- a. Cost Proposal.

- b. Contractor Initiated Notice.
- c. Claim, provided the related Cost Proposal or Contractor Initiated Notice included a request to adjust the Contract Time.

**10.2 Adjustment of Contract Time.** The Contract Time shall be adjusted by the amount of time Design-Builder actually is delayed by an Excusable Delay in the performance of the Work, provided that: (a) written initial and supplemental notice is given by Design-Builder within the time periods provided in Section 8.6; (b) the delay impacts the Critical Path (as reflected on the most recent monthly Project Schedule update), such delay could not be avoided by resequencing the Work, and the delay is outside the reasonable control of Design-Builder; (c) Design-Builder's performance would not have been concurrently delayed or interrupted by any event other than those identified in Section 10.4; and (d) Design-Builder, in view of all the circumstances, has exercised reasonable efforts to avoid the delay and did not cause the delay. Delays of Subcontractors shall be deemed to be within the reasonable control of Design-Builder, unless such delays are themselves excusable in accordance with the provisions of this Agreement.

**10.3 Adjustment of Contract Sum for Excusable Delays.**

**10.3.1 Compensable and Non-Compensable Excusable Delays.** If Design-Builder encounters an Excusable Delay under Sections 10.4 (1), (2), (3), (4), (5), (10), (11), or (13), for which it is entitled to a time extension pursuant to Section 10.2, Design-Builder also shall be entitled to an adjustment of the Contract Sum, as provided in Section 10.3.2. Except as provided in the preceding sentence, Design-Builder expressly waives any and all monetary relief for any delay to the Work, whether or not such delay is an Excusable Delay, and specifically agrees that its sole and exclusive remedy for Excusable Delay, including any loss of productivity of impact costs associated with such Excusable Delays, will be an adjustment to the Substantial Completion Dates(s).

**10.3.2 Adjustments to Contract Sum.** The daily cost of any change in the Contract Time allowed under Section 10.3.1 shall be limited to the items below. Design-Builder shall not be entitled to any Overhead and profit for an adjustment in Contract Time except as provided below:

- (1) Cost of nonproductive field supervision or labor extended because of the delay;
- (2) Cost of weekly meetings or similar indirect activities extended because of the delay;
- (3) Cost of temporary facilities or equipment rental extended because of the delay;
- (4) Cost of insurance extended because of the delay; and
- (5) General and administrative overhead in an amount to be agreed upon, but not to exceed the sum of items (1) through (4) multiplied by the combined Overhead and Fee percentages set forth in Section 5.5.23 and Section 5.4.1.

**10.4 Events Constituting Excusable Delay.** The following events shall constitute Excusable Delay, provided, however, that before any event is deemed to be an Excusable Delay, Design-Builder shall be required to meet the conditions set forth in Section 10.2 for each such event:

- (1) Owner's suspension of all or part of the Work pursuant to Article 17;

- (2) Any failure of Owner to act within the times expressly provided in this Agreement;
- (3) Any unreasonable delay caused by an act, event or condition caused by Owner or persons acting on Owner's behalf;
- (4) Owner changes pursuant to Article 8;
- (5) **Not used.**
- (6) Major earthquakes or floods;
- (7) Weather conditions that meet the criteria established in Division One;
- (8) Public disorders, insurrection, rebellion, epidemic, terrorism, acts of war;
- (9) Fire or other casualty for which Design-BUILDER is not responsible;
- (10) Actions of Governmental Units enjoining the Project from proceeding or in unreasonably delaying the issuance of a Government Approval;
- (11) Changes in Laws; and
- (12) Labor strikes lasting in excess of seven (7) consecutive days that affect a specific trade on a national or regional level and such strike was not caused by the acts or omissions of Design-BUILDER or Subcontractors.
- (13) Differing Site Conditions as set forth in Section 3.4.5.
- (14) Supplier delay of sole source products, provided the delay is completely outside the control of the Design-BUILDER.

**10.5 Events Not Considered As Excusable Delay.** The following events shall not constitute Excusable Delay, and Design-BUILDER assumes all risk of such events:

- (1) Actions or inactions of Government Units except as provided in Section 10.2(10);
- (2) Delays in obtaining or delivery of goods or services from Design-BUILDER or any Subcontractor unless such delay is caused by an Excusable Delay encountered by the Subcontractor;
- (3) Economic conditions, including labor shortages, inexperienced or unqualified labor, material shortages, or increases in the prices of labor or material.
- (4) Delays of common carriers;
- (5) Delays or disruptions arising out of or related to security clearances at the Site unless such delays or disruptions are not due to the actions or omissions of the Design-BUILDER or its subcontractors;
- (6) Adverse weather conditions, except as provided in Sections 10.2(6) and 10.2(7); and

- (7) Any other delay not specifically enumerated in Section 10.2.

**10.6 Design-Builder To Proceed With Work As Directed.** Pending final resolution of any request in accordance with this article, unless otherwise agreed in writing, Design-Builder shall proceed diligently with performance of the Work.

**10.7 Disputes: Burden of Proof.** In case of a dispute regarding the application of the provisions of this Article 10, including any dispute as to whether an Excusable Delay has occurred, either Party shall have the right to submit the dispute for resolution pursuant to Article 11, and Design-Builder shall bear the burden of proof, by clear and convincing evidence, in establishing its entitlement to adjustments to the Contract Time and its entitlement to relief under this Article 10.

## **ARTICLE 11**

### **CLAIMS AND DISPUTE RESOLUTION**

**11.1 Condition Precedent to Filing a Claim.** Compliance with the requirements of Article 8, Article 9, and Article 10, is a condition precedent to filing a Claim.

**11.2 Claims Process.**

**11.2.1 Claim Filing Deadline for Design-Builder.** Design-Builder shall file its Claim within forty-five (45) days from Owner's denial or deemed denial of a Contractor Initiated Notice under Section 8.6.

