

# DRAFT AIA® Document A141™ – 2014

## Standard Form of Agreement Between Owner and Design-Builder

AGREEMENT is made as of April 24, 2024.

BETWEEN the Owner:

Beach Cities Health District (“Owner” or “District”)  
1200 Del Amo Street  
Redondo Beach, CA 90277  
Attention: Tom Bakaly, Chief Executive Officer; Monica Suua, Chief Financial Officer  
Email: [tom.bakaly@bchd.org](mailto:tom.bakaly@bchd.org); [monica.suua@bchd.org](mailto:monica.suua@bchd.org)

and the Design-Builder:

[Redacted]

for the following Project:

The location of the Project is: 1272 Beryl Street, Redondo Beach, CA 90277.

The Project includes a new youth wellness center “allcove Beach Cities” building that will provide young people ages 12-25 from the Greater South Bay with clinical services including mental health, physical health, substance use prevention, as well as supported education and employment, and peer and family support —on their own terms. This new 9,400 square foot modular building will be two stories and will include offices, conference facilities, open lounge space and group chat rooms. Project site scope of work includes utilities, grading, paving, retaining wall, landscaping, vehicle charging stations, site lighting and other site development items, as per current preliminary design documents.

The Owner and Design-Builder agree as follows.

**ADDITIONS AND DELETIONS:**  
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Consultation with an attorney is also encouraged with respect to professional licensing requirements in the jurisdiction where the Project is located.

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 Owner's Criteria

This Agreement is based on the Owner's Design Criteria/Bridging Documents (Owner's Criteria) set forth in Exhibits A1 through D of the District's Request for Statements of Qualifications and Proposals (RFQ/P) dated February 28, 2024.

§ 1.1.2 The Owner's budget for the Work to be provided by the Design-Builder is: The GRANT Funded budget for this Project is \$7,300,000.00.

§ 1.1.3 The Preliminary Project Schedule is attached hereto as Exhibit D.

§ 1.1.4 The Guaranteed Maximum Price (GMP) will be developed in 2 phases as follows:

1. Phase 1: The initial contract and NTP for Design-Builder will be for design and preconstruction services only in the total amount of \$ \_\_\_\_\_. This work includes the complete design and obtaining all required approvals for the Project.
2. Phase 2: Following completion of the Phase 1 work by the Design-Builder, the Owner may amend the Contract to add in the site work construction and modular building cost and installation through a Design-Build Amendment and issue a second NTP for the start of the site work. When the building package is completed and submitted to the AHJ for review, it will concurrently be used to bid out the trade work. These bids will be used to develop the GMP. This GMP will be used to amend the Contract to add the site work and building construction cost in a Design-Build Amendment.
3. The provisions of this Section 1.1.4 are subject to the provisions set forth in Articles 4 and 5 herein.

§ 1.1.5 The Design-Builder shall, subject to the Standard of Care defined in Section 3.1.3, confirm that the information included in the Owner's Criteria complies with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.

§ 1.1.5.1 If the Owner's Criteria conflicts with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Design-Builder shall notify the Owner of the conflict and propose such changes as may be necessary to bring the Owner's Criteria into compliance.

§ 1.1.5.2 If there is a change in the Owner's Criteria, the Owner and the Design-Builder shall execute a Modification in accordance with Article 6.

### § 1.2 Project Team

§ 1.2.1 The Owner identifies the following representative in accordance with Section 7.1.1:

Monica Suua, Chief Finance Officer  
Beach Cities Health District  
1200 Del Amo Street  
Redondo Beach, CA 90277  
[Monica.Suua@BCHD.org](mailto:Monica.Suua@BCHD.org)  
(310) 374-3426, x8210

§ 1.2.2 The persons or entities, in addition to the Owner's representative, who are required to review the Design-Builder's Submittals are as follows: Paul Murdoch Architects

§ 1.2.3 The Owner will retain the following consultants and separate contractors:

John Reser MRICS, CCP LEED AP | Senior Project Manager (Consultant)  
Beach Cities Health District  
Turner & Townsend Heery  
2555 Townsgate Road, Suite 312  
Westlake Village, CA 91361  
[John.reser@turntown.com](mailto:John.reser@turntown.com)

§ 1.2.4 The Design-Builder identifies the following representative in accordance with Section 3.1.2:



§ 1.2.5 Key Personnel: The Design-Builder identifies the following key personnel and levels of their commitment to the project (in accordance with Section 5.7):

Project Executive:  
Sr. Project Manager:  
Principal in Charge/AOR:  
Design Project Manager:  
Sr. Project Designer:  
General Superintendent:  
Superintendent:

§ 1.2.6 Neither the Owner's nor the Design-Builder's representative shall be changed without ten (10) days' written notice to the other party.

**§ 1.3 Binding Dispute Resolution**

For any Claim subject to, but not resolved by, mediation pursuant to Section 14.1.8, the method of binding dispute resolution shall be the following:

Arbitration pursuant to Sections 14.1.10 and 14.1.11.

**§ 1.4 Definitions**

**§ 1.4.1 Design-Build Documents.** The Design-Build Documents consist of this Agreement between Owner and Design-Builder and its attached Exhibits (hereinafter, the "Agreement"); other documents listed in this Agreement; and Modifications issued after execution of this Agreement. A Modification is (1) a written amendment to the Contract signed by both parties, including the Design-Build Amendment, (2) a Change Order, or (3) a Change Directive/Field Modification. In the event of a conflict or ambiguity between any term, condition or provision in the Exhibit C Proposal and the Owner's Criteria, the Owner's Criteria shall control. In the event of a conflict or ambiguity between any term, condition or provision in the Exhibit C Proposal and the Owner's RFQ/P, including all addenda, the RFQ/P and addenda shall control. In the event of a conflict or ambiguity between any term, condition or provision in this A141 Agreement and the Owner's RFQ/P, including all addenda, this A141 Agreement shall control.

**§ 1.4.2 The Contract.** The Design-Build Documents form the Contract. The Contract represents the entire and integrated agreement between the parties and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Design-Build Documents shall not be construed to create a contractual relationship of any kind between any persons or entities other than the Owner and the Design-Builder.

**§ 1.4.3 The Work.** The term "Work" means the design, construction and related services required to fulfill the Design-Builder's obligations under the Design-Build Documents, whether completed or partially completed, and includes all labor, materials, equipment and services provided or to be provided by the Design-Builder. The Work may constitute the whole or a part of the Project.

**§ 1.4.4 The Project.** The Project is the total design and construction of which the Work performed under the Design-Build Documents may be the whole or a part and may include design and construction by the Owner and by separate contractors.

**§ 1.4.5 Instruments of Service.** Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Design-Builder, Subcontractor(s), Architect, and Consultant(s) under their respective agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, digital models and other similar materials.

**§ 1.4.6 Submittal.** A Submittal is any submission to the Owner for review and approval demonstrating how the Design-Builder proposes to conform to the Design-Build Documents for those portions of the Work for which the Design-Build Documents require Submittals. Submittals include, but are not limited to, shop drawings, product data, and samples. Submittals are not Design-Build Documents unless incorporated into a Modification.

**§ 1.4.7 Owner.** The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Design-Build Documents as if singular in number. The term “Owner” means the Owner or the Owner’s authorized representative. The “Owner” is also referred to herein as the “District”.

**§ 1.4.8 Design-Builder.** The Design-Builder is the person or entity identified as such in the Agreement and is referred to throughout the Design-Build Documents as if singular in number. The term “Design-Builder” means the Design-Builder or the Design-Builder’s authorized representative.

**§ 1.4.9 Consultant.** A Consultant is a person or entity providing professional services for the Design-Builder for all or a portion of the Work, and is referred to throughout the Design-Build Documents as if singular in number. To the extent required by the relevant jurisdiction, the Consultant shall be lawfully licensed to provide the required professional services.

**§ 1.4.10 Architect.** The Architect is a person or entity providing design services for the Design-Builder for all or a portion of the Work, and is lawfully licensed to practice architecture in the applicable jurisdiction. The Architect is referred to throughout the Design-Build Documents as if singular in number.

**§ 1.4.11 Contractor.** The Contractor is a person or entity providing preconstruction and construction services for the Design-Builder for all or a portion of the Work, and is a lawfully licensed general contractor in the applicable jurisdiction. The Contractor is referred to throughout the Design-Build Documents as if singular in number.

**§ 1.4.12 Subcontractor.** A Subcontractor is a person or entity performing all or a portion of the construction (including, if applicable, on a design-build basis), required in connection with the Work, for the Design-Builder. All Subcontractors shall be lawfully licensed, if required in the jurisdiction where the Project is located. Subcontractors are referred to throughout the Design-Build Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. Subcontractors include all subcontractors of every tier.

**§ 1.4.13 Contract Time.** Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, as set forth in the Design-Build Amendment, to achieve Substantial Completion of the Work. The Contract Time, or the time within which to achieve any milestone date, does not commence until issuance of an NTP as contemplated in Section 1.1.4 above.

**§ 1.4.14 Day.** The term “day” as used in the Design-Build Documents shall mean calendar day unless otherwise specifically defined.

**§ 1.4.15 Contract Sum or Guaranteed Maximum Price (GMP).** The Contract Sum is the amount to be paid to the Design-Builder for performance of the Phase 1 design and preconstruction services, which are being compensated on a lump sum basis, and for the remaining Work performed upon execution of the Design-Build Amendment, if any.

**§ 1.4.16 Design and Preconstruction Services.** Work performed prior to execution of the Design Build Amendment is the Design and Preconstruction Services portion of the Work set forth in Article 4 herein.

**§ 1.4.17 Construction Services.** The term “Construction Services” means that portion of the Work performed following execution of the Design Build Amendment as set forth in Article 5 herein, and specifically excludes preconstruction phase services.

## ARTICLE 2 COMPENSATION AND PROGRESS PAYMENTS

### § 2.1 Compensation for Work Performed Prior To Execution of Design-Build Amendment

§ 2.1.1 Payments for Phase 1 of the Work performed prior to execution of the Design-Build Amendment shall be made monthly based on the agreed schedule of values attached as Exhibit E.

Compensation for Design and Preconstruction Services (Phase 1) total: \$ \_\_\_\_\_.

§ 2.1.2 Compensation for Phase 1 of the Work performed prior to execution of the Design-Build Amendment shall be based upon a lump sum amount of \$ \_\_\_\_\_ for complete design and pre-construction services including but not limited to:

- .1 Evaluation of Owner's Criteria
- .2 Construction Documents
- .3 Costs for design and pre-construction services of architect, engineers, consultants, design build and/or design assist Subcontractors, and others including but not limited to Architectural, Civil, Structural, Mechanical, Electrical, Plumbing, Fire Alarm, Fire Protection, Irrigation, and Low Voltage.
- .4 Estimating, scheduling and constructability reviews for Design-Builder, Contractor, Subcontractors, consultants and others.
- .5 Overhead and profit on design and preconstruction services.

§ 2.1.3 The hourly billing rates for services of the Design-Builder and the Design-Builder's Architect, Consultants and Subcontractors, if any, are set forth in Exhibit E. Annual increases to the hourly rates shall reflect actual, demonstrated cost increases, not to exceed two percent (2%).

§ 2.1.3.1 Reimbursable Expenses are in addition to compensation set forth in Section 2.1.1 and 2.1.2 and include expenses, directly related to the Project, incurred by the Design-Builder and the Design-Builder's Architect, Consultants, and Contractors, as follows (expressly excluding any Subconsultant's service fees):

- .1 Fees paid for securing approval of authorities having jurisdiction over the Project;
- .2 Printing, reproductions, plots, standard form documents;
- .3 Postage, handling and delivery;
- .4 Renderings, physical models, mock-ups, professional photography, and presentation materials requested and authorized acknowledging the actual cost in writing in advance by the Owner; provided, however, that if such materials are required by permitting authorities for performance of the Work and such requirements were not reasonably anticipated at the time the GMP was established; and
- .5 Other Project-related expenditures, if authorized in writing and in advance by the Owner

§ 2.1.3.2 For Reimbursable Expenses, the compensation shall be the actual expenses incurred by the Design-Builder and the Design-Builder's Architect, Consultants and Contractors, without mark-up or multiple.

