

**ATTACHMENT R:**

**PART G DESIGN BUILD CONTRACT**

**DESIGN-BUILD  
CONTRACT**

**By and  
Between**

**KING COUNTY  
(Owner)**

**and**

**[ ]**

---

**(Design-Builder)**

**for**

**KING COUNTY CHILDREN AND FAMILY  
JUSTICE CENTER**

**CONTRACT NO. C00863C13**

## 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").

### **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 ("RFP"); and

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

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

**WHEREAS**, after evaluating Design-Builder's Proposal in accordance with the processes and criteria set forth in the RFP, Owner determined that its 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 Documents include this Design-Build Contract 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
- ☐ RFP Documents, Parts A-D, and F-H (except Part E Reference Documents) and Appendix A, and any addenda to the RFP
- ☐ Design-Builder's Proposal, including exhibits thereto (as may be negotiated with Owner)
- ☐ Design-Builder's Statement of Qualifications dated \_\_\_\_\_, 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 RFP Documents
- (4) RFP 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
  - (e) Remainder of the RFP, except Parts E and G
- (5) Construction Documents prepared and approved in accordance with Section 3.3.7 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 Contract between Owner and Design-Builder.

**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 6.5.1 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.** An executed written order to Design-Builder signed by Owner and Design- Builder stating their agreement upon all of the following: (a) the scope of the change in the Work; (b) the amount of any adjustment to the Contract Sum; (c) the extent of any adjustment to the Substantial Completion Date(s); and (d) any other amendment to the contract terms. A Change Order may authorize an addition, deletion, or revision in the Work, any change to the Contract Sum, and/or any adjustment to the Substantial Completion Date(s). Change Orders shall be considered to be a modification to this Agreement.

**1.5.11 Cost Proposal.** A written proposal submitted by the Design-Builder to the Owner proposing: (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).

**1.5.12 Claim.** Design-Builder's exclusive remedy for resolving disputes with Owner regarding the terms of a Change Order or a request for equitable adjustment, as more fully set forth in Section 8.6 and Article 11.

**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 for in Section 5.8.1.2 which is available for Design-Builder's exclusive use for unanticipated costs it has incurred.

**1.5.15 Contract Documents.** This Design-Build Contract 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 a designated portion of the Work.

**1.5.18 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.

**1.5.19 Design-Builder.** Party entering into this Agreement with Owner in which the party agrees to both design and build the Work as specified in this Agreement.

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

**1.5.21 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.

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

**1.5.23 Differing Site Conditions.** means: (1) Subsurface or latent physical conditions at the Site which differ materially from those indicated in the Contract Documents (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 the Contract (Type II).

**1.5.24 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.

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

**1.5.26 Fee.** Design-Builder's Fee shall be the amount specified in Section 5.4.

**1.5.27 Construction Change Directive.** 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.

**1.5.28 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.

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

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

**1.5.31 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)

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

**1.5.33 Governmental Rules.** Any and all statutes, laws, regulations, ordinances, codes, regulations, 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.

**1.5.34 Governmental Unit.** Any national, state or local government, any political subdivision thereof, or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or other entity having jurisdiction over the performance of the Work, the Project or the Parties; provided, however, that the term "Governmental Unit" shall not be construed to include Owner.

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

**1.5.36 Guaranteed Maximum Price (GMP) or Owner's Budgeted GMP.** The sum specified in Section 5.1, which shall 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.

**1.5.37 Hazardous Materials.** Any materials, wastes, substances and chemicals deemed to be hazardous under applicable Governmental Rules, or the handling, storage, remediation, or disposal of which are regulated by applicable Governmental Rules, and includes, but is not limited to any pollutant, contaminant, toxic or hazardous waste, dangerous substance, potentially dangerous substance, noxious substance, toxic substance, flammable material, explosive material, radioactive material, urea formaldehyde foam insulation, asbestos, PCBs, or any other substances 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 and all federal, state, county, or municipal statutes or laws and regulations promulgated thereunder, now or at any time hereafter in effect, including, but not limited to, the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601, et seq.), the Hazardous Materials Transportation Act (49 U. S. C. §§ 1801, et seq.), the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901, et seq.), the Federal Water Pollution Control Act (33 U.S.C. §§ 1251, et seq.), the Clean Air Act (42 U. S. C. §§ 7401, et seq.), the Toxic Substances Control Act, as amended (15 U.S.C. §§ 2601, et seq.), the Occupational Safety and Health Act (29 U.S.C. §§ 651, et seq., and the Model Toxics Control Act (RCW 70.105), or similar state or local statute or code), as the laws have been amended and supplemented.

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

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

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



**1.5.41 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.

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

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

**1.5.44 Owner's Design-Build Consultant.** The firm engaged by Owner and identified to Design-Builder in accordance with Section 2.4.

**1.5.45 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".

**1.5.46 Owner's Representative (or Project Representative).** The individual designated by Owner pursuant to Section 2.1.2, 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 also be referred to as the Project Representative.

**1.5.47 Owner's Separate Contractors.** Those contractors identified in Section 2.3.

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

**1.5.49 Performance Guarantee Period.** The time period for performance assurance and measurement and verification, which shall be for three (3) year from the date of Substantial Completion of Phase 1A.

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

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

**1.5.52 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.

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

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

**1.5.55 Punchlist.** The list of 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 conduct its operations.

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

**1.5.57      Retainage.** Funds withheld by Owner pursuant to RCW 60.28.011 and Section 6.4.3.

**1.5.58      Savings.** The difference between the sum of the Design-Builder's Cost of the Work and Fee (and, if applicable, any prices established under Section 5) and the GMP, as such GMP may have been adjusted over the course of the Project.

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

**1.5.60      Scope Validation Period.** The time period set forth in Section 3.3.5.1.

**1.5.61      Site.** The location of the Project for construction and any adjacent occupation of property by the Design-Builder.