**11.2.2 Claim Must Cover All Costs and Be Documented.** The Claim shall be deemed to cover all changes in cost and time (including direct, indirect, impact, and consequential) to which Design-Builder may be entitled. It shall be fully substantiated and documented and, at a minimum, shall contain the following information:

- (1) A detailed factual statement of the Claim for additional compensation and time, if any, providing all necessary dates, locations, and items of Work affected by the Claim;
- (2) The date on which facts arose which gave rise to the Claim;
- (3) The name of each employee, agent or representative of Owner and Design-Builder knowledgeable about the Claim;
- (4) The specific provisions of the Contract Documents which support the Claim;
- (5) The identification of any documents and the substance of any oral communications that support the Claim;
- (6) Copies of any identified documents, other than the Contract Documents, that support the Claim;

- (7) If an adjustment in the Contract Time is sought, then: (a) the specific number of days sought; (b) the specific reasons Design-Builder believes an extension in the Contract Time should be granted; and (c) Design-Builder's analysis of its Project Schedule and relevant schedule updates as required by Article 25 to demonstrate the reason for such an adjustment;
- (8) If an adjustment in the Contract Sum is sought, the exact amount sought, calculated in accordance with the Contract, a breakdown of that amount into the categories set forth in, and in the detail required by, Article 9 and the cost categories in Section 6.7; and
- (9) A statement certifying, under penalty of perjury, that Design-Builder has exercised reasonable diligence in investigating the Claim and that after its investigation, it has determined that the Claim is made in good faith, that the supporting cost and pricing data are true and accurate to the best of Design-Builder's knowledge and belief, that the Claim is fully supported by the accompanying data, and that the amount requested accurately reflects the adjustment in the Contract Sum or Contract Time to which Design-Builder believes Owner is liable.

**11.2.3 Limitation on Claim Amendment.** Design-Builder shall not be allowed to change the alleged basis for a Claim or to increase the amount of money, time or other relief requested after the applicable time period for bringing a Claim, if the change is based in any way upon data or information that a reasonable and diligent investigation would have uncovered prior to making the Claim.

**11.2.4 Time for Owner's Response to Claim.** After Design-Builder has submitted a fully documented Claim that complies with all applicable provisions of Section 11.2.2, Owner shall respond in writing to Design-Builder, Owner shall respond in writing within sixty (60) days from the date the Claim is received with either:

- (1) A decision regarding the Claim; or
- (2) Written Notice extending the Owner's time to respond to the Claim for another thirty (30) Days.

Absent a thirty (30) Day extension, the Claim shall be deemed denied upon the sixty-first (61<sup>st</sup>) Day following receipt of the Claim by Owner. If Owner used a thirty (30) Day extension, the Claim shall be deemed denied upon the ninety-First (91<sup>st</sup>) Day following receipt of the Claim by the Owner.

**11.2.5 Owner's Review of Claim & Finality of Decision.** To assist in the review of any Claim, Owner or its designee may visit the Site, request additional information or documentation in order to fully evaluate and/or audit the Claim. Design-Builder shall proceed with performance of the Work pending final resolution of any Claim in accordance with Section 8.8. Owner's written decision on a Claim shall be final and conclusive as to all matters set forth in the Claim, unless Design-Builder follows the procedures set forth in Section 11.3.

**11.2.6 Waiver of Design-Builder Rights for Failure to Comply with this Section.** Any Claim of Design-Builder against Owner for damages, additional compensation, or additional time, shall be conclusively deemed to have been waived by Design-Builder unless timely made in accordance with the requirements of this Section 11.2.

### **11.3 Alternative Dispute Resolution and Litigation.**

**11.3.1.** As a mandatory condition precedent to the initiation of litigation by the Design-Builder against the Owner, Design-Builder shall:

**11.3.1.1** Comply with all provisions set forth in this Contract;

**11.3.1.2** Complete all Work required for, and request that the Owner issue, a Certificate of Substantial Completion of the Work;

**11.3.1.3** Request initiation of an Alternate Dispute Resolution (ADR) process agreeable to both Parties no later than 180 Days after the Design-Builder submits its final Application for Payment, or, if the dispute arises out of an event that occurs after the final Application for Payment, within 180 Days after such event.

**11.3.1.4** Participate in an effort to complete the ADR process within 180 Days after Design-Builder requests initiation of the ADR process.

**11.3.2** Any litigation brought against the Owner shall be filed and served on the Owner within 365 Days after the Design-Builder submits its final Application for Payment, or, if the dispute arises out of an event that occurs after the final Application for Payment, within 365 Days after such event. The requirement that the Parties participate in ADR does not waive the requirements of this subparagraph.

**11.3.3** Failure to comply with these mandatory condition time requirements shall constitute a waiver of the Design-Builder's right to pursue judicial relief for any Claim arising from Work performed under the Contract.

**11.4 Continuation of Work.** Design-Builder shall continue to perform the Work and Owner shall continue to satisfy its payment obligations to Design-Builder pending final resolution of any dispute or disagreement.

**11.5 Owner May Audit Claims.** In its discretion, Owner may exercise its right under Section 6.8 to audit any Claim following the filing of the Claim.

## **ARTICLE 12** **INSPECTION AND CORRECTION OF WORK**

**12.1 Periodic Inspections.** Owner and its respective agents and representatives, including Owner's Design-Build Consultant, shall have the right to inspect and test the Work at the Site or where the same is being prepared, manufactured, fabricated or assembled (including but not limited to any item of equipment and materials, design, engineering, or other service or the workmanship associated therewith). Design-Builder shall, at the request of Owner, arrange for any such inspection and testing at reasonable times and upon reasonable advance notice. Owner's inspection and testing may include, to the extent Owner deems it appropriate, testing

of such Work. Owner shall inform Design-Builder promptly of any defects or deficiencies in the Work it discovers in any inspection or test of the Work. Any inspection or test by Owner, Owner's Design-Build Consultant or any of their representatives of any part of the Work, or any failure to inspect or test, shall in no way: (a) affect Design-Builder's obligations to perform the Work in accordance with the Contract Documents; (b) constitute or imply acceptance; (c) relieve Design-Builder of responsibility for risk of loss or damage to the Work; or (d) impair Owner's right to reject defective or nonconforming items, or to avail itself of any other remedy to which it may be entitled. All such inspections and tests shall be conducted in a manner that does not unreasonably interfere with the normal performance and progress of the Work. Notwithstanding anything to the contrary in the Contract Documents, Owner shall have the right to take photographs of the Work and Site at any time.