### § 2.1.4 Payments to the Design-Builder Prior To Execution of Design-Build Amendment

§ 2.1.4.1 Payments are due and payable upon presentation of the Design-Builder's invoice. Amounts which are unpaid 30 days after the Owner's receipt of the invoice date shall not bear interest. Payment of the Phase 1 lump sum amount is subject to 5% retainage by the Owner.

§ 2.1.4.2 **Owner's Right to Audit.** The Owner shall have the right to review, obtain, inspect, audit, and copy all the written and electronically stored records of Design-Builder, the Architect, Consultants, the Contractor and its Subcontractors and suppliers, including all proposal preparation documents, estimates, take-offs and the like, all Project-related emails, pertaining to the Contract and/or Work and any Claim in connection with any of the foregoing, and regarding all applicable laws and/or regulations pertaining to the Contract. Design-Builder agrees to provide the Owner with copies of records in computer readable format as well as hard copies of all relevant information requested in writing within ten (10) days of the request. Design-Builder agrees to maintain such records and allow such audits for a period of up to five (5) years following the date that the Notice of Completion is recorded. This provision applies equally to electronic records of the Design-Builder, including any records under its possession, custody or control. Design-Builder, Architect, and Contractor shall require all of its payees (e.g., Consultants, Subcontractors, suppliers, materialmen, employees, officers, directors and others) to comply with the

provisions of this section by expressly including the requirements hereof in all written contracts with all such payees. Such requirements are to include that these flow-down right to audit provisions shall be included by such payees in all of their contracts with their Consultants and Subcontractors of any tier, materialmen, etc. The fact that a claim, arbitration, and/or litigation under other sections of the Contract Documents is pending involving the Owner, Design-Builder, Architect, or Contractor, and/or others, shall not in any way preclude, postpone, or impair in any way, Owner's rights to proceed under this section.

## **§ 2.2 Contract Sum and Payment for Work Performed After Execution of Design-Build Amendment**

For the Design-Builder's performance of the Work after execution of the Design-Build Amendment, the Owner shall pay to the Design-Builder on a monthly basis in accordance with Article 9 the Contract Sum in current funds as agreed in the Design-Build Amendment based upon the following:

**§ 2.2.1** Direct Cost of the Work based upon the total of acceptable bids from trade contractors and the agreed upon cost of any self-performed work to be performed by the Design-Builder as approved by the Owner. Direct Cost of the Work includes but is not limited to SWPPP implementation, Trenching, Material, Labor including burden, Subcontracts, Self-Performed Work, Final Cleaning, EIR Mitigation Measures, Subcontractor and Design-Builder Insurance costs, Sales Tax and Mock-ups, if any.

**§ 2.2.2** Design-Builder's Fee, Overhead and Profit shall be the fixed sum of \$\_\_\_\_\_ per negotiated Cost Proposal Exhibit C. This fixed sum includes but is not limited to all general conditions costs, general requirements, Design-Builder Staff and Facilities located at the construction site, Main office staffing, Accounting, Safety, Clerical, Legal, Travel, Benefits, On Site Equipment and Maintenance, Fuel, Inspections and Warranty, Printing, Shipping, Design-Builder Bonds, Design-Builder's Insurance costs, Mobilization, Demobilization, Temporary Utility connection and on-going costs, Dust Control and track out, Traffic Control, Cleaning, Dumping and Disposal, Security (technology and/or guards), Fire Extinguishing, First Aid, Opening Protection, Temporary stairs, Barricades, Scaffolding, Temporary Sanitation (toilets, etc.), Temporary Signage, Photographs, Office Trailer (including supplies, custodial, equipment and furniture), Storage Containers or Trailers, Tools (owned or rented), EIR Mitigation Monitoring, Submittals.

Design-Builder agrees that this fixed sum of \$\_\_\_\_\_ will not increase or decrease due to changes in the hard construction costs/direct costs of the Work occurring during design or in development of the GMP. Design-Builder agrees that this fixed sum will be included in the final GMP regardless of any deviations from the budgeted amount for procurement of Subcontractors and suppliers prior to determination of the final GMP, unless such increases or decreases result from significant Owner directed changes to the Owner's Criteria Documents. Any changes to this fixed sum will occur only pursuant to Change Orders issued in accordance with Article 6.

**§ 2.2.3** Design-Builder's GMP proposal for Phase 2 will include a Design-Builder contingency. The Design-Builder may use the contingency to pay for Work required due to design development or errors, omissions, conflicts or ambiguities in the drawings, specifications or other design documents and for which the Design-Builder is not otherwise entitled to a Change Order. The Design-Builder may also use the contingency to defray costs arising from scope gaps between Subcontractors and/or suppliers. Design-Builder's use of the Contingency is subject to review and approval by the Owner. The unused portion of the Design-Builder's contingency shall be retained by the District at the end of the Project.

**§ 2.2.4** Design-Builder's GMP proposal for Phase 2 will include an Owner's contingency to be used in the District's sole discretion. If the District chooses to utilize all or a portion of this contingency, the District shall notify the Design-Builder in writing. The unused portion of the Owner's contingency shall be retained by the District at the end of the Project.

## **§ 2.3 Project Labor Agreement**

Design-Builder shall execute, as required, and comply with the terms of all applicable Project Labor Agreements: (Exhibit F to RFQ/P).

## **ARTICLE 3 GENERAL REQUIREMENTS OF THE WORK OF THE DESIGN-BUILD CONTRACT**

### **§ 3.1 General**

**§ 3.1.1** The Design-Builder shall comply with any applicable licensing requirements in the jurisdiction where the Project is located.

**§ 3.1.2** The Design-Builder shall designate in writing a representative who is authorized to act on the Design-Builder's behalf with respect to the Project.

**§ 3.1.3 Standard of Care.** The Design-Builder shall perform and complete its obligations under this Design-Build Contract through the exercise of care, diligence, and skill expected of a design-builder (i) experienced and skilled in the design and construction of buildings of the quality, complexity, size, nature, site and location comparable to the Project and (ii) familiar with (a) the site upon which the Project is to be constructed and (b) local conditions and laws under which the Work is to be performed (such care, diligence, and skill is the “Standard of Care”). The Design-Builder shall be responsible to the Owner for acts and omissions of the Design-Builder’s employees, Architect, Consultants, Contractors, and their agents and employees, and other persons or entities performing portions of the Work.

**§ 3.1.3.1** The Design-Builder shall perform the design and engineering services required for the Work in accordance with the same degree of skill and care ordinarily exercised by design professionals experienced in the design of comparable Projects practicing under similar conditions at the locality of the Project. The Design-Builder shall perform the Construction Services in accordance with the Design-Build Documents and in accordance with the same degree of skill and care ordinarily exercised by contractors experienced in performing construction services on comparable Projects practicing under similar conditions at the locality of the Project. The Design-Builder shall not be relieved of the obligation to perform the Construction Services in accordance with the Design-Build Documents by the activities, tests, inspections or approvals of the Owner.

**§ 3.1.3.2** The Design-Builder shall perform the Work in compliance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Design-Builder performs Work contrary to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, the Design-Builder shall assume responsibility for such Work and shall bear the costs attributable to correction.

**§ 3.1.4** Not Used.

**§ 3.1.5 General Consultation.** The Design-Builder shall schedule and conduct periodic meetings with the Owner to review matters such as procedures, progress, coordination, and scheduling of the Work. The Design-Builder Design Manager or Project Manager shall be responsible for all Owner meetings.

**§ 3.1.6 Licensed Professionals.** When applicable law requires that services be performed by licensed professionals, the Design-Builder shall provide those services through qualified, licensed professionals. The Owner understands and agrees that the services of the Design-Builder’s Architect and the Design-Builder’s other Consultants are performed in the sole interest of, and for the exclusive benefit of, the Design-Builder.

**§ 3.1.7** The Design-Builder, with assistance of the Owner, shall prepare and file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project.

**§ 3.1.8** Design-Builder shall work in collaboration and cooperation with Owner towards realizing a high-quality Project.

**§ 3.1.9** Design-Builder is required to comply with all applicable prevailing wage requirements and/or regulations. The general prevailing rates of per diem wages for each craft, classification, or type of worker needed to execute the Contract, are determined by Director of the State of California Department of Industrial Relations. State prevailing wage requirements are published by the Director of the State of California Department of Industrial Relations and can be found online at [www.dir.ca.gov/](http://www.dir.ca.gov/)

**§ 3.1.10** Design-Builder and the Subcontractors, of every tier, shall be registered with the Department of Industrial Relations pursuant to Labor Code §§ 1725.5 and 1771.1 for the duration of time that Design-Builder is performing the Work under the Contract Documents. Neither Design-Builder nor any Subcontractor shall be qualified to submit a Bid/Proposal or be listed in a Bid/Proposal, subject to the requirements of Section 4104 of the Public Contract Code or engage in the performance of Work under the Contract Documents unless currently registered and qualified to perform public work pursuant to Labor Code §1725.5. Design-Builder shall not enter into any subcontract without proof of the potential Subcontractor’s registration. If an unregistered Subcontractor submits a proposal, the Owner will deem such proposal non-responsive. If any unregistered Subcontractor performs Work on this Project at any time, the Owner has the right to terminate the Contract for cause.

**§ 3.1.11** Design-Builder shall comply with all applicable federal, state, and local laws, rules, and regulations in regard to nondiscrimination in employment because of race, color, ancestry, national origin, religion, sex, marital



status, age, medical conditions, disability, or any other reason.

**§ 3.1.12 Certifications.** Upon the Owner's written request, the Design-Builder shall provide or obtain from the Architect, Consultants, and Contractors, and furnish to the Owner, certifications with respect to the documents and services provided by the Architect, Consultants, and Contractors (a) that, to the best of their knowledge, information and belief, the documents or services to which the certifications relate (i) are consistent with the Design-Build Documents, except to the extent specifically identified in the certificate, and (ii) comply with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities governing the design of the Project; and (b) that the Owner and its consultants shall be entitled to rely upon the accuracy of the representations and statements contained in the certifications. The Design-Builder's Architect, Consultants, and Contractors shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of their services.

### **§ 3.2. Progress Reports**

**§ 3.2.1** The Design-Builder shall keep the Owner informed of the progress and quality of the Work. On a monthly basis, or otherwise as agreed to by the Owner and Design-Builder, the Design-Builder shall submit written progress reports to the Owner, showing estimated percentages of completion and other information identified below:

- .1 Work completed for the period;
- .2 Project schedule status;
- .3 Submittal schedule and status report, including a summary of outstanding Submittals;
- .4 Responses to requests for information to be provided by the Owner;
- .5 Approved Change Orders and Change Directives;
- .6 Pending Change Order and Change Directive status reports;
- .7 Tests and inspection reports;
- .8 Status report of Work rejected by the Owner;
- .9 Status of Claims previously submitted in accordance with Article 14;
- .10 Cumulative total of the Cost of the Work to date including the Design-Builder's compensation and Reimbursable Expenses, if any;
- .11 Current Project cash-flow and forecast reports; and
- .12 Additional information as agreed to by the Owner and Design-Builder; and
- .13 Status of budget and cash flow reports.

**§ 3.2.2** In addition, where the Contract Sum is the Cost of the Work with or without a Guaranteed Maximum Price, the Design-Builder shall include the following additional information in its progress reports:

- .1 Design-Builder's work force report;
- .2 Equipment utilization report; and
- .3 Cost summary, comparing actual costs to updated cost estimates.

### **§ 3.3 Design-Builder's Schedules**

**§ 3.3.1** The Design-Builder, promptly after execution of this Agreement, shall prepare and submit for the Owner's information a schedule for the Work in a format and software acceptable to the Owner. The schedule, including the time required for design and construction, shall not exceed time limits current under the Design-Build Documents, shall be revised monthly, shall be related to the entire Project to the extent required by the Design-Build Documents, shall provide for expeditious and practicable execution of the Work, and shall include allowances for periods of time required for the Owner's review and for approval of submissions by authorities having jurisdiction over the Project.