**1.5.62      Subcontractor.** Any person or entity, including any vendor or Design Consultant, with whom Design-Builder has entered into any subcontract 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.

**1.5.63      Substantial Completion.** The stage in the progress of the Work (or portion thereof designated and approved by Owner) when the construction is sufficiently complete, in accordance with the Contract Documents, so Owner fully can occupy the Work (or the designated portion thereof) for the use for which it is intended.

**1.5.64      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.

**1.5.65      Work.** All administrative, design, procurement, supply, installation, construction, supervision, management, testing, labor, equipment and materials and other duties and services set forth in this Agreement 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.

## **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, to Design-Builder information, within Owner's possession or control, reasonably requested by Design-Builder 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's Representative 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 County to changes in the Work, Contract Sum, and Contract Time. In the event the Project 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;
4. Responding to requests for information directed to the County 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 Contractor Initiated Notices (CIN) 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 contractually shall require its separate contractors to cooperate with, and coordinate their activities so as not to interfere with, Design-Builder in order to enable Design-Builder 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 construction manager will assist the Owner's Representative to represent Owner within the limits of the construction manager's delegated authority. The Owner's Representative cannot grant the construction manager greater authority than the authority of the Owner's Representative. Prior to issuance of Notice to Proceed, the Project Representative shall set forth in writing the authority of the construction manager under the Contract and for this Project.

### **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 Contractor 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 ninety (90) day period following the Notice to Proceed (“Design Verification Period”), Design-Builder thoroughly shall 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 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 request for Change Order, 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.

**3.3.5.2 Design-Builder’s Assumption of Risk of Scope Issues.** The Parties acknowledge that the purpose of the Design Verification Period is to enable Design-Builder to identify those Scope Issues, if any, that could not reasonably be identified prior to the Agreement Date. Notwithstanding anything to the contrary in the Contract Documents, the Scope Validation Period has not been established for the purpose of enabling Design- Builder to offer Value Engineering Change Proposals, and the term “Scope Issue” is not to intended to include Value Engineering Change Proposals. Value Engineering Change Proposals are be offered and administered in accordance with Article 26. 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 3.3.6.1, 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 the 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 County 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. 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. Design-Builder shall proceed with procurement and construction in accordance with the approved Construction Documents for that portion of the Work covered by the Construction Documents.

**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.** 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 County 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 the Contract and during the Design Verification Period of the Project, which the Design-Builder acknowledges to be sufficient for this purpose, the Design-Builder assumes the risk of all reasonably ascertainable surface and subsurface or 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 and/or construction exceeds existing contingency and was not 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. Conditions shall not be disturbed prior to such notice. If such conditions differ materially and cause a change in Design-Builder's cost of, or time required for, performance of any part of the Work, Design-Builder may request an equitable adjustment in the Substantial Completion Date(s) or Contract Sum, or both, provided it makes such request therefor as provided in Section 8.6.



**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 Owner's 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 date of Substantial Completion, Design-Builder shall remove from the Site, 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.** Design-Builder shall 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, Design-Builder shall 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.

**3.5.9      Protection of Existing Structures. Equipment. Vegetation.** Design-Builder shall 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.

**3.5.10      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.

**3.5.11      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.

**3.5.12      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 project site safety.

**3.6.3 Safety Program.** Prior to inducting any work at the site, and in accordance with Section 01 14 00 of Division One, the Design-Builder shall prepare and provide to the County 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 make its own arrangements 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 15.1.7.

### **3.7      Hazardous Materials**

**3.7.1      Design-Builder's Responsibilities.** Design-Builder is responsible for any Hazardous Materials encountered at the Site. Upon encountering any Hazardous Materials, Design-Builder will stop Work immediately in the affected area and give Notice to County and, if required by Government Rules, all government or quasi-government entities with jurisdiction over the Project or Site.

**3.7.2      Remediation.** Upon providing Notice of the presence of suspected Hazardous Materials, Design-Builder shall take the necessary measures required to ensure that the Hazardous Materials are remediated or rendered harmless. Such necessary measures shall include retention by Design-Builder of qualified independent experts to (i) ascertain whether Hazardous Materials have actually been encountered, and, if they have been encountered, (ii) prescribe the remedial measures that Design-Builder must take either to remove the Hazardous Materials or render the Hazardous Materials harmless.

**3.7.3      Resumption of Work.** Design-Builder shall be obligated to resume Work at

the affected area of the Project only after Design-Builder provides County with written certification that (i) the Hazardous Materials have been removed or rendered harmless, and (ii) all necessary approvals have been obtained from all government and quasi-government entities having jurisdiction over the Project or Site.

**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 Plan.**

**3.8.1      Work Plan.** The Design-Builder shall prepare and submit to the Project Representative a plan by which the Design-Builder and its Subcontractors shall ensure all environmental requirements associated with the Work shall be complied with during performance of the Work under this Contract. The plan shall specifically address each such requirement. Failure to submit a complete environmental mitigation plan may result in suspension of work. Delays, if any, resulting from such suspension of work shall be considered caused by the acts of the Design-Builder, and any time delays or additional costs resulting therefrom shall be borne by the Design-Builder.

### **3.9      Labor**

**3.9.1      Labor Relations Generally.** Design-Builder shall use reasonable efforts in the selection and continuing employment of labor and Subcontractors (whether directly or indirectly employed) so as to cause no conflict or interference with or between the various trades, or delay in performance of Design-Builder's obligations. Design-Builder shall be responsible for all labor relations matters relating to the Work and shall at all times use reasonable efforts to maintain harmony among unions and other personnel employed in connection therewith. Design-Builder shall coordinate all Work and the trades of all labor. Design-Builder shall at all times use its best efforts and judgment as an experienced Design-Builder to adopt and implement policies and practices designed to avoid work stoppages, slowdowns, disputes and strikes. Design-Builder shall be solely responsible for any work stoppages, slowdowns, disputes and/or strikes at the Site and such shall not be deemed an Excusable Delay or entitle Design-Builder to a Change Order or an extension of the Substantial Completion Date(s), except as specifically provided in Section 10.1(12).