**12.2 Access to and Dismantling of Work.** Design-Builder shall cooperate fully with Owner at any reasonable time that Owner shall determine that inspection of the Work is necessary or appropriate. Such cooperation shall include furnishing Owner with access to the Work whenever and wherever Work is in progress, even to the extent of dismantling finished Work where necessary to permit such inspection. If such dismantling and subsequent inspection reveals defects or deficiencies, such Work and all associated Work shall be corrected at the expense of Design-Builder. If such dismantling and subsequent inspection reveals no defects or deficiencies, such Work shall be restored at the expense of Owner.

**12.3 Correction of Work.** Design-Builder promptly shall correct any defects or deficiencies in any part of the Work, regardless of the stage of its completion or the time or place of discovery of such errors. If Design-Builder fails to take corrective actions, Owner may replace, correct, or remove the non-conforming work and charge the cost thereof to Design-Builder. At Design-Builder's discretion, correction of such work shall be either at its expense or, if sufficient funds are available to cover the costs, charged against the Design-Builder's Contingency.

**12.4 Work Affected By Corrective Work.** Design-Builder shall bear the cost of correcting destroyed or damaged Work, whether completed or partially completed, caused by Design-Builder's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

**12.5 Owner Acceptance of Non-Conforming Work.** If Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, Owner may do so instead of requiring its removal and correction, in which case the Contract Sum shall be reduced as appropriate and equitable.

**12.6 Removal From Site.** Design-Builder 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 Design-Builder nor accepted by Owner.

**12.7 Observance of Tests.** Owner shall have the right to observe all tests of the Work and the Project performed by Design-Builder pursuant to the Contract Documents.

**ARTICLE 13**  
**WARRANTIES: CORRECTION OF DEFECTS OR DEFICIENCIES**  
**AFTER SUBSTANTIAL COMPLETION**

**13.1 Design-Builder's Warranty.** Design-Builder warrants that: (a) the equipment and materials will be new, free of defects or deficiencies in materials and workmanship, and fit and sufficient for their intended purpose as set forth in the Contract Documents; (b) the Work will be performed in accordance with the standards and requirements specified in the Contract Documents; and (c) the Project shall be designed and constructed to meet the requirements of the Contract Documents and to produce a fully functional facility that is capable of achieving all performance objectives of the Contract Documents and of operating free of defects in its major components.

**13.2 Warranty Period.** For Phase 1A, the warranty period shall be for the longer period of: one (1) year from the date of Substantial Completion of the Phase 1A Work, or the duration of any special extended warranty offered by a supplier or common to the trade. For Phase 1B, the warranty period shall be for the longer period of: one (1) year from the date of Substantial Completion of the Phase 1B Work, or the duration of any special extended warranty offered by a supplier or common to the trade.

**13.3 Additional Warranty Obligations.** With respect to all warranties for Work, Design-Builder shall:

- (1) Obtain all warranties that would be given in normal commercial practice and any specific warranties as set forth in the Contract Documents;
- (2) Require all warranties to be executed, in writing, for the benefit of Owner;
- (3) Enforce all warranties for the benefit of Owner, if directed by Owner; and
- (4) Be responsible to enforce any Subcontractor warranties.

**13.4 Correction of Defects or Deficiencies.**

**13.4.1 Obligation to Correct.** Design-Builder agrees to correct any Work that is found to not be in conformance with the Contract Documents, including those subject to the warranties identified in Sections 13.1 and 13.3 above, within the warranty period stated in Section 13.2.

**13.4.2 Notice.** Design-Builder shall, within seven (7) days of receipt of written notice from Owner that the Work is not in conformance with the Contract Documents, take necessary steps to commence correction of such nonconforming Work, including the correction, removal or replacement of the nonconforming Work and any damage caused to other parts of the Work affected by the nonconforming Work. If Design-Builder fails to commence the necessary steps within such seven (7) day period, Owner, in addition to any other remedies provided under the Contract Documents, may provide Design-Builder with written notice that Owner will commence correction of such nonconforming Work with its own forces. If Owner does perform such corrective Work, Design-Builder shall be responsible for all reasonable costs incurred by Owner in performing such correction. If the nonconforming Work creates an emergency requiring an immediate response, the seven (7) day periods identified herein shall be inapplicable.



**13.5 No Limitation on Other Obligations.** Nothing contained in this section shall be construed to establish a period of limitation with respect to other obligations which Design-Builder might have according to the Contract Documents. Establishment of the warranty period in Section 13.2 relates only to Design-Builder's specific obligation to correct the Work, and has no relationship to the time within which Owner may enforce Design-Builder's obligation to comply with the Contract Documents, including the time within which such enforcement proceedings may be commenced.

**13.6 Warranty Survey.** Owner shall schedule a warranty survey to take place nine (9) months after Substantial Completion of Phase 1A and Substantial Completion of Phase 1B. Design-Builder will be given an opportunity to attend each warranty survey at its own expense. In accordance with Section 13.3, Owner will provide Design-Builder notice of all defects and deficiencies discovered during the warranty survey.

## **ARTICLE 14**

### **TITLE AND OWNERSHIP OF WORK PRODUCT**

**14.1 Clear Title.** Design-Builder warrants and guarantees that legal title to and ownership of the Work shall be free and clear of any and all liens, claims, security interests, or other encumbrances when title thereto passes to Owner. With respect to all computer programs used in connection with the operation and maintenance of the Project, Design-Builder warrants legal title to, or a legal license to use, such programs when title thereto passes to Owner. Title to all Work, equipment and materials, tools, supplies provided by Design-Builder as part of the Work will pass to Owner as and to the extent: (a) payment therefor is made by Owner in accordance with this Agreement; (b) they are incorporated into the Project; or (c) upon termination of this Agreement for an Event of Design-Builder Default pursuant to Article 15, whichever is earlier. Design-Builder shall deliver to Owner such assignments, bills of sale, or other documents as reasonably requested by Owner to evidence such transfer of title.