**§ 3.3.2 Preliminary Construction Schedule.** Design-Builder shall prepare and submit to the Owner a Preliminary Construction Schedule so as to be able to meet the date of Substantial Completion identified in the Notice to Proceed. The Contractor may submit a Preliminary Construction Schedule depicting completion of the Work in a duration shorter than the Contract Time; provided that such Preliminary Construction Schedule shall not be a basis for adjustment to the Contract Sum in the event that completion of the Work shall occur after the time depicted therein, nor shall such Preliminary Construction Schedule be the basis for any extension of the Contract Time. The Design-Builder's entitlement to any extension of the Contract Time shall be based upon the Contract Time and not on any shorter duration which may be depicted in the Design-Builder's Preliminary Construction Schedule. If the Construction Schedules required under this section 3.3 incorporate therein any "float" time, such float shall be deemed to jointly belong to and owned by the Owner and the Design-Builder. As used herein, "float time" shall be deemed to refer to the time between earliest finish date and the latest finish date of each activity shown on the Construction Schedule. Review of the Preliminary Progress Schedule and any comments thereto by the Owner shall

not be deemed to be the assumption of construction means, methods or sequences by the Owner, all of which remain the Design-Builder's obligations under the Contract Documents.

**§ 3.3.2 Approved Construction Schedule.** Design-Builder shall prepare and submit a Construction Schedule as set forth in Division 01 of the Contract Specifications. Upon the Owner's approval of the form and content of a Construction Schedule, the same shall be deemed the "Approved Construction Schedule." The Owner's approval of a Construction Schedule shall be for the sole and limited purpose of determining conformity with the requirements of the Contract Documents. By the Approved Construction Schedule, the Owner shall not be deemed to have exercised control over, or approval of, construction means, methods or sequences, all of which remain the responsibility and obligation of the Design-Builder in accordance with the terms of the Contract Documents. Further, the Approved Construction Schedule shall not operate to limit or restrict any of Design-Builder's obligations under the Contract Documents nor relieve the Design-Builder from the full, faithful and timely performance of such obligations in accordance with the terms of the Contract Documents. The activities, commencement and completion dates of activities, and the sequencing of activities depicted on the Approved Construction Schedule shall not be modified or revised by the Design-Builder without the prior consent, or direction, of the Owner. Updates to the Approved Construction Schedule shall not be deemed revisions to the Approved Construction Schedule. In the event that the Approved Construction Schedule shall depict completion of the Work in a duration shorter than the Contract Time, the same shall not be a basis for an adjustment of the Contract Time or the Contract Sum in the event that actual completion of the Work shall occur after such the time depicted in such Approved Construction Schedule. In such event, the Contract Sum shall not be subject to adjustment on account of any additional costs incurred by the Design-Builder to complete the Work prior to the Contract Time, as adjusted in accordance with the terms of the Contract Documents. Any adjustment of the Contract Time or the Contract Sum shall be based upon the Contract Time set forth in the Contract Documents and not any shorter duration which may be depicted in the Approved Construction Schedule.

**§ 3.3.3 Revisions to Approved Construction Schedule.** In the event that the progress of the Work or the sequencing of the activities of the Work shall materially differ from that indicated in the Approved Construction Schedule, as determined by the Owner in its reasonable discretion and judgment, the Owner may direct the Design-Builder to revise the Approved Construction Schedule; within fifteen (15) days of the Owner's direction, the Design-Builder shall prepare and submit to the Owner a revised Approved Construction Schedule, for review and approval by the Owner. The Design-Builder may request consent of the Owner to revise the Approved Construction Schedule. Any such request shall be considered by the Owner only if in writing setting forth the Design-Builder's proposed revision(s) to the Approved Construction Schedule and the reason(s) therefor. The Owner may consent to, or deny, any such request of the Design-Builder to revise the Approved Construction Schedule in its reasonable discretion.

**§ 3.3.4 Updates to Approved Construction Schedule (Recovery Schedule).** If the progress of the Work is behind the Approved Construction Schedule, the Design-Builder shall indicate what measures will be taken to place the Work back on schedule. Such measures shall be provided to the Owner within ten (10) days of request. The Owner may, from time to time, and in the Owner's sole and exclusive discretion, transmit to the Design-Builder's Performance Bond Surety the Approved Construction Schedule, any updates thereof and the narrative statement described hereinabove. The Owner's election to transmit, or not to transmit such information, to the Design-Builder's Performance Bond Surety shall not limit the Design-Builder's obligations under the Contract Documents. Construction Schedule updates are required monthly. Submittal of a Construction Schedule monthly update is a condition precedent to submittal of a payment application.

**§ 3.3.5 Design-Builder Responsibility for Construction Schedule.** The Design-Builder shall be responsible for the preparation, submittal and maintenance of the Construction Schedules required by the Contract Documents, and any failure of the Design-Builder to do so may be deemed by the Owner as the Design-Builder's default in the performance of a material obligation under Contract Documents. Any and all costs or expenses required or incurred to prepare, submit, maintain, and update the Construction Schedules shall be solely that of the Design-Builder and no such cost or expense shall be charged to the Owner. The Contract Sum shall not be subject to adjustment on account of costs, fees or expenses incurred or associated with the Design-Builder's preparation, submittal, and maintenance or updating of the Construction Schedules.

**§ 3.4** Not Used.

### **§ 3.5 Design-Builder's Submittals**

**§ 3.5.1** Prior to submission of any Submittals, the Design-Builder shall prepare a Submittal schedule, and shall submit the schedule for the Owner's approval. The Owner's approval shall not unreasonably be delayed or withheld. The Submittal schedule shall (1) be coordinated with the Design-Builder's schedules provided in Section 3.3, (2) allow the Owner reasonable time to review Submittals, and (3) be periodically updated to reflect the progress of the Work. If the Design-Builder fails to submit a Submittal schedule, the Design-Builder shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of Submittals.

**§ 3.5.2** By providing Submittals the Design-Builder represents to the Owner that it has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so and (3) checked and coordinated the information contained within such Submittals with the requirements of the Work and of the Design-Build Documents.

**§ 3.5.3** The Design-Builder shall perform no portion of the Work for which the Design-Build Documents require Submittals until the Owner has approved the respective Submittal.

**§ 3.5.4** The Work shall be in accordance with approved Submittals except that the Design-Builder shall not be relieved of its responsibility to perform the Work consistent with the requirements of the Design-Build Documents. The Work may deviate from the Design-Build Documents only if the Design-Builder has notified the Owner in writing of a deviation from the Design-Build Documents at the time of the Submittal and a Modification is executed authorizing the identified deviation. The Design-Builder shall not be relieved of responsibility for errors or omissions in Submittals by the Owner's approval of the Submittals.

**§ 3.5.5** All professional design services or certifications to be provided by the Design-Builder, including all drawings, calculations, specifications, certifications, shop drawings and other Submittals, shall contain the signature and seal of the licensed design professional preparing them. Submittals related to the Work designed or certified by the licensed design professionals, if prepared by others, shall bear the licensed design professional's written approval. The Owner and its consultants shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals.

**§ 3.6 Warranty.** Design-Builder warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless the Design-Build Documents require or permit otherwise. The Design-Builder further warrants that the Construction Services will conform to the requirements of the Design-Build Documents and will be free from defects, except for those inherent in the quality of the Construction Services or otherwise expressly permitted by the Design-Build Documents. Construction Services, materials, or equipment not conforming to these requirements may be considered defective. The Design-Builder's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Design-Builder, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Owner, the Design-Builder shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

### **§ 3.7 Royalties, Patents and Copyrights**

**§ 3.7.1** The Design-Builder shall pay all royalties and license fees.

**§ 3.7.2** The Design-Builder shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and its separate contractors and consultants harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Owner, or where the copyright violations are required in the Owner's Criteria. However, if the Design-Builder has reason to believe that the design, process or product required in the Owner's Criteria is an infringement of a copyright or a patent, the Design-Builder shall be responsible for such loss unless such information is promptly furnished to the Owner. If the Owner receives notice from a patent or copyright owner of an alleged violation of a patent or copyright, attributable to the Design-Builder, the Owner shall give prompt written notice to the Design-Builder.

### **§ 3.8 Indemnification**

**§ 3.8.1** Unless arising out of the sole or active negligence, gross negligence or willful misconduct of the District, its agents or employees, the Design-Builder shall indemnify, defend and hold harmless the Indemnified Parties who are: (i) the District and its Board of Directors, officers, employees, agents and representatives; (ii) the District's architect and its consultants for the Work and their respective agents and employees; and (iii) the District's

consultant and its agents and employees. The Design-Builder's obligations hereunder include indemnity, defense and hold harmless of the Indemnified Parties from and against any and all damages, losses, claims, demands or liabilities whether for damages, losses or other relief, including, without limitation attorneys' fees and costs which arise, in whole or in part, from the Work, the Contract Documents, or the negligent or willful acts or omissions of the Design-Builder, any Architect, Consultant, Contractor or Subcontractor or any person or entity engaged by them for the Work. The Design-Builder's obligations under the foregoing include without limitation: (i) injuries to or death of persons; (ii) damage to property; or (iii) theft or loss of property; (iv) Stop Payment Notice claims asserted by any person or entity in connection with the Work; and (v) other losses, liabilities, damages or costs resulting from, in whole or part, any acts, omissions or other conduct of Design-Builder, the Architect, Consultants, Contractor, or Subcontractors, of any tier, or any other person or entity employed directly or indirectly by Design-Builder in connection with the Work and their respective agents, officers or employees. The obligations of the Design-Builder, as set forth in (v) above shall include, without limitation losses, costs, expenses, damages and other claims asserted by any other Contractor to the District in connection with the Work or in connection with a work of improvement related to or affected by the Work. If any action or proceeding, whether judicial, administrative, arbitration or otherwise, shall be commenced on account of any claim, demand or liability subject to Design-Builder's obligations hereunder, and such action or proceeding names any of the Indemnified Parties as a party thereto, the Design-Builder shall, at its sole cost and expense, defend the named Indemnified Parties in such action or proceeding with counsel reasonably satisfactory to the named Indemnified Parties. In the event that there shall be any judgment, award, ruling, settlement, or other relief arising out of any such action or proceeding to which any of the Indemnified Parties are subject to, or bound by, Design-Builder shall pay, satisfy or otherwise discharge any such judgment, award, ruling, settlement or relief; Design-Builder shall indemnify and hold harmless the Indemnified Parties from any and all liability or responsibility arising out of any such judgment, award, ruling, settlement or relief. The Design-Builder's obligations hereunder are binding upon Design-Builder's Performance Bond Surety and these obligations shall survive notwithstanding Design-Builder's completion of the Work or the termination of the Contract.

**§ 3.8.2** In any and all claims against any of the Indemnified Parties by any employee of the Design-Builder, Architect, Consultant, Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the Design-Builder's indemnification obligations herein shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Design-Builder, Architect, Consultant, Contractor or any Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

### **§ 3.9 Contingent Assignment of Agreements**

**§ 3.9.1** Each agreement for a portion of the Work is assigned by the Design-Builder to the Owner, provided that

- .1 assignment is effective only after termination of the Contract by the Owner for cause or for convenience pursuant to Sections 13.2.2 and 13.2.4, and only for those agreements that the Owner accepts by written notification to the Design-Builder and the Architect, Consultants, Contractor, and Subcontractors whose agreements are accepted for assignment; and
- .2 assignment is subject to the prior rights and obligations of the Design-Builder and its surety under the Labor and Material Payment Bond and Performance Bond pertaining to the Contract.

**§ 3.9.2** Upon such assignment to the Owner under this Section 3.9, the Owner may further assign the agreement to a successor design-builder or other entity.

**§ 3.10 Design-Builder's Insurance and Bonds.** The Design-Builder shall purchase and maintain insurance as set forth in Exhibit I and shall provide payment and performance bonds in the full amount of the GMP, as may be amended.

**§ 3.11 Owner Provided Builder's Risk Insurance.** The Owner will provide Builder's Risk insurance for the Project. The insurance shall include the interests of the Design-Builder, Contractor, and Subcontractors as additional insured parties, and be written on an "all-risk" completed value policy form that includes, without limitation, insurance against the perils of fire and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements.