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

**3.9.3      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 in accordance with the Contract Documents, Design-Builder immediately shall give notice, including all relevant information, to Owner.

**[TO BE DETERMINED]**

**3.9.4      Project Labor Agreement (PLA).** This Contract is subject to the terms and conditions contained in the Project Labor Agreement for the Brightwater Conveyance System. The PLA is attached hereto and incorporated into the Contract. 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.** By written agreement, Design-Builder shall require each Subcontractor, so far as applicable to the Work to be performed by the Subcontractor, to be bound to Design-Builder by terms of the Contract Documents. Each subcontract shall preserve and protect the rights of Owner in accordance with the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights. 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 attributable to any failure of Design-Builder or any Subcontractors, employees, agents or representatives, to comply with such Governmental Rules 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.** Provide to Owner information reasonably requested by Owner to enable it 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 meeting all LEED Energy & Sustainability Performance Requirements contained in Division One and Owner's Project Criteria. Design-Builder shall maintain the 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 USGBC 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 Performance Validation.** Performance assurance (PA) and measurement and verification (M&V) shall be measured annually for three (3) years from the date of Substantial Completion of Phase 1A.

**3.14.2 Scope.** Design-Builder's Performance Guarantee shall cover the operations, maintenance, and performance of all systems that are related to the environmental controls of the building. The building's environmental controls shall consist of the mechanical, electrical, telecommunications, security, building controls, and specialty systems.

**3.14.3 Energy and Sustainability Performance Requirement Measurements.** Design- Builder, in mutual agreement with Owner, shall devise a method of performance assurance and measurement & verification, which shall assure that the targeted building performance is achieved. The plan shall cover how the Performance Guarantee is administered, reviewed and measured during the Performance Guarantee Period. The plan also shall outline the overall compensation, review period payment releases, and non-performance compensation. The compensation held during the later years of the

performance period will be higher creating a tiered release schedule as the building ages and operational requirements become more critical.

Performance validation shall be measured annually by evaluating whether the building meets the designated performance criteria developed by Design-Builder in consultation with Owner. Such measures, at a minimum, shall include:

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

**3.14.4 Financial Guarantee.** Owner shall withhold a pre-determined amount from the Contract Sum, during the Performance Guarantee Period. Release of payment for this withheld amount shall be contingent upon the final confirmation that the operations, maintenance and energy use index (EUI) performance standards for the facility (i.e. actual EUI = BTU/GSF-Year) have been achieved as verified by the M&V conducted over the three year (1,075 days) period. The start date of the Performance Guarantee Period is the date, post-Substantial Completion, when the building is at a minimum of 80% occupancy. The withheld amount shall be \$500,000 which is equivalent to the approximate value of the estimated operations, maintenance and energy operating costs for the first year.

If the actual operations, maintenance, and EUI as presented in the M&V findings and recommendations is equal to or better than the guaranteed performance requirements, a percentage of withheld amount will be released annually as noted in the approved plan indicated above.

If the actual operations, maintenance, and EUI as presented in the M&V findings and recommendations fails to meet the guaranteed performance requirements, the Design-Builder shall make a proportionate performance compensation payment to the Owner at the end of the performance period to account for the performance differences from the approved plan.

**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 is 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; and

**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 to ingress and egress to the Site required by security measures at 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 Substantial Completion Date(s).

By representing warranting that it has so evaluated the above-referenced conditions, Design-Builder confirms that the Contract Sum and its agreement to complete on or before the Substantial Completion Date(s) assume the risk of any and all such conditions set forth above, and that it shall not make a request for a Change Order or equitable adjustment for such conditions, subject to Design-Builder's rights under Section 3.3.6 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.** The Contract Sum shall be the Guaranteed Maximum Price of One Hundred Forty-Nine Million dollars (\$149,000,000), which shall be paid to Design-Builder 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), 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** Design-Builder's Fee shall be: \_\_\_\_\_ percent (\_\_\_\_%) of the Cost of the Work, as adjusted in accordance with Section 5.4.2 below.

**5.4.2** Design-Builder's Fee will be adjusted pursuant to Article 9 for any changes in the Work.

**5.4.3 Owner-Requested Betterment Fee.** Design-Builder shall earn an additional two percent (2%) fee on the Cost of Work for each County-Requested Betterment, as identified in Form D of the RFP, ("Owner Requested Betterment Fee") that Design-Builder is able to incorporate into the Project in an amount up to but not exceeding the GMP stated in Section 6.6.

**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; provided, however, that the costs for those employees of Design-Builder performing design and engineering services shall be negotiated and set forth in an exhibit to the Agreement.

**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 Project site. The cost of each member of the supervisory and administrative personnel at the Project 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 Project 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.

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**5.5.4** Costs actually incurred and paid by Design-Builder for employee benefits, premiums, taxes, 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 for Design-Builder's personnel necessarily and directly incurred in connection with the performance of the Work. 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 County 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 Project Representative. This will be accomplished by providing Notice to the Project Representative stating the destination, purpose of the trip, who is traveling, and the expected duration of the trip. The County 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 insurance and bond premiums are to be identified in Exhibit \_\_\_\_\_ in order to be considered a Cost of the Work.

**5.5.7** Not used.

**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, including the cost of facsimile transmissions, long-distance telephone calls, postage and express delivery charges, telephone service, photocopying and reasonable petty cash expenses.

**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.

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

**5.5.15** Sales, use or similar taxes, tariffs or duties incurred in the performance of the Work

**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.

## **5.6 Allowance Items and Allowance Values.**

**5.6.1** Allowance Items, and their corresponding Allowance Values, are described in Division One. Allowance items are not included within the GMP, but it is intended that they will be incorporated into the GMP by Change Order at a later date.