#### **14.2 Design Work Product.**

**14.2.1 Ownership of Design Work Product.** Unless otherwise provided, all Design Work Product ("Materials") produced under this Agreement shall be considered "works for hire" as defined by the U.S. Copyright Act and shall be owned by the Owner. Owner shall be considered the author of such Materials. In the event the Materials are not considered "works for hire," under the U.S. Copyright Laws, Design-Builder hereby irrevocably assigns all right, title, and interest in Materials, including all intellectual property rights, to Owner effective from the moment of creation of such Materials. Materials means all items in any format and includes Construction Documents, specifications, electronic data, CAD files, drawings, data, reports, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions. Ownership includes the right to copyright, patent, register and the ability to transfer these rights.

For Materials that are delivered under this Agreement, but that incorporate preexisting materials not produced under this Agreement, Design-Builder hereby grants to Owner a nonexclusive, royalty-free, irrevocable license (with rights to sublicense others) in such Materials to translate, reproduce, distribute, prepare derivative works, publicly perform, and publicly display. Design-Builder warrants and represents that Design-Builder has all rights

and permissions, including intellectual property rights, moral rights and rights of publicity, necessary to grant such a license to Owner. Design-Builder shall exert all reasonable effort to advise Owner, at the time of delivery of data furnished under this Agreement, of all known or potential invasions of privacy contained therein and of any portion of such document which was not produced in the performance of this Agreement. Owner shall receive prompt written notice of each notice or claim of infringement received by the Design-Builder with respect to any data delivered under this Agreement. Owner shall have the right to modify or remove any restrictive markings placed upon the data by the Design-Builder.

**14.2.2 Reuse of Design Work Product.** The Design Work Product is not intended or represented to be suitable for reuse by Owner or others on expansions of the Project or on any other project. Any reuse without prior written verification or adaptation by Design-Builder or applicable Subcontractors for the specific purpose intended will be at Owner's sole risk and without liability or legal exposure to Design-Builder.

## **ARTICLE 15**

### **DEFAULT OF DESIGN-BUILDER**

**15.1 Events of Default by Design-Builder.** Design-Builder shall be in default hereunder upon the occurrence of any one of the following events, which shall be events of default (each an "Event of Design-Builder Default") if not cured by Design-Builder following delivery to Design-Builder of a notice of such event from Owner:

**15.1.1 Failure to Prosecute Work.** Design-Builder fails to prosecute the Work or any portion thereof with sufficient diligence to ensure Substantial Completion or Final Completion within the Substantial Completion Date(s);

**15.1.2 Failure to Correct Work.** Following Substantial Completion Design-Builder fails to replace or correct Work not in conformance with the Contract Documents;

**15.1.3 Failure to Provide Adequate Labor and Materials.** Design-Builder fails to supply skilled workers or proper equipment and materials

**15.1.4 Failure to Pay.** Design-Builder repeatedly fails to make prompt payment due to Subcontractors or any other entity or person who provides services or performs any aspect of the Work;

**15.1.5 Failure to Comply with Laws.** Design-Builder materially fails to comply with Governmental Rules or Governmental Approvals;

**15.1.6 Material Breach.** Design-Builder is in material breach of any provision of the Contract Documents.

**15.2 Owner's Remedies Against Design-Builder.** In issuing notice pursuant to Section 15.2, Owner, at its option, shall require the Design-Builder to either promptly correct the Event of Design-Builder Default noted or provide Owner with a corrective action plan, within the time period specified in the notice, as to how such Event of Design-Builder Default will be cured in a timely fashion. The provisions of Article 11 notwithstanding, if after receipt of the proposed cure

the Owner has a reasonable basis for concluding that the Design-Builder has (a) failed or is unwilling to cure the Event of Design-Builder Default, or (b) failed or is unwilling to provide a reasonable and satisfactory corrective action plan, Owner shall have the right immediately to terminate this Agreement, in addition to any rights and remedies that may be available at law or in equity or as provided herein. If it is subsequently determined that Owner was not entitled to terminate this Agreement for Design-Builder default, this Agreement shall be deemed terminated under Article 16.

**15.3 Additional Owner's Rights Upon Design-Builder Default.** If Owner elects to terminate this Agreement pursuant to Section 15.2, Design-Builder shall provide Owner with the right to continue to use any and all Work, including but not limited to any Work developed by Design Consultants, Owner deems necessary. Furthermore, Owner shall have the right to take possession of, and Design-Builder shall make available to, Owner all equipment and materials, construction equipment and other components of the Work, whether located at the Site or elsewhere, on the date of such termination for the purpose of completing the Work, and Owner may employ any other person or entity (sometimes hereinafter referred to as "Replacement Design-Builder") to finish the Work in accordance with the terms of this Agreement by whatever method Owner may deem expedient. Owner shall make such expenditures as in Owner's sole judgment will best accomplish the timely completion of the Project, provided Owner shall not be required or expected to mitigate any such costs by terminating, repudiating or renegotiating any agreement entered into between Design-Builder and any Subcontractor, including those agreements with Design Consultants.

**15.4 General Obligations.** If Owner elects to terminate this Agreement pursuant to Section 15.2, Design-Builder shall, at Owner's request and at Design-Builder's expense, perform the following services relative to the Work so affected:

**15.4.1 Inventory Equipment. Etc.** Assist Owner in preparing an inventory of all equipment and other components of the Work in use or in storage at the Site and elsewhere;

**15.4.2 Assign Subcontracts. Etc.** Assign to Owner or to any Replacement Design-Builder designated by Owner, without any right to compensation not otherwise provided for herein, title to all Work not already owned by Owner, together with all subcontracts and other contractual agreements (including warranties) and rights thereunder as may be designated by Owner, all of which subcontracts and contractual agreements shall be so assignable, and assign to Owner to the extent assignable all issued permits, licenses, authorizations and approvals then held by Design-Builder pertaining to the Work which have been procured in connection with performance of the Work, including but not limited to those associated with Design Consultants;

**15.4.3 Deliver Design Work Product.** Deliver to Owner all Design Work Product as may be requested by Owner for the completion and/or operation of the Project; and

**15.5 Payment Obligations.**

**15.5.1 Owner's Right to Termination and Completion Expenses.** If Owner terminates this Agreement, as soon as practicable after Final Completion of the Project, Owner shall determine the total reasonable and necessary expense incurred and accrued in connection with such termination (including all legal fees and expenses) and the completion of the

Work including, without limitation, all amounts charged by any Replacement Design-Builder to finish the Work based on the obligations such Replacement Design-Builder assumes under this Agreement and under any of Design-Builder's subcontract(s) or other contractual agreement(s) that Design-Builder has assigned to Owner or to such Replacement Design-Builder pursuant to Section 15.4.2 and additional reasonable and necessary overhead incurred and accrued by Owner to effect such takeover and to complete the Work.