## **ARTICLE 4 WORK PRIOR TO EXECUTION OF THE DESIGN-BUILD AMENDMENT (Phase 1)**

### **§ 4.1 General**

§ 4.1.1 Any information submitted by the Design-Builder, and any interim decisions made by the Owner, shall be for the purpose of facilitating the design process and shall not modify the Owner's Criteria unless the Owner and Design-Builder execute a Modification, or such modifications are ratified by the Owner's approval of the Preliminary Design.

§ 4.1.2 The Design-Builder shall advise the Owner on proposed site use and improvements, selection of materials, and building systems and equipment. The Design-Builder shall also provide the Owner with recommendations, consistent with the Owner's Criteria, on constructability; availability of materials and labor; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

§ 4.1.3 Design-Builder shall provide complete architectural, engineering, and consulting services as required to construct the Project in all details in accordance with good practice, applicable building codes, and Owner's Criteria Documents. Design-Builder's attention is called to the requirement to complete programming validation and get final approval from Owner. The complete design services shall be apportioned into Phase 1 Design and Preconstruction Services. Design-Builder shall manage the services provided under the Agreement for Design Build Services, and the Owner will coordinate its responsibilities with Design-Builder, so that the transition between Phases is seamless.

§ 4.1.4 Owner may benefit if the Project construction is divided into phasing components. Examples of possible phasing components are: demolition, mobilization, hazardous material abatement, relocation of underground utilities, site preparation, and landscaping. Phasing components shall be identified during the design phase by Design-Builder and proposed to Owner. Owner is not obligated to accept proposed phasing components or revise the Project phases.

§ 4.1.5 Design-Builder shall prepare a Design Build Cost Model and evaluate the estimates against the construction budget and recommend, if necessary, actions to avoid potential cost overruns. Design-Builder shall establish target values for the cost of each Project element to be used as a basis of design and cost monitoring. Design-Builder shall continuously monitor costs to align with the targeted Design Build Cost and scope. If changes are suggested to the scope that may cause cost overruns, Design-Builder shall notify Owner in writing and as part of the Project meetings.

§ 4.1.6 Design-Builder shall provide full and complete Construction Cost Estimates for Phase 1:

- .1 50% Construction Documents
- .2 90% Construction Documents

Owner's program cost consultant may conduct a peer review of Design-Builder's cost estimates. Design-Builder and Owner will reconcile the two cost estimates. Authorization to proceed with the next step in the design process is contingent on the acceptance of the cost estimates, but Design-Builder may be entitled to a compensable extension of the Contract Time if the Project is delayed during construction due to inability to reconcile the estimates.

§ 4.1.7 It is one of the collaborative responsibilities of Design-Builder to look for ways of reducing Project construction costs. Design-Builder's proposed cost reductions shall not reduce the Owner Criteria requirements, reduce quality of materials or craftsmanship, increase life-cycle costs, negatively affect the architectural aesthetics or design intent, or adversely affect the Project completion, unless such trade-offs are explained as part of the proposed cost reduction alternative and accepted by Owner.

### **§ 4.2 Evaluation of the Owner's Criteria**

§ 4.2.1 The Design-Builder shall schedule and conduct meetings with the Owner and any other necessary individuals or entities to discuss and review the Owner's Criteria as set forth in Section 1.1. The Design-Builder shall thereafter again meet with the Owner to discuss a preliminary evaluation of the Owner's Criteria. The preliminary evaluation shall address possible alternative approaches to design and construction of the Project and include the Design-Builder's recommendations, if any, with regard to accelerated or fast-track scheduling, procurement, or phased construction. The preliminary evaluation shall consider cost information, constructability, and procurement and construction scheduling issues.

§ 4.2.2 After the Design-Builder meets with the Owner and presents the preliminary evaluation, the Design-Builder shall provide a written report to the Owner, summarizing the Design-Builder's evaluation of the Owner's Criteria. The report shall also include

- .1 allocations of program functions, detailing each function and their square foot areas;
- .2 a preliminary estimate of the Cost of the Work, and, if necessary, recommendations to adjust the Owner's Criteria to conform to the Owner's budget; and
- .3 a preliminary schedule, which shall include proposed design milestones; dates for receiving additional information from, or for work to be completed by, the Owner; anticipated date for the Design-Builder's Proposal; and dates of periodic design review sessions with the Owner.
- .4 Design-Builder shall identify Project risks, which are conditions or events that could negatively affect the Project scope, quality, schedule or cost. Design-Builder shall evaluate the risk to include severity of impact, probability of occurrence and other factors as Design-Builder deems appropriate and recommend ways to manage or mitigate each risk. Design-Builder shall present the risk analysis in a risk matrix format to Owner.

§ 4.2.3 The Owner shall review the Design-Builder's written report and, if acceptable, provide the Design-Builder with written consent to proceed to the development of the Preliminary Design as described in Section 4.3. The consent to proceed shall not be understood to modify the Owner's Criteria unless the adjustments or modifications to the Owner's Criteria are called out for the Owner's attention and approved in the report, or the Owner and Design-Builder execute a Modification. Owner shall endeavor to issue a written consent to proceed to development of the Preliminary Design within thirty (30) days of the Design-Builder's written report.

§ 4.3 Not Used.

#### § 4.4 Construction Documents

§ 4.4.1 Upon approval of the Preliminary Design(s), the Design-Builder shall prepare Construction Documents in accordance with the Project Schedule. The Construction Documents shall establish the quality levels of materials and systems required. The Construction Documents shall be consistent with the Design-Build Documents as modified or supplemented by the design approvals obtained pursuant to Sections 4.2 and 4.3.

§ 4.4.2 The Design-Builder shall provide the Construction Documents to the Owner for the Owner's information. If the Owner discovers any deviations between the Construction Documents and the Design-Build Documents as modified or supplemented by the design approvals obtained pursuant to Sections 4.2 and 4.3, the Owner shall promptly notify the Design-Builder of such deviations in writing. The Construction Documents shall not modify the Design-Build Documents as modified or supplemented by the design approvals obtained pursuant to Sections 4.2 and 4.3 unless the modifications are called out for the Owner's attention and approval in writing as part of the Construction Document submission, or the Owner and Design-Builder execute a Modification. The failure of the Owner to discover any deviations that are not so approved or the subject of a Modification shall not relieve the Design-Builder of the obligation to perform the Work in accordance with the Design-Build Documents.

§ 4.4.3 Design-Builder shall develop and review the Construction Documents with Owner, taking into account the quality of materials and equipment that is achievable within the Owner's Budget. Design-Builder's design decisions shall be based on construction materials, methods, systems, phasing, and costs that will provide the highest quality building achievable within the available Budget and schedule. The Contract Documents shall identify the design codes, standards, and requirements used for the development of the plans, including the edition and applicable sections.

§ 4.4.4 Construction Documents shall include a quality control program and an implementation plan to ensure that the completed Project complies with the approved design. The Architect shall specify within the Construction Documents all tests and inspections that are required by the building code and those that are appropriate to achieve compliance with the Contract. Design-Builder shall retain Architect to provide construction administration services in a professional capacity. These services shall include shop drawing review, response to requests for information regarding the Construction Documents, and periodic visits to the site to observe the quality of the Work.

§ 4.4.5 The final, approved-for-construction set of Construction Documents shall be signed and stamped by California-licensed professionals who prepared the documents, and who shall certify their compliance with codes, standards, practices and regulations. The Design-Builder shall retain full responsibility for the design.

§ 4.4.6 The Owner shall review the Construction Documents and, if acceptable, provide the Design-Builder with written consent to proceed with Subcontractor Procurement, submission of the Construction Documents to the AHJ and other necessary agencies for approvals and permitting, and development of the Design-Builder's Proposal.

#### § 4.5 Subcontractor Procurement Methodology

§ 4.5.1 Design-Builder shall procure all Subcontractors that were not identified as members of the Design-Builder team in the Statement of Qualifications or in the Design-Builder's proposal, in accordance with Public Contract Code section 22185.6. All subcontracts with such Subcontractors shall be awarded according to a publicly advertised process that provides for public notice of the availability of work to be subcontracted and a fixed date and time on which the subcontracted work will be awarded. These subcontractors shall be afforded the protections contained in Chapter 4, (commencing with Section 4100) of Part 1 of Division 2 of the Public Contract Code.

§ 4.5.2 The Design-Builder will work with the Owner to determine the method to procure each individual Subcontractor:

A competitive bidding process resulting in lump-sum bids for an award made on the basis of the lowest responsible bid; or an alternate method as approved by the Owner.

§ 4.5.3 Design-Builder shall identify work to be self-performed by the Design-Builder and performed by design-build or design-assist subcontractors in the proposal and provide documentation to confirm that Design-Builder and its design-build or design-assist Subcontractors possess the required licenses. The Owner will work closely with the Design-Builder should the Design-Builder elect to self-perform any Subcontractor bid packages. The Design-Builder shall submit to the Owner a competitive bid for any such work two (2) days prior to the Subcontractor Bid Opening.

§ 4.5.4 Design-Builder shall develop Subcontractor bid packages based upon Construction Documents submitted to the AHJ for final approval or as approved by the Owner. The bid packages shall incorporate Design-Builder's subcontract agreement requirements, Project specific requirements such as site access and phasing, and Owners' bidding requirements and Contract General Conditions requirements. Design-Builder shall develop the most logical, competitive, seamless and distinct Subcontractor bid packages with all scopes of work included in the packages.

§ 4.5.5 Design-Builder shall make best effort to obtain a minimum of three (3) bids from Subcontractors for each bid.

§ 4.5.6 Not Used.

§ 4.5.7 Owner will not reimburse Design-Builder or Subcontractors for the reproduction costs of bid or construction documents.

§ 4.5.8 Once Owner has approved individual or multiple Subcontractor bid packages, Design-Builder shall bid these packages competitively as described above. Design-Builder shall issue a notice to bidders and bid advertisement in accordance with Public Contract Code for all trade bids and in that notice indicate that the Project is a public works Project, and as such is subject to prevailing rate wages. The Owner may require the Design-Builder to use the Owner's online vendor portal; set up specifically for this project to manage these public works bid solicitations.

§ 4.5.9 Design-Builder shall receive bids and review them with Owner to identify the lowest responsible bidder as applicable to each subcontract Design-Builder shall review and confirm scope of work with Subcontractors before subcontracts are awarded. Design-Builder shall invite Owner's representative to the bid openings and to participate in reviews with Design-Builder. Design-Builder shall provide a copy of subcontracts to Owner and, as requested by Owner, lower tier subcontracts. Owner shall approve award of subcontracts.

#### § 4.6 Design-Builder's Proposal

§ 4.6.1 Upon completion of Subcontractor bidding and submission of the Construction Documents to the AHJ for final approval, the Design-Builder shall prepare and submit the Design-Builder's Proposal to the Owner. The Design-Builder's Proposal shall include the following:

- .1 A list of the Construction Documents and other information, including the Design-Builder's clarifications, assumptions and deviations from the Owner's Criteria, upon which the Design-Builder's Proposal is based;
- .2 The proposed Contract Sum, in the form of a Guaranteed Maximum Price (GMP);
- .3 The proposed date for plan approval, Owner issuance of NTP for Construction and by which the Design-Builder shall achieve Substantial Completion;

- .4 A detailed CPM schedule reflecting all activities required for completion of construction and turn-over of the completed project to the Owner;
- .5 An enumeration of any qualifications and exclusions, if applicable;
- .6 A list of the Design-Builder's key personnel, Subcontractors and suppliers; and
- .7 The date on which the Design-Builder's Proposal expires.

§ 4.6.2 Submission of the Design-Builder's Proposal shall constitute a representation by the Design-Builder that it has visited the site and become familiar with local conditions under which the Work is to be completed.

§ 4.6.3 If the Owner and Design-Builder agree on a proposal, the Owner and Design-Builder shall execute the Design-Build Amendment setting forth the terms of their agreement. The Owner and Design-Builder shall endeavor to agree on a proposal and execute the Design-Build Amendment within Forty-Five (45) days of the Design-Builder's submission of its Proposal for Phase 2.