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

## **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 the negligence 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 or damaged, defective or nonconforming Work and insurance deductibles paid on account of damages caused by Design-Builder's negligent acts or omissions.

**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   Owner's Budgeted GMP.**

**5.8.1.1** Design-Builder represents, warrants, and guarantees that it shall not exceed the Guaranteed Maximum Price (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 has incurred that are the Design-Builder's responsibility under the Contract Documents. By way of example, and not as a limitation, such costs may include: (a) trade buy-out differentials; (b) overtime or acceleration; (c) escalation of materials; (d) correction of defective, damaged or nonconforming Work, design errors or omissions, however caused; (e) Subcontractor defaults; (f) 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, or (g) schedule recovery costs. 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 the Contract 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.

**5.8.3 Savings.** Any and all Savings shall revert one hundred percent (100%) to Owner prior to final reconciliation and invoicing.

## **ARTICLE 6** **PAYMENT TERMS**

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

**6.1.1** Within fourteen (14) Days after the date of Contract execution, 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** The County will timely review and approve the schedule of values so as not to delay the submission of the Design-Builder's first application for payment. Unless otherwise specified in the Contract Documents, County shall use reasonable efforts to review the Schedule of Values within thirty (30) Days of the County's receipt of the Design-Builder's submittal of its Schedule of Values. The County 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** The County'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** 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** 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.

### **6.3 Applications for Payment**

**6.3.1 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 with each Application for Payment such documentation or information as required in Division One, and the following:

- (a) Current status 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; and
- (d) The contract purchase agreement number, CPA #\_\_\_\_\_ shall be used for each Application for Payment submitted by the Contractor to the County.

**6.3.2 Failure to Include Required Documentation.** Inclusion of the required documentation is a condition precedent to payment. The Contractor is not entitled to payment for any Work unless the Application For Payment includes all required documentation. The County reserves the right to withhold payment pursuant to Section 6.6 if it is subsequently determined that all required documentation was not provided by the Contractor.

**6.3.3 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 Contractor, 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 the County's consent, up to 75% of the invoiced cost of major materials or equipment suitably stored off the Site if the County's interest in those major materials or equipment is protected through insurance and the Contractor provides documentation of such insurance.

## **6.4 Progress Payments**

**6.4.1 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.

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

**6.4.3 Retainage.** Owner shall retain five percent (5%) of the amount of each progress payment due under an Application for Payment. 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 Project Representative at the address given for notices in this Contract, for filing with the Project documents. The Project Representative will maintain a copy of all claims "liens" against the retainage in the Project document files..

**6.4.4 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.

**6.4.5 Payment for Punchlist.** Design-Builder's right to be paid for the Punchlist is set forth in Section 7.3.2.

**6.4.6 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.

## **6.5 Final Payment**

**6.5.1 Application for Final Payment.** Once Owner has issued a Certificate of Final Acceptance, 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) Affidavit of Wages Paid for Contractor and all Subcontractors in accordance with state law;
- (2) Contractor's release of claims against the County, except for Claims specifically described in the release document and submitted in accordance with Article 11;
- (3) Contractor certification that all Subcontractors and Suppliers 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.

**6.5.2 Payment.** Within sixty (60) days after receipt of an acceptable Application for Final Payment, Owner shall pay to Design-Builder the unpaid balance of the Contract Sum (less any money withheld as required for the Performance Guarantee Period per Article 6.8), 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.

### **6.5.3 Effect of Final Acceptance and Final Payment.**

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



d. Payments made in error.

**6.5.4 Waiver and Release.** 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.

## **6.6 Owner's Right to Withhold Payment and Offset**

**6.6.1 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 Contractor 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 Contractor 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 Contractor's or Subcontractor's acts, omissions, fault, or negligence;
6. Deduction in Contract Work;
7. Failure of Contractor to repair damaged materials, equipment, property, or Work;
8. Failure of the Contractor 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 Contractor to disclose all material facts or accurate information upon which the Owner relied when issuing a Unilateral Change Order;
13. Failure to provide Statement of intent to Pay Prevailing Wage and/or Affidavits of Wages Paid.

**6.6.2 Payment Disputes.** If Design-Builder disputes Owner's determination of payments due hereunder, or disputes any offsets or withholding by Owner, Design-

Builder shall have the right to submit the dispute for resolution in accordance with Article 11. Pending resolution of any such dispute, Design-Builder shall continue its performance of the Work in accordance with the Contract Documents. Amounts determined by such resolution process to have been properly due shall be payable by Owner within thirty (30) days after (a) the effective date of the Parties' negotiated settlement or (b) absent such settlement, any judgment award issued pursuant to Section 11.2.

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

**6.8 Record Keeping and Finance Controls.** Design-Builder acknowledges that this Agreement is to be administered on an "open book" arrangement. Design-Builder and Subcontractors shall be subject to audit at any time with respect to this Contract. Failure to maintain and retain sufficient records in full compliance with all Contract requirements and to allow Owner to verify all costs or damages or failure to 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 Contract.

**6.8.1 Design-Builder to Provide Facilities for Audit and Shall Cooperate.** The audit may be performed by employees of Owner or a representative of Owner. Design-Builder, and its Subcontractors, shall provide adequate facilities acceptable to Owner, for the audit during normal business hours. Design-Builder, and all Subcontractors, shall make a good faith effort to cooperate with Owner's auditors. All records shall be maintained for a period of six (6) years after final payment under this Agreement.

**6.8.2 Cost Records.** At a minimum, the following documents, including the 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, requests for equitable adjustment, Claims and any other request for damages or additional money or;
- (22) Financial statements for all years during the Contract time. In addition, the County 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 request for equitable adjustment 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. 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.