**15.5.2. Contract Sum Balance.** Design-Builder shall be entitled to receive the balance due of the Contract Sum minus the sum of: (a) Owner's expenses incurred in connection with the termination of this Agreement and the completion of the Work as determined in accordance with Section 15.5.1, and (b) all Liquidated Damages owed by Design-Builder. If the sum of such Liquidated Damages and the total expense so incurred by Owner in completing the Work exceeds the balance of the Contract Sum unpaid at the time of Design-Builder's default, then Design-Builder shall be liable for and shall pay to Owner the amount of such excess within twenty (20) business days following receipt of Owner's demand for such payment. Design-Builder obligations for payment shall survive termination.

**15.6 No Relief of Responsibility.** Termination of the Work in accordance with this Article 15 shall not relieve Design-Builder or its surety of any responsibilities for Work performed.

## **ARTICLE 16**

### **TERMINATION FOR CONVENIENCE**

**16.1 Owner's Right to Terminate Agreement for Convenience.** Owner has the right, upon written notice, to terminate this Agreement for its convenience if Owner determines that such termination is in Owner's best interests.

**16.2 Design-Builder's Responsibility Upon Termination for Convenience.** Unless Owner directs otherwise, after receipt of a written notice of termination for or convenience, Design-Builder promptly shall:

- (1) Stop performing Work on the date and as specified in the notice of termination;
- (2) Place no further orders or subcontracts for materials, equipment, services or facilities, except as may be necessary for completion of such portion of the Work as is not terminated;
- (3) Cancel all orders and subcontracts, upon terms acceptable to Owner, to the extent that they relate to the performance of Work terminated;
- (4) Assign to Owner all of the right, title, and interest of Design-Builder in all orders and subcontracts;
- (5) Take such action as may be necessary or as directed by Owner to preserve and protect the Work, Site, and any other property related to this Project in the possession or control of Design-Builder (or Design-Builder's agents) in which Owner has an interest; and

- (6) Continue performance only to the extent not terminated.

**16.3 Adjustment for Termination for Convenience.** If Owner terminates the Work for convenience, Design-Builder shall be entitled to be paid for all Work properly performed by Design-Builder prior to the effective date of the termination for convenience, plus the reasonable administrative and wind-down expenses associated with such termination. The preceding amount shall be reduced by amounts previously paid by Owner to Design-Builder and any amounts which Owner has the right to offset or withhold by the terms of the Contract Documents. Notwithstanding the above, in no event shall Design-Builder ever be entitled to recover: (a) profit or unabsorbed Overhead in connection with work not actually performed or future work; (b) amounts that would result in the Design-Builder receiving payments that it would not have been entitled to receive under the Contract Documents if the Design-Builder was not terminated for convenience; or (c) amounts that would cause the total payments received by the Design-Builder to exceed the Contract Sum.

## **ARTICLE 17** **SUSPENSION OF WORK**

**17.1 Owner's Suspension of Work for Convenience.** Owner may, for its convenience and for any reason, suspend the Work in whole or in part at any time by written notice to Design-Builder, stating the nature, effective date and anticipated duration of such suspension, whereupon Design-Builder shall suspend the Work to the extent specified and shall place no further orders or subcontracts relating thereto. During the period of any such suspension, Design-Builder shall protect and care for all Work, equipment and materials at the Site or at the storage areas under its responsibility. If Design-Builder claims that the suspension has affected either the Contract Sum or Contract Time Design-Builder shall be entitled to submit a Contractor Initiated Notice in accordance with Article 8. Design-Builder shall use its best efforts to minimize the costs and expenses associated with a suspension of the Work.

**17.2 Owner's Suspension of Work for Cause.** If Design-Builder fails or refuses to perform its obligations in accordance with the Contract Documents, Owner may order Design-Builder, in writing, to stop the Work, or any portion thereof, until satisfactory corrective action has been taken. Design-Builder shall not be entitled to an adjustment in the Contract Sum or Contract Time) for any increased cost or time of performance attributable to Design-Builder's failure or refusal to perform or from any reasonable remedial action taken by Owner based upon such failure.

## **ARTICLE 18** **INSURANCE**

### **18.1 Insurance Carried by Design-Builder**

Design-Builder shall comply with all insurance requirements stated in \_\_\_\_\_.

## **ARTICLE 19**

### **INDEMNIFICATION**

#### **19.1 Patent and Copyright Infringement**

**19.1.1** Design-Builder shall defend any action or proceeding brought against Owner based on any claim that the Work, or any part thereof, or the operation or use of the Work or any part thereof, constitutes infringement of any United States patent or copyright, now or hereafter issued. Owner shall give prompt written notice to Design-Builder of any such action or proceeding and will reasonably provide authority, information and assistance in the defense of same. Design-Builder shall indemnify and hold harmless Owner from and against all damages and costs, including but not limited to attorneys' fees and expenses awarded against Owner or Design-Builder in any such action or proceeding. Design-Builder agrees to keep Owner informed of all developments in the defense of such actions.

**19.1.2** If Owner is enjoined from the operation or use of the Work, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding, Design-Builder shall at its sole expense take reasonable steps to procure the right to operate or use the Work. If Design-Builder cannot so procure such right within a reasonable time, Design-Builder shall promptly, at Design-Builder's option and at Design-Builder's expense, (i) modify the Work so as to avoid infringement of any such patent or copyright or (ii) replace said Work with Work that does not infringe or violate any such patent or copyright.

**19.1.3** Sections 19.1.1 and 19.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by Owner and not offered or recommended by Design-Builder to Owner or (ii) arising from modifications to the Work by Owner or its agents after acceptance of the Work. If the suit, claim or proceeding is based upon events set forth in the preceding sentence, Owner shall defend, indemnify and hold harmless Design-Builder to the same extent Design-Builder is obligated to defend, indemnify and hold harmless Owner in Section 19.1.1 above.