§ 4.6.4 The Owner is not obligated to accept the Design-Builder's Proposal or execute an Amendment with the Design-Builder. If the Owner and the Design-Builder are unable to come to agreement on the terms and conditions of the Design-Builder's Proposal, the Owner may, at its sole discretion, terminate the Agreement. Any work product or Instruments of Service shall be turned over to Owner. Owner shall have a perpetual license to the Instruments of Service as provided in Article 12, and the Owner shall pay the Design-Builder for Work properly performed prior to the termination, subject to Owner's right of setoff. In the event Owner and Design-Build Entity do not continue with the Project, all work product or Instruments of Service for the Project may be used by Owner in any manner related to this Project, including use for subsequent contracts to maintain, repair, improve or renovate the Project; provided, however, that the Owner shall indemnify, defend and hold Design-Builder, the Architect, and Consultants and their respective officers and employees against any claims, damages, losses or expenses, including attorneys' fees and costs, arising out of any such use by the Owner, except to the extent that the work product or Instruments of Service do not meet the Standard of Care.

§ 4.6.5 The Guaranteed Maximum Price established in the Design-Build Amendment will be the maximum compensation available for Phase 2, or as otherwise provided in the Design-Build Documents.

## **ARTICLE 5 WORK FOLLOWING EXECUTION OF THE DESIGN-BUILD AMENDMENT – (Phase 2)**

### **§ 5.1 Notice to Proceed with Construction.**

§ 5.1.1 Upon the execution of the Design-Build Amendment, approval of Construction Documents by the AHJ and Notice to Proceed by the Owner, the Design-Builder may proceed with Construction.

§ 5.1.2 Owner and Design-Builder shall co-conduct a preconstruction conference with the Subcontractors, design personnel, and appropriate Owner staff. The preconstruction conference agenda may include but is not limited to safety, job procedures for clarifications, change orders, shop drawings, progress payments, field testing and inspection, and preparation and distribution of preconstruction conference notes.

§ 5.1.3 Prior to start of construction the Design-Builder shall prepare and submit to the Owner, for acceptance, a detailed Construction Schedule in a format and software that is acceptable to the Owner. The Construction Schedule shall be in a Critical Path Method (CPM) format and shall include all activities, milestones and approvals required to complete construction of the Project including but not limited to submittals and approvals by the Owner and authorities having jurisdiction over the Project.

§ 5.1.4 Design-Builder shall update the Project Schedule on a monthly basis.

### **§ 5.2 Construction**

§ 5.2.1 **Commencement.** Except as permitted by mutual agreement of the parties in Section 5.2.2, construction shall not commence prior to execution of the Design-Build Amendment.

§ 5.2.2 If the Owner and Design-Builder agree in writing, construction may proceed prior to the execution of the Design-Build Amendment. However, such authorization shall not waive the Owner's right to reject the Design-Builder's Proposal.

§ 5.2.3 The Design-Builder shall supervise and direct the Work, using the skill and attention ordinarily used by members of the design-build industry under similar conditions at the Project location. The Design-Builder shall be



solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Construction Services under the Contract, unless the Design-Build Documents give other specific instructions concerning these matters.

§ 5.2.4 The Design-Builder shall be responsible for inspection of portions of Construction Services already performed to determine that such portions are in proper condition to receive subsequent Work.

### § 5.3 Labor and Materials

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

§ 5.3.2 When a material or system is specified in the Design-Build Documents, the Design-Builder may make substitutions only in accordance with Article 6.

§ 5.3.3 The Design-Builder shall enforce strict discipline and good order among the Design-Builder's employees and other persons carrying out the Work. The Design-Builder shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them, and the Design-Builder shall comply, and cause its consultants and subcontractors to comply, with all applicable labor and employment laws and regulations in its and their employment of their respective employees and other persons carrying out the Work.

§ 5.3.4 The Design-Builder and each Consultant and Contractor shall evaluate and satisfy themselves as to the conditions and limitations under which the Work is to be performed, including, without limitation (1) the location, condition, layout, and nature of the Project site and the existing facility; (2) generally prevailing climatic conditions; (3) anticipated labor supply and costs; and (4) availability and cost of materials, tools, and equipment. The Owner shall not be required to make any adjustment in either the Contract Sum or Contract Time in connection with any failure by the Design-Builder or any Contractor to comply with the requirements of this Article 5.

§ 5.3.5 Subject to Section 5.5.3, Design-Builder is responsible for notification and protection of all utilities in connection with the Work. In the event that utility services are interrupted during the course of Design-Builder's Work, Design-Builder will take whatever actions are necessary and appropriate to ensure that utility services are restored in the shortest possible time and will hold Owner harmless and indemnify Owner from any claims related to damages or interruption to such utility service.

§ 5.3.6 Design-Builder shall make the Work available to Owner for review, inspection or investigation at any time and shall provide Owner reasonable access to all parts of the Work upon request. Upon reasonable notice to Design-Builder, Owner may bring its invitees on site, who shall comply with all safety requirements of the Owner, Project and Design-Builder.

§ 5.3.7 In accordance with Public Contract Code Section 7103.5, in entering into a public works contract or a subcontract to supply goods, services, or materials pursuant to a public works contract, Design-Builder offers and agrees to assign to the Owner all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, or materials pursuant to the public works contract or the subcontract. This assignment shall be made and become effective at the time the Owner tenders final payment to the Design-Builder, without further acknowledgment by the parties.

### § 5.4 Taxes

The Design-Builder shall pay sales, consumer, use and similar taxes, for the Work provided by the Design-Builder, which are legally enacted when the Design-Build Amendment is executed, whether or not yet effective or merely scheduled to go into effect.

### § 5.5 Permits, Fees, Notices and Compliance with Laws

§ 5.5.1 Unless otherwise provided in the Design-Build Documents, the Design-Builder shall secure and pay for the building permit as well as any other permits, fees, licenses, and inspections by government agencies, necessary for proper execution of the Work and Completion of the Project.

§ 5.5.2 The Design-Builder shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, applicable to performance of the Work.

§ 5.5.3 **Concealed or Unknown Conditions.** In accordance with Public Contract Code section 7104, if the Design-Builder encounters conditions at the site that are (1) material that the Design-Builder believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law; (2) subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to Design-Builder prior to the deadline for submitting its proposal; or (3) unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the Design-Build Documents, the Design-Builder shall promptly (within 48 hours) provide written notice to the Owner before conditions are disturbed. Design-Builder has no right to an adjustment in Contract Sum or Contract Time unless Design-Builder promptly (within 48 hours) notifies the Owner, except that Owner may extend the notification time upon Design-Builder's written request in order to obtain additional relevant information. The Owner shall promptly investigate such conditions and, if the Owner determines that they do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the Design-Builder's cost of, or the time required for, performance of any part of the Work, shall make an equitable adjustment under the provisions set forth in Article 6 herein. If the Owner determines that the conditions at the site are not materially different from those indicated in the Design-Build Documents and that no change in the terms of the Contract is justified, the Owner shall promptly notify the Design-Builder in writing, stating the reasons. If the Design-Builder disputes the Owner's determination or recommendation, the Design-Builder may proceed as provided in Article 14.

§ 5.5.4 If, in the course of the Work, the Design-Builder encounters human remains, or recognizes the existence of burial markers, archaeological sites, or wetlands, not indicated in the Design-Build Documents, the Design-Builder shall immediately suspend any operations that would affect them and shall notify the Owner. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Design-Builder shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 6.

§ 5.5.5 The Design-Builder shall implement mitigation measures identified in the Environmental Impact Report (EIR) included in the Contract specifications and designated as the Design-Builder's responsibility. The Design-Builder shall identify in the Project schedule the specific timing related to the planning and implementing of these measures.

## § 5.6 Allowances

§ 5.6.1 The Design-Builder shall include in the Contract Sum all allowances stated in the Design-Build Documents. Items covered by allowances shall be supplied for such amounts, and by such persons or entities as the parties may agree upon and the Design-Builder shall not be required to employ persons or entities to whom the Design-Builder has reasonable objection.

§ 5.6.2 The following provisions apply to allowances,

- .1 allowances shall cover the cost to the Design-Builder of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .2 the Design-Builder's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated allowance amounts, shall be included in the allowances; and
- .3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 5.6.2.1 and (2) changes in Design-Builder's costs under Section 5.6.2.2.

§ 5.6.3 The Owner shall make selections of materials and equipment with reasonable promptness for allowances requiring Owner selection.

## **§ 5.7 Key Personnel, Subcontractors and Suppliers**

**§ 5.7.1** The Design-Builder shall not employ personnel, or contract with Subcontractors or suppliers to whom the Owner has made reasonable and timely objection. The Design-Builder shall not be required to contract with anyone to whom the Design-Builder has made reasonable and timely objection.

**§ 5.7.2** If the Design-Builder changes any of the personnel, Subcontractors or suppliers identified in Section 1.2.5 or in the Design-Build Amendment, the Design-Builder shall notify the Owner and provide the name and qualifications of the new personnel, Subcontractor or supplier. The Owner may reply within 14 days to the Design-Builder in writing, stating (1) whether the Owner has reasonable objection to the proposed personnel, Subcontractor or supplier or (2) that the Owner requires additional time to review. Failure of the Owner to reply within the 14-day period shall constitute notice of no reasonable objection.

**§ 5.7.3** Except for those persons or entities identified in Section 1.2.5 or required in the Design-Build Amendment, the Design-Builder, as soon as practicable after execution of the Design-Build Amendment, shall furnish in writing to the Owner the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Owner may reply within 14 days to the Design-Builder in writing stating (1) whether the Owner has reasonable objection to any such proposed person or entity or (2) that the Owner requires additional time for review. Failure of the Owner to reply within the 14-day period shall constitute notice of no reasonable objection.

**§ 5.7.3.1** If the Owner has reasonable objection to a person or entity proposed by the Design-Builder, the Design-Builder shall propose another to whom the Owner has no reasonable objection. If the rejected person or entity was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute person or entity's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Design-Builder has acted promptly and responsively in submitting names as required.

## **§ 5.8 Documents and Submittals at the Site**

The Design-Builder shall maintain at the site for the Owner one copy (or in electronic versions available to the Owner) of the Design-Build Documents and a current set of the Construction Documents, in good order and marked currently to indicate field changes and selections made during construction, and one copy of approved Submittals. The Design-Builder shall deliver these items to the Owner in accordance with Section 9.10.2 as a record of the Work as constructed.

## **§ 5.9 Use of Site**

The Design-Builder shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Design-Build Documents, and shall not unreasonably encumber the site with materials or equipment.

## **§ 5.10 Cutting and Patching**

The Design-Builder shall not cut, patch or otherwise alter fully or partially completed construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Design-Builder shall not unreasonably withhold from the Owner or a separate contractor the Design-Builder's consent to cutting or otherwise altering the Construction Services.

## **§ 5.11 Cleaning Up**

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

**§ 5.11.2** If the Design-Builder fails to clean up as provided in the Design-Build Documents, the Owner may, after seven days of written notice to Design-Builder, do so and Owner shall be entitled to reimbursement from the Design-Builder.

## **§ 5.12 Access to Work**

The Design-Builder shall provide the Owner and its separate contractors and consultants access to the Construction Services in preparation and progress wherever located. The Design-Builder shall notify the Owner regarding Project safety criteria and programs, which the Owner, and its contractors and consultants, shall comply with while at the site.

## **§ 5.13 Construction by Owner or by Separate Contractors**

### **§ 5.13.1 Owner's Right to Perform Construction and to Award Separate Contracts**

**§ 5.13.1.1** The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces; and to award separate contracts in connection with other portions of the Project, or other construction or operations on the site, under terms and conditions identical or substantially similar to this Contract, including those terms and conditions related to insurance and waiver of subrogation. The Owner shall notify the Design-Builder promptly after execution of any separate contract. If the Design-Builder claims that delay or additional cost is involved because of such action by the Owner, the Design-Builder shall make a Claim as provided in Article 14.

**§ 5.13.1.2** When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Design-Builder" in the Design-Build Documents in each case shall mean the individual or entity that executes each separate agreement with the Owner.