#### **7.2 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 commissioning of the new courthouse and detention center, conducts 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.**

**7.3.1 Conditions of Substantial Completion.** Substantial Completion is the stage in the progress of the Work (or portion thereof designated and approved by Owner) when the construction is sufficiently complete, in accordance with the Contract Documents, so Owner can fully occupy the Work (or the designated portion thereof) for the use for which it is intended. All Work other than incidental corrective or Punchlist work shall be completed as of Substantial Completion, and Substantial Completion shall not have been achieved if: (a) any systems and parts are not functioning as required by the Contract Documents; (b) utilities are not connected and operating normally; (c) all required occupancy permits have not been issued; or (d) the Work is not accessible by normal vehicular and pedestrian traffic routes.

### **7.3.2 Punchlist.**

**7.3.1 Design-Builder's Creation of Punchlist.** Design-Builder shall prepare a Punchlist and provide it to Owner together with an estimate of the cost and time to complete and/or correct each Punchlist item.

**7.3.2 Owner's Action on Punchlist.** Owner shall notify Design-Builder within ten (10) business days after receipt of the Punchlist that it accepts such Punchlist and estimate or shall otherwise state its reasons for disagreement therewith in reasonable detail; provided, however, that: (a) Owner shall have no obligation to accept such Punchlist if the aggregate value of the Work to be performed as described in the Punchlist (including labor and equipment) exceeds one half of one percent (0.5%) of the Contract Sum; and (b) 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 relative to the Punchlist; and (b) either Party may refer the matter to dispute resolution in accordance with the provisions of Article 11.

**7.3.3 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.

**7.3.4 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, 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.

### **7.3.3 Substantial Completion Certificate**

**7.3.3.1 Design-Builder's Issuance of Certificate.** When Design-Builder believes that Substantial Completion has occurred, Design-Builder, through its Architect of

Record, it shall issue a Substantial Completion Certificate, supported by such information required by the Contract Documents.

**7.3.3.2 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.

**7.3.4 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.**

**7.4.1 Conditions for Final Completion.** Final Completion 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; and
- (2) the Design-Builder has completed all of the requirements, up to and including submittal of a proper application for the LEED Certificate.

**7.4.2 Issuance of Final Acceptance Certificate.** When Design-Builder believes that Final Completion has occurred and all other requirements for Final Acceptance contained in Division One have been met, Design-Builder shall issue a proposed Final Acceptance Certificate for approval by Owner. The process for Owner's review, acceptance and/or rejection of this certificate shall be in accordance with Section 7.3.3.2.

## **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 1A 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 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 equitable adjustment shall be made as provided in Articles 8, 9, and 10, and incorporated into a Change Order.

**8.2 Owner Request for 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 14 Days of the request from Owner, or within such other period as mutually agreed. 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 Substantial Completion Date(s), 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, or a request for equitable adjustment in the Contract Sum or Substantial Completion Date(s), or both, 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 Change Order Work. Design-Builder shall not proceed with any change in the Work until it has obtained Owner's 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 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 Substantial Completion Date(s), such agreement shall be incorporated in a Change Order. The Change Order shall constitute full payment and final settlement of all claims for time and for direct, indirect, and consequential costs, including costs of delays, inconvenience, disruption of schedule, or loss of efficiency or productivity, related to any Work either covered or affected by the Change Order, or related to the events giving rise to the request for equitable adjustment.

**8.2.3 Failure to agree upon terms of Change Order: Final offer and Claims:** 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 Substantial Completion Date(s), Design-Builder may at any time in writing, request a final offer from Owner. Owner shall provide Design-Builder with its written response within thirty (30) Days of Design-Builder's request. Owner may also provide Design-Builder with a final offer at any time. If Design-Builder rejects Owner's final offer, or the parties are otherwise unable to reach agreement, Design-Builder only remedy shall be to file a Claim as provided in Article 11.

**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 Order) 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: (1) The scope of work; (2) An agreed upon maximum not-to-exceed amount; (3) Any estimated change to the Substantial Completion Date(s); (4) The method of final cost determination in accordance with the requirements of Article 9.; (5) The supporting cost data to be submitted in accordance with the requirements of Article 9.

Upon satisfactory submittal by the Design-Builder and approval by the Owner of supporting cost data, a Change Order will be executed. The Owner will not make payment to the Design-Builder for Construction Change Directive work until that work has been incorporated into an executed Change Order.

**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. Not Used**

**8.6 Design-Builder's Requests for Equitable Adjustments**. If Design-Builder believes that any event arising out of or relating to the Work causes a material increase in its cost of, or time required for the performance of, any part of the Work, and that under the terms of the Contract Documents such event entitles Design-Builder to an adjustment to the Contract Sum or the Substantial Completion Date(s), then Design-Builder shall comply with the following processes.

**8.6.1 Request for Equitable Adjustment**. Design-Builder shall provide Owner with written notice, in accordance with Section 8.6.2, of any event that Design-Builder believes entitles it to an equitable adjustment in the Contract Sum and/or Substantial Completion Date(s) within fourteen (14) days of the occurrence of the event 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 event 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 Notice**. Design-Builder shall not be entitled to any adjustment in the Contract Sum for any occurrence of events or costs that occurred more than fourteen (14) days before Design-Builder's written notice to Owner. The written notice shall set forth, at a minimum, a description of: (a) the event giving rise to the request for an equitable adjustment in the Contract Sum; (b) the nature of the impacts to Design-Builder; and (c) to the extent possible the amount of the adjustment in Contract Sum requested. Failure properly to give such written notice shall constitute a waiver of Design-Builder's right to an equitable adjustment.

**8.6.3 Contents of the Supplemental Notice**. Within thirty (30) days of the occurrence of the event giving rise to the request, unless Owner agrees in writing to allow an additional period of time to ascertain more accurate data, Design-Builder shall supplement the written notice provided in accordance with Section 8.6.2 above with additional supporting data. Such additional data shall include, at a minimum: (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 equitable adjustment to Design-Builder for such act, event, or condition; 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 Substantial Completion Date(s), Design-Builder shall also be obligated to comply with all of the requirements of Article 10. Failure to provide such additional information and documentation within the time allowed or within the format required shall constitute a waiver of Design-Builder's right to an equitable adjustment.