**19.1.4** The obligations set forth in this Section 19.1 shall constitute the sole agreement between the Parties relating to liability for infringement or violation of any patent or copyright.

#### **19.2 Payment Claim Indemnification**

**19.2.1** Design-Builder, to the fullest extent permitted by law shall indemnify, defend and hold harmless Owner from any claims or payment bond liens brought against Owner or against the Project as a result of the failure of Design-Builder, or those for whose acts it is responsible, to pay for any services, materials, labor equipment, taxes or other items or obligations furnished or incurred for or in connection with the Work. Within seven (7) Days of receiving written notice from Owner that such a claim or lien has been filed, Design-Builder shall commence to take the steps necessary to discharge said claim or lien, including, if necessary, the furnishing of a bond. If Design-Builder fails to do so, Owner will have the right to discharge the claim or lien and hold Design-Builder liable for costs and expenses incurred, including attorney fees.

#### **19.3 Design-Builder's General Indemnification**

**19.3.1** The Design-Builder shall protect, defend, indemnify, and hold harmless the Owner, its officers, officials, employees, and agents, from any and all claims, demands, suits, penalties, losses, damages, judgments, or costs of any kind whatsoever (hereinafter "claims"), arising out of or in any way resulting from the Design-Builder's, its officers, employees, agents, partners, respective members, parent corporations, subsidiaries or affiliates, and/or Subcontractors of all tiers, acts or omissions, performance or failure to perform its obligations under this Agreement, to the maximum extent permitted by law or as defined by RCW 4.24.115, now enacted or as hereinafter amended.

**19.3.2** The Design-Builder's obligations under this Section 19.3 shall include, but not be limited to, the duty to indemnify and defend the Owner from any claim, demand, and/or cause of action brought by or on behalf of any of Design-Builder's employees, agents, representatives, or Subcontractors. The foregoing duty is specifically and expressly intended to constitute a waiver of the Design-Builder's immunity under Washington's Industrial Insurance Act, RCW Title 51, as respects the Owner with a full and complete indemnity and defense of claims made by the Design-Builder's employees and representatives. The parties acknowledge that these provisions were mutually negotiated and agree upon by them.

**19.3.3** The Owner may, in its sole discretion and after notice to the Design-Builder, (1) withhold amounts sufficient to pay the amount of any claim for injury or damage, and/or (2) pay any claim for injury or damage of which the Owner may have knowledge, arising out of the performance of this Contract.

**19.3.4** Any amount withheld will be held until the Design-Builder secures a written release from the claimant, obtains a court decision that such claim is without merit, or satisfies any judgment on such claim. In addition, the Design-Builder shall reimburse and otherwise be liable for costs incurred by the Owner, including, without limitation, costs for claims adjusting services, attorneys, engineering, and administration.

**19.3.5** In the event the Owner incurs any judgment, award, and/or costs arising therefrom, including attorneys' fees, to enforce the provisions of this Section, all such fees, expenses, and costs shall be recoverable from the Design-Builder.

**19.3.6** The indemnification, protection, defense and save harmless obligations contained herein shall survive the expiration, abandonment or termination of this Contract.

**19.3.7** Nothing in this section shall affect and/or alter the application of any other provision contained within this Contract. The Owner's rights and remedies in this Contract are in addition to any other rights and remedies provided by law.

## **ARTICLE 20**

### **NON-DISCLOSURE OF CONFIDENTIAL DOCUMENTS: PUBLIC RECORDS ACT**

**20.1 Distribution of Records.** Design-Builder shall keep records of the distribution of documents, including those to all Subcontractors.

**20.1.1 Disposal Methods.** Design-Builder shall stipulate the method of disposal (shredding, burning, etc.) that is required to destroy the retired documents.

**20.1.2 Backcharges.** Instances of improper distribution of documents which create

Owner expenses to control and secure the Contract Documents will be charged to Design-Builder.

**20.1.3 Security of Documents.** All parties having access to Contract Documents shall maintain reasonable security control over the premises in which they reside.

## **20.2 Public Records Act.**

**20.2.1 Public Records.** All proceedings, records, contracts, and other public records relating to this Design-Build Contract shall be open to the inspection of any interested person, firm, or corporation in accordance with the chapter 42.56 RCW, the Public Records Act, and RCW39.10.470, except as provided in subsection (2) below.

**20.2.2 Confidential Records.** The term “confidential record” includes trade secrets, as defined in RCW 19.108.010, or other proprietary information submitted by the Design-Builder in connection with an alternative public works transaction authorized by RCW 39.10. Such confidential records shall not be subject to chapter 42.56 RCW if the Design-Builder specifically states in writing the reasons why protection is necessary, and identifies the data or materials to be protected. RCW 39.10.470(2).

If Owner receives any public records request for identified confidential records, Owner will notify the Design-Builder of the request and of the date that Owner will disclose such confidential records, which shall not be less than ten (10) Days from the date of such notice unless the Design-Builder obtains a court order directing Owner to withhold such confidential records pursuant to RCW 42.56.540.

## **ARTICLE 21** **INDEPENDENT CONTRACTOR**

**21.1 Independent Contractor.** Design-Builder is an independent contractor and nothing contained herein shall be construed as constituting any other relationship with Owner. Neither Design-Builder nor any of its employees shall be deemed to be employees of Owner.

**21.2 Design-Builder’s Responsibilities for its Employees.** Subject to the provisions of the Contract Documents, Design-Builder shall have sole authority and responsibility to employ, discharge and otherwise control its employees.

**21.3 Responsibilities of Design-Builder as Principal for its Subcontractors.** Design-Builder has complete and sole responsibility as a principal for its agents, Subcontractors and all other hires to perform or assist in performing the Work.

## **ARTICLE 22** **[Not used]**



**ARTICLE 23**  
**PREVAILING WAGES**

**23.1 Prevailing Wages.** Design-Builder shall pay the prevailing rate of wages to all workers, laborers, or mechanics employed in the performance of any part of the Work in accordance with RCW Ch. 39.12 and the Governmental Rules of the Washington State Department of Labor and Industries. The schedule of prevailing wage rates for the locality or localities of the Work is determined by the Industrial Statistician of the Department of Labor and Industries. It is Design-Builder's responsibility to verify the applicable prevailing wage rate at the time of its Proposal.