**§ 5.13.1.3** The Owner shall provide for coordination of the activities of the Owner's own forces, and of each separate contractor, with the Work of the Design-Builder, who shall cooperate with them. The Design-Builder shall participate with other separate contractors and the Owner in reviewing their construction schedules. The Design-Builder shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Design-Builder, separate contractors and the Owner until subsequently revised.

**§ 5.13.1.4** Unless otherwise provided in the Design-Build Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces or separate contractors, the Owner shall be deemed to be subject to the same obligations, and to have the same rights, which apply to the Design-Builder under the Contract.

## **§ 5.14 Mutual Responsibility**

**§ 5.14.1** The Design-Builder shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Design-Builder's construction and operations with theirs as required by the Design-Build Documents.

**§ 5.14.2** If part of the Design-Builder's Construction Services depends upon construction or operations by the Owner or a separate contractor, the Design-Builder shall, prior to proceeding with that portion of the Construction Services, prepare a written report to the Owner, identifying apparent discrepancies or defects the Design-Builder has discovered in the construction or operations by the Owner or separate contractor that would render it unsuitable for proper execution and results of the Design-Builder's Construction Services. Failure of the Design-Builder to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Design-Builder's Construction Services, except as to defects not then reasonably discoverable.

**§ 5.14.3** The Design-Builder shall reimburse the Owner for costs the Owner incurs that are payable to a separate contractor because of the Design-Builder's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Design-Builder for costs the Design-Builder incurs because of a separate contractor's delays, improperly timed activities, damage to the Construction Services or defective construction.

**§ 5.14.4** The Design-Builder shall promptly remedy damage the Design-Builder wrongfully causes to completed or partially completed construction or to property of the Owner or separate contractors as provided in Section 10.2.5.

**§ 5.14.5** The Owner and each separate contractor shall have the same responsibilities for cutting and patching the Work as the Design-Builder has with respect to the construction of the Owner or separate contractors in Section 5.10.

### § 5.15 Owner's Right to Clean Up

If a dispute arises among the Design-Builder, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and will allocate the cost among those responsible.

## ARTICLE 6 CHANGES IN THE WORK

### § 6.1 General

§ 6.1.1 Owner may at any time, without notice to the Sureties, by written Order, make changes in the Work within the general scope of the Contract, including but not limited to additions, deletions or other revisions, changes in the Design-Build Documents and in the method and manner of performing the Construction Services. Such changes will be Ordered in either of two ways, by:

- .1 **Field Modification**, which is a written instruction, clarification or additional information communicated by Owner to Design-Builder directing or authorizing a minor adjustment in the Work or the requirements of the Design-Build Documents that does not change the Contract Sum or Contract Time; or by
- .2 **Change Order**, which is a written amendment to the Contract, changing the Work, and/or the Design-Build Documents, and/or the Contract Sum, and/or the Contract Time, executed by the Board of Directors.

§ 6.1.2 **Timeline:** Within fifteen (15) Days of receipt of a request for a Proposed Change Order (PCO) from the Owner, Design-Builder will, to the extent feasible given the scope of the PCO, submit in a format acceptable to the Owner, Design-Builder's proposed cost and time estimates detailing the amount to be added to or deducted from the Contract Sum and Contract Time due to the proposed change. The Design-Builder's proposal must include ("Supporting Documentation"):

- .1 Detailed estimates and other documentation supporting the proposed cost; and
- .2 Proposed adjustment of the Contract Time that is known by the Design-Builder to be directly or indirectly attributable to the proposed Change Order. All requests for adjustment to the Contract Time must be supported by a detailed schedule analysis.

§ 6.1.3 **Failure to submit cost and time estimate:** If Design-Builder fails to submit the required information and documentation, or an explanation of why doing so is not feasible, within the 15 Day time limit, Owner has the right to issue a unilateral Change Order. The Contract Sum and Contract Time will be changed in accordance with the Owner's estimate of cost and time, unless, within 15 Days following completion of the added Work or with written notice to delete the Work, the Design-Builder submits to the Owner written proof that the Owner's estimate is in error.

§ 6.1.4 If, after the Design-Builder has submitted their cost and time proposal, the Owner and the Design-Builder fail to successfully negotiate and agree on a time and/or cost for the proposed Change Order, the Owner may issue a unilateral Change Order to the Design-Builder and the Design-Builder must proceed with the changed Work. If the Design-Builder disputes any portion of the unilateral Change Order, the Design-Builder must maintain time and materials records as specified herein. If the Design-Builder fails to maintain such records or fails to submit such records within 15 Days following completion of the added Work, Owner's estimate will be used for the purpose of final adjustment in Contract Time and Contract Sum.

### § 6.2 DELETED WORK

§ 6.2.1 When Work is deleted, the Owner is entitled to a credit for the deleted Work.

§ 6.2.2 If Design-Builder has ordered acceptable material or equipment for the deleted Work before the date of notification of such deletion by Owner, and if orders for such material or equipment cannot be canceled, such material or equipment will be paid for by Owner at Design-Builder's actual cost. In such case, the material or equipment paid for will become Owner's property and Owner will pay the actual cost of any further handling. If the material or equipment is returnable to the vendor and if Owner so Directs, Design-Builder must return the material or equipment and Owner will pay the actual costs of returning the material or equipment, including reasonable and verifiable handling and restocking charges.

### § 6.3 CONTRACT MODIFICATIONS

§ 6.3.1 The methods for Contract Modification are:

- .1 By negotiation based on estimates of increase or decrease in Contract Time and/or Contract Sum. Upon Owner's written request, Design-Builder must furnish a detailed estimate of increase or decrease in costs and/or time, together with cost and schedule breakdowns and other support data within the time specified in such request. The Design-Builder is responsible for any additional costs caused by the Design-Builder's failure to submit the estimates of cost and/or time within the time specified.
- .2 By Owner, through issuance of a unilateral Change Order pursuant to Section 6,1, whether or not negotiations are initiated as provided above based on Owner's estimate of increase or decrease in Contract Time and/or Contract Sum.
- .3 By Owner, through the issuance of a "Force Account" Change Order, whether or not negotiations are initiated as provided above, by Force Account as defined below. Beginning with the first Day and at the end of each Day, the Design-Builder must furnish to the Owner detailed hourly records for labor, construction equipment, and services and itemized records of materials and equipment used that Day in performance of the changes. Such records must be on a mutually acceptable form. Such records must be signed by the Design-Builder and verified by the Owner's Project Manager on a daily basis; provided, however, that failure of the Owner's Project Manager to verify the records as required is not a basis for denial of a Change Order by the Owner.

**§ 6.3.2 Adjustment of compensation will be based upon:**

- .1 Labor: Compensation for labor includes the necessary payroll cost for labor, including the first level supervision, directly engaged in performance of the change. Wages shall not exceed current prevailing wages in the locality where the change is performed. Use of a classification that would increase labor cost will not be permitted. Exceptions to the above will be permitted only if Design-Builder establishes to the satisfaction of Owner the necessity for payment at higher rates or classification.
- .2 Materials and Equipment: Compensation for materials and equipment includes the necessary cost for materials and equipment directly required for performance of the change. Cost of materials and equipment may include costs of transportation and delivery, and reasonably anticipated waste or spoilage. If discounts by Suppliers are obtained by Design-Builder, they must be credited to Owner. If materials and equipment are obtained from supply or source(s) owned by, or partially owned by Design-Builder, payment will not exceed current wholesale price for such materials and equipment.
  - .1 If Design-Builder fails to furnish satisfactory evidence of cost from Supplier, the cost of materials and equipment shall be the lowest current wholesale price at which similar materials and equipment are available in quantities required. Owner reserves the right to furnish materials and equipment required for performance of the change(s) and Design-Builder has no right to Claim for costs or mark-ups on such materials and equipment furnished by Owner.
- .3 Construction Equipment: Compensation shall be only for use of equipment directly required for performance of the change and will be calculated as provided below under Force Account Work.
- .4 Services: Compensation shall be only for the necessary cost of Approved services directly required for the performance of the change.
- .5 General Conditions and General Requirements Costs: For Modifications involving compensable extensions of the Contract Time, compensation will include an adjustment in the Contract Sum for demonstrated increases in general conditions and general requirements costs.

**§ 6.3.3 Markups for Added or Deleted Work**

These markups for performance of changes constitute full compensation for all costs not covered above, including profit, direct and indirect overhead, extended overhead, insurance, taxes, and bonds:

- .1 If the direct cost of extra work is less than or equal to \$25,000, the mark-up shall be computed as follows:
  - a. For extra work performed directly by the Contractor's forces, the added cost shall not exceed fifteen percent (15%) of the cost of the extra work.
  - b. For extra work performed by a first tier Subcontractor, the combined added cost of both the Contractor and Subcontractor shall not exceed twenty percent (20%) of the direct cost of the Subcontractor's extra work.

- c. For extra work performed by any Sub-Subcontractor, the combined cost of the Contractor, the Subcontractor and the lowest tier of Subcontractor shall not exceed twenty-five percent (25%) of the direct cost of the lowest tier Subcontractor's extra work.
- .2 If the direct cost of extra work is greater than \$25,000 and less than or equal to \$100,000, the mark-up shall be computed as follows:
    - a. For extra work performed directly by the Contractor's forces, the mark-up shall not exceed twelve percent (12%) of the direct cost of the extra work.
    - b. For extra work performed by a first tier Subcontractor, the combined cost of both the Contractor and Subcontractor shall not exceed seventeen percent (17%) of the direct cost of the Subcontractor's extra work.
    - c. For extra work performed by any Sub-Subcontractor, the combined cost of the Contractor, the Subcontractor and the lowest tier of Subcontractor shall not exceed twenty-two percent (22%) of the direct cost of the lowest tier Subcontractor's extra work.
  - .3 If the direct cost of extra work is greater than \$100,000, the mark-up shall be computed as follows:
    - a. For extra work performed directly by the Contractor's forces, the mark-up shall not exceed ten percent (10%) of the direct cost of the extra work.
    - b. For extra work performed by a first tier Subcontractor, the combined cost of both the Contractor and Subcontractor shall not exceed fifteen percent (15%) of the direct cost of the Subcontractor's extra work.
    - c. For extra work performed by any Sub-Subcontractor, the combined cost of the Contractor, the Subcontractor and the lowest tier Subcontractor shall not exceed twenty percent (20%) of the direct cost of the lowest tier Subcontractor's extra work.
  - .4 For Deleted Work: When Work is deleted, the Owner is entitled to a credit for the deleted Work. The credit must include direct labor, materials, equipment, and supervision plus overhead and profit of the Design-Builder and Subcontractor, as applicable for the deleted Work. Deleted overhead and profit shall be computed as five percent (5%) of the direct labor, materials, equipment, and supervision. For example, if a \$10,000 direct cost item of Work were deleted, the credit to the Owner would be \$10,500.

**§ 6.3.4 General Limitations** Cost to Design-Builder for a change that exceeds market values prevailing at the time of the change will not be allowed unless Design-Builder establishes that all reasonable means for performance of the change at prevailing market values have been investigated and the excess cost could not be avoided. Notwithstanding actual charges to Design-Builder on Work performed by Design-Builder or others, no markups will be paid in excess of those specified above.

**§ 6.3.5 Disallowed Costs** Disallowed Costs in Change Orders or Claims include, but are not limited to:

- .1 Interest or financing cost of any type other than those mandated by statute;
- .2 Claim preparation or filing costs;
- .3 legal expenses;
- .4 the costs of preparing or reviewing Change Order proposals
- .5 lost revenues;
- .6 loss of anticipated profits;
- .7 lost income or earnings;
- .8 Schedule preparation costs;
- .9 Submittal preparation costs;
- .10 costs of idled equipment when such equipment is not yet at the site or has not yet been employed on the Work;
- .11 lost earnings or interest on unpaid retention;
- .12 Claims consulting costs;
- .13 the costs of corporate officers or staff visiting the site or participating in meetings with the Owner;
- .14 any compensation due to the fluctuation of foreign currency conversions or exchange rates;
- .15 loss of other business;
- .16 costs or damages for delays, interruptions, hindrances or disruptions to the Work for on-site or off-site costs or damages based upon formulas, e.g. Eichleay or other formula.