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

**8.6.5 Fault or Negligence of Design-Builder**. Design-Builder shall have no right to

seek an equitable adjustment to the Contract Sum or Substantial Completion Date(s) if the basis for the adjustment arises out of or relates to events caused in whole or in part by the fault or negligence of Design-Builder, or anyone for whose acts Design-Builder is responsible.

## **8.7 Computation of Adjustments**

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

**8.7.2 Substantial Completion Date(s).** The computation of any adjustments to the Substantial Completion Date(s) as the result of any Change Order, or of any Design-Builder request for equitable adjustment under Section 8.6, or any other event or reason, shall be as set forth in Article 10.

**8.8 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 equitable 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 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 Substantial Completion Date(s). 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 Cost Proposal.

**9.1.2 Owner Fault or Negligence as Basis for Change in Contract Sum.** If the cost of Design-Builder's performance is changed due to the fault or negligence of Owner, or anyone for whose acts Owner is responsible, Design-Builder shall be entitled to make a request for an equitable adjustment in the Contract Sum in accordance with the following procedure. No change in the Contract Sum shall be allowed to the extent: Design-Builder's changed cost of performance is due to the fault or negligence of Design-Builder, or anyone for whose acts Design-Builder is responsible; or the change is concurrently caused by Design-Builder and Owner.

- a. **Notice and Record Keeping for Equitable Adjustment.** A request for an equitable adjustment in the Contract Sum shall be based on written notice delivered to Owner within seven (7) Days of the occurrence of the event 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 event 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.

- b. **Content of Notice for Equitable Adjustment: Failure to Comply.** Design- Builder shall not be entitled to any adjustment in the Contract Sum for any occurrence of events or costs that occurred more than seven (7) Days before Design-Builder's written notice to Owner. The written notice shall set forth, at a minimum, a description of: the event giving rise to the request for an equitable adjustment in the Contract Sum; the nature of the impacts to Design-Builder and its Subcontractors of any tier, if any; and to the extent possible the amount of the adjustment in Contract Sum requested. Failure to properly give such written notice shall, to the extent Owner's interests are prejudiced, constitute a waiver of Design-Builder's right to an equitable adjustment.
- c. **Design-Builder to Provide Supplemental Information.** Within thirty (30) Days of the occurrence of the event giving rise to the request, unless Owner agrees in writing to allow an additional period of time to ascertain more accurate data, Design- Builder shall supplement the written notice provided in accordance with subparagraph a. above with additional supporting data. Such additional data shall include, at a minimum: the amount of compensation requested, itemized in accordance with the procedure set forth herein; 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 equitable adjustment to Design-Builder for such act, event, or condition; and documentation sufficiently detailed to permit an informed analysis of the request by Owner. When the request for compensation relates to a delay, or other change in Contract Time, Design-Builder shall demonstrate the impact on the critical path, in accordance with Section 10.5. Failure to provide such additional information and documentation within the time allowed or within the format required shall constitute a waiver of Design-Builder's right to an equitable adjustment.
- d. **Design-Builder to Proceed with Work as Directed.** Pending final resolution of any request made in accordance with this paragraph, unless otherwise agreed in writing, Design-Builder shall proceed diligently with performance of the Work.
- e. **Design-Builder to Combine Requests for Same Event Together.** Any requests by Contractor for an equitable adjustment in the Contract Sum and in the Substantial Completion Date(s) that arise out of the same event(s) shall be submitted together.

**9.1.3 Methods for Calculating Change Order Amount.** The value of any Work covered by a Change Order, or of any request for an equitable 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. **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.

**9.1.4 Time and Materials Method Is Default: Owner May Direct Otherwise**. When Owner has requested Design-Builder to submit a Cost Proposal, Owner may direct Design-Builder as to which method in Section 9.1.3 to use when submitting its proposal. Otherwise, Design-Builder shall determine the value of the Work, or if a request for an equitable adjustment, on the basis of the fixed price method.

## **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 reimbursement for all direct and indirect Costs of the Work, including any additional design or engineering costs as required to complete the Work, and Design-Builder's Fee.

**9.2.3** Design-Builder shall only be paid under this method 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.

## **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 Contract Sum and any other financial documentation requested by the Project Representative.

**9.3.3** Any adjustments to the Contract Sum using the Firm Fixed Price Method shall include, when appropriate, all reasonable Costs of the Work.

**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 Work to be performed; and
- b. Total Fixed Price payment for performing such work, which shall be added to the GMP.

## **9.4 Time and Materials Method**

**9.4.1** Whenever the Owner authorizes the Design-Builder to perform Work on a Time and Material 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 shall:

- a. Cooperate with the Owner and assist in monitoring the Work being performed;
- b. Substantiate 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 Project Representative so that the Owner may review and initial each time card/log;
- 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** Design-Builder shall submit costs and any additional information requested by the Owner to support Design-Builder's requested price adjustment.

**9.4.4** The Design-Builder shall only be entitled to be paid for reasonable costs actually incurred by the Design-Builder. 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 following categories and shall incorporate markups for overhead and Subcontractor profit as provided herein.

**9.5** **Labor.** For all labor, including foreman supervision but excluding superintendents, the Design-Builder shall be reimbursed for labor costs provided herein. The labor cost of an event or condition shall be calculated as the sum of the following:

**9.5.1** **Labor Rate.** The Labor Rate is the actual reasonable wage paid to the individual plus the actual reasonable costs incurred by the Design-Builder to cover costs associated with Federal Insurance Compensation Act (FICA), Federal Unemployment Tax Act (FUTA), State Unemployment Tax Act (SUCA), industrial insurance, fringe benefits, and benefits paid on behalf of labor by the Design-Builder. The applicable Labor Rates shall be multiplied by the number of hours reasonably expended in each labor classification because of the event or condition to arrive at a total cost of labor.