**23.1.1 Wage Rates.** Before commencing the Work, Design-Builder shall file a statement under oath with Owner and with the Director of Labor and Industries certifying the rate of hourly wage paid and to be paid each classification of laborers, workers, or mechanics employed upon the Work by Design-Builder and all Subcontractors. Such rates of hourly wage shall not be less than the prevailing wage rate.

**23.1.2 Disputes.** Disputes regarding prevailing wage rates shall be referred for arbitration to the Director of the Department of Labor and Industries. The arbitration decision shall be final and conclusive and binding on all Parties involved in the dispute as provided for by RCW 39.12.060.

**23.1.3 Applications for Payment.** Each Application for Payment submitted by Design-Builder shall state that prevailing wages have been paid in accordance with the pre-filed statement(s) of intent, as approved. Copies of the approved intent statement(s) shall be posted on the Site with the address and telephone number of the Industrial Statistician of the Department of Labor and Industries where a complaint or inquiry concerning prevailing wages may be made.

**23.1.4 Fees.** Design-Builder shall pay to the Department of Labor and Industries the currently established fee(s) for each statement of intent and/or affidavit of wages paid submitted to the Department of Labor and Industries for certification.

**23.1.5 Intent to Pay Prevailing Wages.** Copies of approved Intents to Pay Prevailing Wages for Design-Builder and all Subcontractors shall be submitted with Design-Builder's first Application for Payment. As additional Subcontractors perform Work on the Project, their approved Intent forms shall be submitted with Design-Builder's next Application for Payment.

**23.1.6 Certified Payroll Copies.** Design-Builder and all Subcontractors shall promptly submit to Owner certified payroll copies if requested by Owner.

**23.2 Violation.** Any violation by Design-Builder of the mandatory requirements of this Article 23 shall be a material breach of this Agreement

**ARTICLE 24**  
**NOTICES AND COMMUNICATIONS**

**24.1 Notices.** Any formal notice pursuant to the terms and conditions of the Contract Documents shall be in writing and either: (a) delivered personally; (b) sent by certified mail, return

receipt requested; (c) sent by a recognized overnight mail or courier service with delivery receipt required; or (d) when permitted, entered into Owner's Unifier project tracking system using protocols and processes established in Division One:

If to Design-Builder:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Attention: \_\_\_\_\_

With a copy to:

\_\_\_\_\_

If to Owner:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Attention: \_\_\_\_\_

With a copy to:

\_\_\_\_\_

Either Party may change its address or the Party to notify by a notice delivered in accordance with this Section.

**24.2 Effectiveness of Notices.** Notices shall be effective when received by the Party to whom it is addressed.

## **ARTICLE 25**

### **PROJECT PLANNING AND CONTROL**

**25.1 Project Schedule.** Design-Builder shall prepare and submit a schedule for the execution of the Work for Owner's review and response ("Project Schedule") and such other schedules as may be required by the Contract Documents. The Project Schedule shall show the sequence in which the Design-Builder proposes to perform the Work, indicate the dates for the start and completion of the various stages of Work, including the dates when Owner information, comments and approvals are required to enable Design-Builder to achieve the Contract Time(s), indicate the Critical Path, indicate Substantial Completion within the Substantial Completion Date(s) and indicate a date for Final Completion. The Design-Builder shall update the Project Schedule monthly with each Application for Payment to show actual progress of the Work and extensions in Contract Time, if any, approved by the Owner. The Project Schedule, and updates thereto, shall also meet all requirements and be prepared in such format as may be set forth in more particularity in Division One.

**25.2. Schedule to Represent Expectation of Performance.** The Project Schedule shall be realistic, comprehensive, achievable, and accurately represent Design-Builder's true expectation of performance, and Design-Builder must be able to demonstrate same in the event of disputes regarding delay, early completion or late completion or other schedule issues.

**25.3 Owner Review of Project Schedule.** Review and comment by the Owner of the Project Schedule, or updates thereto, shall not relieve the Design-Builder: (a) of its complete and exclusive control over the means, methods, sequences and techniques for executing the Work within the Contract Time); or (b) from its sole responsibility for the accuracy of the Project Schedule, and its compliance with all Contract requirements.

**25.4 Owner's Separate Contractors.** Design-Builder shall include the activities of Owner's Separate Contractors into the Project Schedule. Design-Builder shall cooperate with Owner's

Separate Contractors and coordinate its activities with those of such contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

## **ARTICLE 26**

### **VALUE ENGINEERING**

**26.1 Required Information.** If Design-Builder is interested in developing and submitting a Value Engineering Change Proposal (VECP), it shall, at its own expense, provide the following information to Owner with each VECP:

- (1) A statement that the submission is a VECP, and a narrative description of the proposed change;
- (2) A description of the existing requirements under the Contract Documents that are involved in the proposed change;
- (3) A discussion of the differences between existing requirements and the proposed change, together with advantages and disadvantages of each changed item;
- (4) An itemization of the requirements of the Contract Documents (with reference to specific sections) that must be changed if the VECP is approved;
- (5) The justification for changes in function or characteristics of each item, and the effect of the change on the performance of the end item, as well as on the meeting of requirements contained in the Contract Documents;
- (6) The date by which a Change Order adopting the VECP must be issued in order to obtain the maximum cost reduction, noting any effect on the Project Schedule or in the Contract Time);
- (7) A complete cost analysis including: (a) a cost estimate for the existing requirements under the Contract Documents compared to Design-Builder's cost estimate of the proposed changes; and (b) an estimate of any additional costs that will be incurred by Owner;
- (8) Costs of development and implementation of the VECP by Design-Builder; and
- (9) Any additional information requested by Owner.

### **26.2 Owner's Action on a VECP**

**26.2.1 Owner's Processing of VECP.** Upon receipt of a VECP, Owner will process it expeditiously. However, if Owner determines that a VECP requires excessive time or costs for review, evaluation or investigations, or the VECP is not consistent with Owner's design policies and basic design criteria, then Owner shall have the right to reject the

VECP without any review. Design-Builder may withdraw all or part of any VECP at any time prior to any action by Owner. Owner shall bear its own costs in connection with the review and processing of a VECP.