**§ 6.3.6 Adjustment of Contract Time** There will be no adjustment of the Contract Time for changes that do not impact the Critical Path of the Approved Construction Schedule, as revised or updated. Design-Builder must show that the change affected the Critical Path of the Approved Construction Schedule, as revised or updated, and how the change increased (or decreased) the Contract Time to complete the Work.

#### **§ 6.4 DESIGN-BUILDER'S ACCEPTANCE OF CHANGE ORDERS**

**§ 6.4.1** Design-Builder's written acceptance of a Change Order constitutes final and binding agreement to the provisions thereof and a waiver of all Claims in connection therewith, whether direct, indirect or consequential. Pursuant to Public Contract Code section 7100, Design-Builder may specifically exclude individual Change Order items from operation of the Design-Builder's written acceptance of the Change Order and waiver of all Claims in connection therewith.

#### **§ 6.5 FORCE ACCOUNT WORK**

##### **§ 6.5.1 General**

- .1 Owner may, at any time, order the Design-Builder in writing, through the issuance of a Change Directive/Field Modification, to perform Work on a Force Account (time and materials, cost not to exceed) basis. When Design-Builder performs Force Account Work, the labor, materials and equipment used in performing such Work are subject to Owner's approval. As used in this Section 6.5 the word "Work" means Force Account Work. For the avoidance of doubt, it is acknowledged that Sections 6.5.1 through 6.5.8 only apply to Force Account Work and have no bearing on other provisions of the Contract or Design-Build Documents.
- .2 Payment for Force Account Work
  - .1 The total payment as provided herein constitutes full compensation to Design-Builder for performance of Force Account Work.
  - .2 Design-Builder will be paid the direct costs for labor, materials and equipment used in performing the Work determined as hereinafter provided. If materials and equipment are obtained from a supply or source owned in whole or in part, by the Design-Builder, payment for such materials and/or equipment will not exceed current wholesale prices for such materials and equipment.
  - .3 If, in the opinion of the Owner, the cost of materials and equipment is excessive, or if the Design-Builder fails to furnish satisfactory evidence of costs from Suppliers, the cost of materials and equipment will be the lowest current wholesale price at which similar materials and equipment are available in quantities required.
  - .4 No costs will be allowed for time while construction equipment is inoperative, idle, or on stand-by, for any reason, unless such times have been Approved in advance by the Owner.
- .3 Markups: To the total of the direct costs computed as provided above the following maximum markups will be added:
  - .1 Ten percent to Labor (10%)
  - .2 Ten percent to Materials and equipment (permanently incorporated) (10%)
  - .3 Ten percent to Equipment Rental (10%)
- .4 Except as provided in Section 6.3.2.5 above, the above markups constitute full compensation for all overhead costs (general overhead, supervision, office expenses, field office facilities, utilities, bonds and insurance of all types, and transportation) including all items of expense not specifically designated as cost or equipment rental. The total payment made as provided constitutes full compensation for the Work performed.
- .5 When forces other than Design-Builder's organization perform Work, Design-Builder must reach agreement with such other forces as to the distribution of the payment made by Owner for such Work. Owner will accept no additional markups by reason of the performance of Force Account Work by a Subcontractor or other forces.
- .6 Design-Builder must monitor all costs and notify Owner at least seventy-two (72) hours before the cost limit will be reached or when seventy percent (70%) of the cost not-to-exceed value is reached. In no event shall Design-Builder exceed Owner's cost limit.

##### **§ 6.5.2 Labor**

- .1 Design-Builder and Subcontractors will be paid the cost of labor for the workers (including first level supervision when authorized by Owner) used in the actual and direct performance of the Work. The Design-Builder and Subcontractor must document labor hours expended in their Daily



Report. The cost of labor, whether the employer is Design-Builder, Subcontractor or other forces, will be the sum of the following:

- .1 Actual Wages: The actual wages paid include two components: (1) direct labor costs actually paid to the employee; and (2) any employer payments to or on behalf of workers for health and welfare, pension, vacation and similar purposes.
- .2 Labor Surcharges: Labor surcharge shall constitute full compensation for all payments imposed by State and Federal laws and for all other payments made to, or on behalf of, the Workers, other than actual wages and subsistence and travel allowance as specified as defined herein.
- .3 Subsistence and Travel Allowance: The actual allowance paid to such workers in compliance with labor agreements.

### § 6.5.3 Materials

- .1 Owner Furnished: Owner may furnish such materials as it deems advisable, and Design-Builder has no rights to Claim for costs and markup on such materials.
- .2 Design-Builder Provided: Only materials necessary to and actually used in the Construction Services will be paid for. The cost of such materials will be the cost to the purchaser, whether Design-Builder, Subcontractor, or other Supplier thereof, unless the following apply:
  - .1 If a cash or trade discount by the actual Supplier is offered or available to the purchaser, it must be credited to Owner whether or not such discount was actually received.
  - .2 If materials are procured by any method, which is not a direct purchase from an actual Supplier, the cost of such materials shall be deemed to be the price, paid to the actual Supplier as determined by Owner. No markup except for actual costs incurred in the handling of such materials will be permitted.
  - .3 If materials are obtained from a supply or source owned in whole or in part by the purchaser, payment therefore will not exceed the price paid by the purchaser for similar materials provided from said source on Contract items, or the current wholesale price for such materials delivered to the Project Site, whichever price is lower.
  - .4 If in Owner's opinion the cost of such materials is excessive, then the cost of such materials shall be deemed to be the lowest current wholesale price at which such materials are available in the required quantities delivered to the Project Site, less any discounts as provided.
  - .5 If Design-Builder does not furnish satisfactory evidence of the cost of such materials from the actual Supplier thereof, the cost shall then be determined in accordance with Article 6.5.3.4 above.

### § 6.5.4 Equipment Rental

- .1 Rental Rate: Design-Builder will be paid for the use of equipment at the rental rate listed for such equipment in the latest edition of the California Department of Transportation, Labor Surcharge and Equipment Rental Rates for Design-Builder owned equipment, or the actual rate paid pursuant to any applicable rental agreement for the use of such equipment entered into by Design-Builder. If it is deemed necessary by Owner to use equipment not so listed, Owner and Design-Builder will establish prior to the Work being done an agreed rental rate for such equipment. Design-Builder may furnish any cost data that might assist Owner in establishing such rental rate.
  - .1 The aforesaid rental rates shall be deemed to include the cost of fuel, power, oil, lubrication, supplies, small tools, necessary attachments, repairs and maintenance of all kinds, depreciation, storage, insurance, labor except for construction equipment operators and any and all costs to the Design-Builder incidental to the use of such construction equipment.
  - .2 Operators of rental equipment will be paid for as provided under Section 6.5.2 Labor. All equipment must be in good working condition and suitable for the purpose for which it is to be used.
  - .3 Unless otherwise specified, Manufacturer's ratings and Manufacturer approved modifications shall be used to classify equipment for determining applicable rental rates. A power unit of at least the minimum rating recommended by the Manufacturer shall power equipment that has no direct power unit.
  - .4 Individual pieces of equipment or tools having a replacement value of \$500 or less, whether or not consumed by use, are considered to be small tools and no rental payment will be made.
  - .5 Rental time will not be allowed while equipment is inoperative due to breakdowns.

### § 6.5.5 Equipment on the Work

- .1 The rental time to be paid for equipment already on the Project Site will be the time the equipment is in operation on the Work being performed, and in addition, will include the time required to move the equipment to the location of the Work and return it to the original location, except that moving time will not be paid if the equipment is used at the Project Site for activities besides Force Account Work.
- .2 Loading and transporting costs will be allowed, in lieu of moving time, when equipment is moved by means other than its own power, except that no payment will be made if equipment is used at the Project Site for activities besides Force Account Work.
- .3 The following will be used in computing the rental time of equipment on the Work:
  - .1 When hourly rates are listed, less than thirty (30) minutes of operation will be considered to be one-half (1/2) hour of operation.
  - .2 When daily rates are listed, less than four (4) hours of operation will be considered to be one-half (1/2) day of operation.

### § 6.5.6 Equipment not on the Work

- .1 For the use of equipment moved in solely to perform Force Account Work, and used exclusively for such Work, Design-Builder will be paid the rental rates determined as provided in Section 6.5.4 Equipment Rental above and for the cost of transporting the equipment to the Work site, all in accordance with the following provisions:
  - .1 Design-Builders must obtain Owner's approval before transporting any equipment to the Project Site.
  - .2 Owners will pay the cost of loading and unloading Approved equipment.
  - .3 The cost of transporting equipment in low bed trailers shall not exceed the hourly rates charged by established haulers.
  - .4 Not Used.
  - .5 Should Design-Builder desire to return the equipment to a location other than the location from where it was transported to the Work site, Owner will pay the cost of transportation in accordance with the above provisions, provided such payment will not exceed the cost of transporting the equipment to the Work site.
  - .6 Payment for transporting, loading and unloading equipment, as above provided, will not be made if the equipment is not used primarily on Force Account Work.
- .2 The rental period will begin when the equipment is unloaded at the Work site, will include each day that the equipment is at the Work site and will terminate at the end of the second workday when Owner directs Design-Builder to discontinue use of such equipment.
  - .1 The hours to be paid for equipment that is operated less than 8 hours due to breakdowns will not exceed 8 less the number of hours the equipment is inoperative due to breakdowns.
  - .2 When hourly rates are listed, less than thirty (30) minutes of operation will be considered to be one-half (1/2) hour of operation.
  - .3 When daily rates are listed, payment for one-half (1/2) day will be made if the equipment is not used. If the equipment is used, payment will be made for one day.
  - .4 The minimum rental time to be paid for the entire rental period on an hourly basis will not be less than eight (8) hours or if on a daily basis will not be less than one day.

### § 6.5.7 Adjustment of Contract Time

- .1 The Milestone Completion Date(s) and Contract Completion date will not be changed because of Force Account Work unless Design-Builder demonstrates that such Work actually affected the Contract Time(s).

### § 6.5.8 Records

- .1 Design-Builder and Subcontractors must maintain records that provide a clear distinction between the performance of the Force Account Work and the performance of all other operations.
- .2 From the above records, Design-Builder must furnish Owner completed daily Force Account Work reports on mutually acceptable forms for each day's Force Account Work.
- .3 The daily Force Account Work reports:
  - .1 Must be submitted not later than one (1) workday following the performance of said Work.
  - .2 Must itemize the materials used.
  - .3 Must cover the direct cost of labor and the charges for equipment rental, whether Provided by Design-Builder, Subcontractor, or other forces.

- .4 Must provide names or identifications and classifications of workers, the hourly rate of pay and hours worked, and the size, type and identification number of equipment and hours operated.
- .4 Before presenting the daily Force Account Work reports to Owner, Design-Builder must compile the estimated daily and to-date cumulative cost of the Work.
- .5 Material charges must be substantiated by valid copies of vendor's invoices. Such invoices must be submitted with the daily Force Account Work reports, or if not available, they must be submitted with subsequent daily Force Account Work reports. Should said vendor's invoices not be submitted within sixty (60) Days after the date of delivery of the material, Owner reserves the right to establish the cost of such materials at the lowest current wholesale prices at which said materials are available in the quantities concerned, delivered to the location of the Work, less any discounts provided.
- .6 Design-Builder must sign each daily Force Account Work report.
- .7 Owner will compare Owner's records with Design-Builder's completed daily Force Account Work reports and make any necessary adjustments. When these daily Force Account Work reports are agreed upon and signed by both parties, said reports become the basis of payment for the Work performed, but do not preclude subsequent adjustment based on a later audit by Owner.
- .8 Design-Builder's cost records pertaining to the Work must be open to inspection or audit by Owner during the life of the Contract and for a period of not less than three (3) years after the Date of Acceptance thereof, and Design-Builder must retain such records for the period.

## **ARTICLE 7 OWNER'S RESPONSIBILITIES**

### **§ 7.1 General**

**§ 7.1.1** The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all Project matters requiring the Owner's approval or authorization.