**9.6.2** **Travel Allowance and/or Subsistence.** The labor calculation shall include the actual costs of travel and/or subsistence paid to the Design-Builder's employees engaged upon the Work when said payments are required by a labor agreement.

**9.6.3** **Design and Engineering Costs.** The Design-Builder labor costs shall also include the additional design or engineering costs as required to complete the work in the manner set forth below. For any technical and/or professional services the Labor Rate, including overhead and profit, shall be established by the Cost Rate Sheet completed by the Design-Builder and attached to this Agreement as Exhibit \_\_\_\_.

**9.7** **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.

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

**9.8.1 Equipment Rates.** 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. 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 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.

**9.8.2 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.

**9.8.3 Standby.** The Design-Builder shall only be entitled to standby equipment costs 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. 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.

## **9.8 Subcontractor**

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

## **9.10 Overhead and Profit Markup**

**9.10.1** On a change to the Contract Sum or any other claim for money by the Design-Builder, the Owner will pay Design-Builder's overhead but only if allowed as a Cost of Work pursuant to Section 5.5. Design-Builder will not be entitled to any profit beyond application of the Design-Builder's Fee. Owner will pay Subcontractor overhead and profit pursuant to the overhead and profit markups set forth herein.

**9.10.2** Subcontractor overhead and profit markups shall not be applied to freight, delivery charges, express charges, and sales tax.

**9.10.3** The allowed Subcontractor overhead and profit markup shall not exceed the following:

- a. 18% for the Subcontractor's direct cost for performing the work.
- b. If the value of material and equipment is greater than fifty percent (50%) of the total value of the Change Order Work, the overhead and profit markup shall only be ten percent (10%) for material and equipment.
- c. In no event shall the total combined overhead and profit markup for all Subcontractors of any tier exceed eighteen percent (18%) of the direct cost to perform the Change Order Work.

**9.10.4** "Direct costs" shall include labor (as defined in Section 9.5), materials (as defined in Section 9.7), equipment (as defined in 9.8), and Subcontractor costs (as defined in Section 9.8).

## **9.11 Deductive Changes to the Contract Sum**

**9.11.1** 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 6, Time and Price Adjustments; and/or,
- c. At the discretion of the Owner, costs set forth in the documents used by the Design-Builder to develop its Proposal.

**9.11.2** 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

**9.12 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), and the amount of such compensation, are set forth in Section 10.6.

## **ARTICLE 10**

### **ADJUSTMENTS TO THE SUBSTANTIAL COMPLETION DATE(S)**

**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 Change Order Proposal.

**10.2 Time Extension Permitted if Not Contractor's Fault.** If the time of Design-Builder's performance is changed due to an Excusable Delay, or due to the fault or negligence of Owner or anyone for whose acts Owner is responsible, Design-Builder shall be entitled to make a request for an equitable adjustment in the Contract Time in accordance with the following procedure. No adjustment in the Contract Time shall be allowed to the extent Design-Builder's changed time of performance is due to the fault or negligence of Design-Builder, or anyone for whose acts Design-Builder is responsible

**10.2.1 Critical Path Must be Delayed.** Additionally, Design-Builder is not entitled to an adjustment in the Contract Time unless the progress of the Work on the Critical Path is delayed, and that such delay could not have been avoided by resequencing the Work..

**10.3 Adjustment of Substantial Completion Date(s).** The Substantial Completion Date(s) 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) notice is given by Design-Builder as hereinafter provided; (b) the delay impacts the critical path (as reflected on the most recent monthly Project Schedule update) and 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 10.7; 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.

**10.4 Notice and Supporting Documentation.** Design-Builder shall not be entitled to an adjustment in the Substantial Completion Date(s) for any events that occurred more than fourteen (14) days before Design-Builder's written notice to Owner. The written notice shall set forth, at a minimum, a description of: (a) the event giving rise to the request for an equitable adjustment in the Substantial Completion Date(s); (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 Substantial Completion Date(s) requested. Failure to properly give such written notice shall, to the extent Owner's interests are prejudiced, constitute a waiver of Design-Builder's right to an equitable adjustment.

**10.5 Supplementation.** Within thirty (30) days of the occurrence of the event giving rise to the request for an extension to the Substantial Completion Date(s), unless Owner agrees in



writing to allow an additional period of time to ascertain more accurate data, Design-Builder shall supplement the written notice provided in accordance with Section 10.4 with additional supporting data. Such additional data shall include, at a minimum: (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 equitable adjustment in the Substantial Completion Date(s) for such act, event, or condition; and (c) supporting documentation sufficiently detailed to permit an informed analysis of the request by Owner. Design-Builder is further required to submit to Owner, as part of these supplemental materials, an acceleration schedule on a fragment basis to demonstrate how such delay can be eliminated. Failure to provide such additional information and documentation within the time allowed or within the format required shall, to the extent Owner's interests are prejudiced, constitute a waiver of Design-Builder's right to an equitable adjustment.

**10.6 Not used.**

**10.7 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 10.3 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 the acts or omissions of 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 Section 013262, subsection 1.6;
- (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 3.4.3.
- (14) Supplier delay of sole source products, provided the delay is completely outside the control of the Design-Builder.

**10.8 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 10.7(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 10.7(6) and 10.7(7); and
  - (7) Any other delay not specifically enumerated in Section 10.7.

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

**10.10 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 Substantial Completion Date(s) and its entitlement to relief under this Article 10.

## **ARTICLE 11**

### **CLAIMS AND DISPUTE RESOLUTION**

**11.1 Final Offer.** If the Parties fail to reach agreement on the terms of any change in the Work, including any adjustment in the Contract Sum or Substantial Completion Date(s), Design-Builder, at any time, may request in writing a final offer from Owner. Owner shall provide its written response within thirty (30) days of Design-Builder's request. Owner also may provide Design-Builder with a final offer at any time. If Design-Builder rejects Owner's final offer, or the Parties are unable to reach agreement, Design-Builder's only remedy shall be to file a Claim in accordance with this Article 11.