**26.2.2 Owner's Approval or Rejection of a VECP.** Owner may approve in whole or in part, by Change Order, any VECP submitted. Until a Change Order is executed on a VECP, Design-Builder shall remain obligated to perform in accordance with the Contract Documents. The decision of Owner as to the rejection or approval of any VECP shall be at the sole discretion of Owner, shall be final and shall not be subject to any further dispute resolution or appeal.

**26.2.3 Liability.** Owner shall not be liable for any delay in acting upon any proposal submitted pursuant to this Article 26. Design-Builder shall have no claim against Owner for any additional costs or delays resulting from the rejection of a VECP. If a VECP is approved, Design-Builder bears full responsibility for all aspects of the VECP, including the ability of the changed design to meet all requirements of the Contract Documents (as may be modified by the VECP).

## **ARTICLE 27** **MISCELLANEOUS**

**27.1 Severability.** If any provision of this Agreement or the Contract Documents is held to be invalid or unenforceable, such provision shall not affect or invalidate the remainder of this Agreement or the Contract Documents, and to this end the provisions of this Agreement and the Contract Documents are declared to be severable. If such invalidity becomes known or apparent to the Parties, the Parties agree to negotiate promptly in good faith in an attempt to amend such provision as nearly as possible to be consistent with the intent of this Agreement of the Contract Documents.

**27.2 Governing Law, Jurisdiction, & Venue.** The validity, construction, and performance of this Agreement shall be governed by and construed in accordance with the laws of the State of Washington, without regard to its conflict of laws rules. The Parties agree that in any action or dispute resolution process arising out of the terms, enforcement, or breach of this Agreement jurisdiction and venue shall lie in King County Superior Court.

**27.3 Waiver.** Failure of either Party to insist upon the strict performance of any of the terms and conditions hereof, or failure to exercise any rights or remedies provided herein or by law, or to notify the other Party in the event of breach, shall not release the other Party of any of its obligations under this Agreement, nor shall any purported oral modification or rescission of this Agreement by either Party operate as a waiver of any of the terms hereof. No waiver by either Party of any breach, default, or violation of any term, warranty, representation, agreement, covenant, right, condition, or provision hereof shall constitute waiver of any subsequent breach, default, or violation of the same or other term, warranty, representation, agreement, covenant, right, condition, or provision.

**27.4 Successors and Assigns.** This Agreement shall be binding upon and shall inure to the

benefit of the Parties hereto and their respective successors and assigns. Neither party shall assign the Work without written consent of the other, except that Design-Builder may assign the Work for security purposes, to a bank or lending institution authorized to do business in the State of Washington. If either party attempts to make such an assignment without such consent, that Party shall nevertheless remain legally responsible for all obligations set forth in the Contract Documents.

**27.5 Not Used.**

**27.6 Third-Party Beneficiaries.** The provisions of this Agreement are intended for the sole benefit of Owner and Design-Builder, and there are no third-party beneficiaries other than assignees contemplated by the terms herein.

**27.7 Not Used.**

**27.8 Time Computations.** When computing any period of time, the day of the event from which the period of time begins shall not be counted. The last day is counted unless it falls on a weekend or legal holiday in the State of Washington, in which event the period runs until the end of the next day that is not a weekend or holiday. When the period of time allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation.

**27.9 Not Used.**

**27.10 Antitrust Assignment.** Owner and Design-Builder recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, Design-Builder hereby assigns to Owner any and all claims for such overcharges as to goods, materials, and equipment purchased in connection with the Work performed in accordance with the Contract Documents, except as to overcharges which result from antitrust violations commencing after the Contract Sum is established and which are not passed on to Owner under a Change Order. Design-Builder shall put a similar clause in its Subcontracts, and require a similar clause in its sub-Subcontracts, such that all claims for such overcharges on the Work are passed to Owner by Design-Builder.

**27.11 Time is of the Essence.** Time is of the essence for each and every provision of this Agreement.

**27.12 No Agency.** The Parties agree that no agency, partnership, or joint venture of any kind shall be or is intended to be created by or under this Agreement. Neither party is an agent of the other party nor authorized to obligate it.

**27.13 Survival.** All representations, warranties, covenants, agreements, and indemnities set forth in or otherwise made pursuant to this Agreement shall survive and remain in effect following the expiration or termination of this Agreement, provided, however, that nothing herein is intended to extend the survival beyond any applicable statute of limitations periods.

**27.14 Integrated Agreement: Modification.** This Agreement in combination with the other

Contract Documents constitutes the entire agreement and understanding of the Parties with respect to the subject matter and supersedes all prior negotiations and representations. All appendices, annexes, and exhibits referred to herein are deemed to be incorporated in this Agreement in their entirety. There are no representations or understandings of any kind not set forth herein. This Agreement and the other Contract Documents may not be modified except in writing and signed by the Parties.

**27.15 Interpretation.** Each Party acknowledges that it and its legal counsel have reviewed this Agreement. The Parties agree that the terms and conditions of this Agreement shall not be construed against any party on the basis of such party's drafting, in whole or in part, of such terms and conditions.

**27.16 Further Assurances.** In addition to the actions specifically mentioned in this Agreement, the Parties shall each do whatever may reasonably be necessary to accomplish the transactions contemplated in this Agreement including, without limitation, executing any additional documents reasonably necessary to effectuate the provisions and purposes of this Agreement.

**27.17 Headings.** The headings in this Agreement are for convenience only and are not intended to, and shall not be construed to, limit, enlarge, or affect the scope or intent of this Agreement nor the meaning of any provisions hereof.

**27.18 Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which counterparts together shall constitute the same instrument which may be sufficiently evidenced by one counterpart. Execution of this Agreement at different times and places by the Parties shall not affect the validity thereof so long as all the Parties hereto execute a counterpart of this Agreement.

Executed and effective as of the date first above written.

By: \_\_\_\_\_  
Name  
\_\_\_\_\_  
Title

By: \_\_\_\_\_  
Name  
\_\_\_\_\_  
Title

**List  
of  
Exhibits**