#### **11.2 Claims Process**

**11.2.1 Claim Filing Deadline for Contractor.** Design-Builder shall file its Claim within the earlier of forty-five (45) days from Owner's final offer in accordance with Section 11.1 (if such an offer has been made) or the date of Final Completion.

**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 Substantial Completion Date(s) is sought, then: (a) the specific number of days sought; (b) the specific reasons Design-Builder believes an extension in the Substantial Completion Date(s) 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 (a) all records supporting the Claim and (b) all relevant records meeting the requirements of Section 6.8; 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 Substantial Completion Date(s) 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 County.

**11.2.4 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.

**11.2.5 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 certification 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 disputes 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. Failure of Design-Builder, or Subcontractors of any tier, to maintain and retain sufficient records to allow Owner to verify all or a portion of the Claim or to permit Owner access to the books and records of Design-Builder, or Subcontractors of any tier, shall constitute a waiver of the Claim and shall bar any recovery.

## **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). Such inspections and tests include, but are not limited to, those identified in Section 2.1.5 above. 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 Contractor 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, at its own expense, 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.

**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 AND CORRECTION OF DEFECTS OR DEFICIENCIES**

**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, 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, 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 13.2 above, within a period of twelve (12) months from the date of Substantial Completion of the Work, or within such longer period to the extent required by the Contract Documents.

**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 time period of twelve (12) months as described in Section 13.3.1 relates only to the specific obligation of Design-Builder to correct the Work, and has no relationship to the time within which Design-Builder's obligation to comply with the Contract Documents may be sought to be enforced, including the time within which such proceedings may be commenced.

**13.6 Warranty Survey.** Owner shall schedule a warranty survey to take place nine (9) months after Substantial Completion. Design-Builder will be given an opportunity to attend the 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 the Agreement, but that incorporate preexisting materials not produced under the contract, 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 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 concluded 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.** 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 the termination of this Agreement (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. 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 the preceding sentence 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 either cause 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 Equitable Adjustment for Termination for Convenience.** If Owner terminates the Work for convenience, Design-Builder shall be entitled to be paid the prorated portion of the Contract Sum 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 Substantial Completion Date(s), Design-Builder shall be entitled to submit a request for adjustment in accordance with Articles 8, 9 and/or 10, as applicable. 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 equitable adjustment in the Contract Sum or Substantial Completion Date(s) 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** Provided that Owner is not in breach of its contractual obligation to make payments to Design-Builder for the Work, 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 Contract, 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 shall include, but not be limited to,

**19.4.2.1.** The duty to promptly accept tender of defense and provide defense to the Owner at the Design-Builder's own expense.

**19.4.2.2.** 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.

**19.4.2.3.** To the maximum extent permitted by law, the Design-Builder shall defend, indemnify and hold harmless the Owner from and be liable for all damages and injury which shall be caused to Owner's property on or in the vicinity of the work or which shall occur to any person or persons or property whatsoever arising out of the performance of this Contract, when such injury or damage is caused by the negligent act or omission or willful misconduct of the Design-Builder, its officers, employees, agents, partners, respective members, parent corporations, subsidiaries or affiliates, and/or Subcontractors of all tiers, or caused by the inherent nature of the work specified.

**19.4.3.** 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.

**19.4.4.** 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.

**19.4.5.** 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.

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

**19.4.7.** 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 RCW 39.10.470, 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).

Owner will respond to any public records request for identified confidential records by notifying 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 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. 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 Acceptance. The Design-Builder shall update the Project Schedule monthly with each Application for Payment to show actual progress of the Work and extensions in Substantial Completion, 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 Substantial Completion date(s); or (b) from its sole responsibility for the accuracy of the Project Schedule, and its compliance with all Contract requirements.

**25.5 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 Substantial Completion Date(s);
- (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, provided, however, that if Owner determines that a VECP requires excessive time or costs for review, evaluation or investigations, or are 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 issued 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.** Except with respect to indemnification obligations contained herein in favor of third parties, 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; provided, that Design-Builder's Subcontractors shall be entitled to the benefit of, and enforce, the provisions of this Agreement providing for waiver of rights or claims against, and release or limitation of liability of, such Subcontractors.

**27.7 Non-Discrimination.** Discrimination in all phases of employment is prohibited by, among other laws and regulations, Title VII of the Civil Rights Act of 1964, the Vietnam Era Veterans Readjustment Act of 1974, sections 503 and 504 of the Vocational Rehabilitation Act of 1973, the Equal Employment Act of 1972, the Age Discrimination Act of 1967, the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, Presidential Executive Order 11246, Executive Order 11375, the Washington State Law Against Discrimination, Chapter 49.60 RCW, and Gubernatorial Executive Order 85-09. These laws and regulations establish minimum requirements for affirmative action and fair employment practices which Design-Builder must meet. Design-Builder shall not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, marital status, or the presence of any physical, sensory, or mental disability, Vietnam era veteran status, or disabled veteran status, nor commit any other unfair practices as defined in Chapter 49.60 RCW.

**27.9 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.

**27.10 Records Retention.** The wage, payroll, and cost records of Design-Builder, and its Subcontractors, and all records subject to audit in accordance with Section 11.6.1 above, shall be retained for a period of not less than six (6) years after the date of Final Acceptance.

**27.11 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.

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

**27.13 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.

**27.14 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.

**27.15 Integrated Agreement: Modification.** This Agreement in combination with the 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 Contract Documents may not be modified except in writing and signed by the Parties.

**27.16 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.

**27.17 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.

**27.18 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.

**27.19 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.

KING COUNTY

[Insert Name of  
Company] DESIGN-  
BUILDER

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

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

**List of  
Exhibits**