**§ 7.1.2** The Owner shall endeavor to render decisions in a timely manner and in accordance with the Design-Builder's schedule agreed to by the Owner. The Owner shall furnish to the Design-Builder, within 15 days after receipt of a written request (unless Board Approval is required), information necessary and relevant for the Design-Builder to evaluate, give notice of or enforce Stop Notice rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

### **§ 7.2 Information and Services Required of the Owner**

**§ 7.2.1** The Owner shall furnish information or services required of the Owner by the Design-Build Documents with reasonable promptness, or in accordance with any time periods specified in the Design Build Documents and Project Schedule.

**§ 7.2.2** The Owner shall provide, to the extent under the Owner's control and if not required by the Design-Build Documents to be provided by the Design-Builder, the results and reports of prior tests, inspections or investigations conducted for the Project involving structural or mechanical systems; chemical, air and water pollution; hazardous materials; or environmental and subsurface conditions and information regarding the presence of pollutants at the Project site. Upon receipt of a written request from the Design-Builder, the Owner shall provide a legal description of the site under the Owner's control. The Owner will provide the Design-Builder with any geotechnical reports generated with regard to the Project site. Any reports provided by the Owner are provided to Design-Builder for reference purposes only and are not part of the Contract. Design-Builder, at its expense, may perform any additional geotechnical or other analyses/reports for the site, subject to Owner's reasonable approval.

**§ 7.2.3** The Owner shall promptly obtain easements, zoning variances, and legal authorizations or entitlements regarding site utilization where essential to the execution of the Project.

**§ 7.2.4** The Owner shall cooperate with the Design-Builder in securing building and other permits, licenses and inspections.

**§ 7.2.5** The services, information, surveys and reports required to be provided by the Owner under this Agreement, shall be furnished at the Owner's expense, and except as otherwise specifically provided in this Agreement or elsewhere in the Design-Build Documents or to the extent the Owner advises the Design-Builder to the contrary in writing, the Design-Builder shall be entitled to reasonably rely upon the accuracy and completeness thereof. In no

event shall the Design-Builder be relieved of its responsibility to exercise proper precautions relating to the safe performance of the Work. Design-Builder shall provide prompt written notice to Owner of any errors, omissions or inconsistencies in such information.

§ 7.2.6 If the Owner observes or otherwise becomes aware of a fault or defect in the Work or non-conformity with the Design-Build Documents, the Owner shall give prompt written notice thereof to the Design-Builder. However, Owner's failure to provide such notice, shall in no way relieve, change or modify Design-Builder's responsibilities with respect to the quality or quantity of the Work, nor waive any rights or claims the Owner may have with respect to Design-Builder.

§ 7.2.7 Not Used.

§ 7.2.8 Except as otherwise provided in the Design-Build Documents or when direct communications have been specially authorized, the Owner shall communicate through the Design-Builder with persons or entities employed or retained by the Design-Builder.

§ 7.2.9 Not Used.

§ 7.2.10. The Design-Builder, the Architect, Consultants, Contractor, Subcontractors, and Owner shall purchase and maintain insurance as set forth in Exhibit I.

### § 7.3 Submittals

§ 7.3.1 The Owner shall review and approve or take other appropriate action on Submittals. Review of Submittals is not conducted for the purpose of determining the accuracy and completeness of other details, such as dimensions and quantities; or for substantiating instructions for installation or performance of equipment or systems; or for determining that the Submittals are in conformance with the Design-Build Documents, all of which remain the responsibility of the Design-Builder as required by the Design-Build Documents. The Owner's action will be taken in accordance with the submittal schedule approved by the Owner or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Owner's judgment to permit adequate review. The Owner's review of Submittals shall not relieve the Design-Builder of the obligations under Sections 3.5 and 5.2.3. The Owner's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Owner, of any construction means, methods, techniques, sequences or procedures. The Owner's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 7.3.2 Upon review of the Submittals required by the Design-Build Documents, the Owner shall notify the Design-Builder of any non-conformance with the Design-Build Documents the Owner discovers. Notwithstanding anything else to the contrary in Section 7.3 or the Design-Build Documents, the Owner's review and/or approval of the Design-Builder's documents or submittals shall not impose any obligation on the Owner, nor relieve the Design-Builder of responsibility to ensure that such documents comply fully with the requirements of the Design-Build Documents, including the Project Criteria unless the Design-Builder has notified the Owner in writing of the deviation and Owner approves in writing the specific deviation.

§ 7.4 Visits to the site by the Owner shall not be construed to create an obligation on the part of the Owner to make on-site inspections to check the quality or quantity of the Work. The Owner shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, because these are solely the Design-Builder's rights and responsibilities under the Design-Build Documents.

§ 7.5 **Design-Builder's Performance.** The Owner shall not be responsible for the Design-Builder's failure to perform the Work in accordance with the requirements of the Design-Build Documents. The Owner shall not have control over or charge of, and will not be responsible for acts or omissions of the Design-Builder, Architect, Consultants, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work for the Design-Builder.

§ 7.6 **Nonconforming Work.** The Owner has the authority to reject Work that does not conform to the Design-Build Documents. The Owner shall have authority to require inspection or testing of the Work in accordance with Section 15.5.2, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Owner nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty

or responsibility of the Owner to the Design-Builder, the Architect, Consultants, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

**§ 7.7 Substantial and Final Completion.** The Owner shall determine the dates of Substantial Completion and Final Completion in accordance with Sections 9.8 and 9.10.

**§ 7.8 Owner's Right to Stop Work.** If the Design-Builder fails to correct Work which is not in accordance with the requirements of the Design-Build Documents as required by Section 11.2 or persistently fails to carry out Work in accordance with the Design-Build Documents, the Owner may issue a written order to the Design-Builder to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Design-Builder or any other person or entity, except to the extent required by Section 5.13.1.3.

**§ 7.9 Owner's Right to Carry Out the Work.** If the Design-Builder defaults or neglects to carry out the Work in accordance with the Design-Build Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case, an appropriate Change Order shall be issued deducting from payments then or thereafter due the Design-Builder the reasonable cost of correcting such deficiencies. If payments then or thereafter due the Design-Builder are not sufficient to cover such amounts, the Design-Builder shall pay the difference to the Owner.

## **ARTICLE 8 TIME**

### **§ 8.1 Progress and Completion**

**§ 8.1.1** Time limits with regard to Completion stated in the Design-Build Documents are of the essence of the Contract. By executing the Design-Build Amendment the Design-Builder confirms that the Contract Time is a reasonable period for performing the Work.

**§ 8.1.2** The Design-Builder shall proceed expeditiously with adequate forces and shall achieve Substantial Completion and Final Completion within the Contract Time. The Contract Time and associated milestones are as set forth in the Preliminary Project Schedule (Exhibit D).

**§ 8.1.3** Pursuant to Government Code §53069.85, should the Design-Builder not achieve Substantial Completion of the Work within the Contract Time, as adjusted, the Design-Builder shall forfeit and pay to the Owner the amount of **One Thousand Two Hundred Dollars (\$1,200.00)** in liquidated damages for every day beyond the Contract Time, as adjusted, until the Design-Builder achieves Substantial Completion. Any such Liquidated Damages are automatically and without notice of any kind forfeited by Design-Builder upon the accrual of each day of delay. The Owner may at any time deduct Liquidated Damages from any payments due or to become due to the Design-Builder. Neither the Owner's failure or delay in deducting liquidated damages from payments otherwise due the Design-Builder, nor the Owner's failure or delay in notifying Design-Builder of the forfeiture of liquidated damages, shall be deemed a waiver of the Owner's right to liquidated damages. The Design-Builder and its Surety shall be liable for and pay to the Owner the entire amount of liquidated damages including any portion that exceeds the amount of the Contract Sum then held, retained or controlled by the Owner. The Design-Builder and Owner acknowledge and agree that the liquidated damages and the provisions of this Section 8.1.3 are reasonable and necessary under the circumstances existing at the time this Agreement is made because of the difficulty of fixing the Owner's actual damages in the event of delayed completion of the Work. The Design-Builder and Owner agree that the liquidated damages do not constitute a penalty and are the Owner's sole damages remedy for the Design-Builder's unexcused failure to achieve the Substantial Completion date.

### **§ 8.2 Delays and Extensions of Time**

**§ 8.2.1** If the Design-Builder is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or of a consultant or separate contractor employed by the Owner; or by changes ordered in the Work by the Owner; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Design-Builder's control; or by other causes that the Owner determines may justify delay, then the Contract Time shall be extended by Change Order in accordance with Article 6 and this Section 8.2.

**§ 8.2.1.1 Excusable Delays.** If Completion of the Work is delayed by Excusable Delays, the Contract Time shall be subject to adjustment for such reasonable period of time as determined in accordance with Article 6. Excusable Delays shall not result in any increase in the Contract Sum. Excusable Delays refer to unforeseeable and

unavoidable casualties or other unforeseen causes beyond the control, and without fault or neglect, of the Design-Builder, any Subcontractor, material supplier or other person directly or indirectly engaged by the Design-Builder in performance of any portion of the Work. Excusable Delays include unanticipated and unavoidable labor disputes, unusual and unanticipated delays in transportation of equipment, materials or construction equipment reasonably necessary for completion and proper execution of the Work, unanticipated unusually severe weather conditions, and unanticipated delays caused by utility companies or DSA or other authorities having jurisdiction over the Work. Neither the financial resources of the Design-Builder or any person or entity directly or indirectly engaged by the Design-Builder in performance of any portion of the Work shall be deemed conditions beyond the control of the Design-Builder. If an event of Excusable Delay occurs, the Contract Time may be adjusted only if the Design-Builder establishes: (i) full compliance with all applicable provisions of the Contract Documents relative to the method, manner and time for Design-Builder's notice and request for adjustment of the Contract Time; (ii) that the event(s) forming the basis for Design-Builder's request to adjust the Contract Time are outside the reasonable control and without any fault or neglect of the Design-Builder or any person or entity directly or indirectly engaged by Design-Builder in performance of any portion of the Work; and (iii) that the event(s) forming the basis for Design-Builder's request to adjust the Contract Time directly and adversely impacted the critical path of the Work as indicated in the then current construction schedule or the schedule relative to the date(s) of the claimed event(s) of Excusable Delay.

**§ 8.2.1.2 Compensable Delays.** If Completion of the Work is delayed and such delay is caused by the acts or omissions of the Owner or separate contractor employed by the Owner, changes ordered in the Work by the Owner, errors or omissions in the Owner Criteria that Design-Builder should not have discovered in the exercise of the Standard of Care, or as otherwise provided in the Design Build Documents (collectively, "Compensable Delays"), upon Design-Builder's request and notice, in strict conformity with Articles 6 and 8.2, the Contract Time may be adjusted by Change Order for such reasonable period of time as justified by the delay in accordance with the Contract. In accordance with Public Contract Code §7102, if the Design-Builder's progress is delayed by any of the events described in the preceding sentence, Design-Builder shall not be precluded from the recovery of damages directly and proximately resulting therefrom, provided that the Owner is liable for the delay, the delay is unreasonable under the circumstances involved and the delay was not within the reasonable contemplation of the Owner and the Design-Builder at the time of execution of the Contract and the Design-Builder timely submits and supports its claim for compensable delay in strict conformity with the terms of the Contract. In such event, Design-Builder's damages, if any, shall be limited to direct, actual and unavoidable additional costs of design professional fees and costs incurred during construction administration directly resulting from such delay, and labor, materials or construction equipment directly resulting from such delay, additional general conditions costs directly resulting from such delay, and shall exclude special, indirect or consequential damages. In no event shall Design-Builder seek costs or damages for delays, interruptions, hindrances or disruptions to the Work for on-site or off-site costs or damages based upon formulas, e.g. Eichleay or other formula.

**§ 8.2.1.3 Unexcusable Delays.** Unexcusable Delays refer to any delay to the progress of the Work caused by events or factors other than those specifically identified in Sections 8.2.1.1 and 8.2.1.2. Neither the Contract Sum nor the Contract Time shall be adjusted on account of Unexcusable Delays.

**§ 8.2.2** Claims relating to time shall be made in accordance with applicable provisions of Article 14.

**§ 8.3 Adjustment of Contract Time.**

**§ 8.3.1** The Contract Time shall be subject to adjustment only in strict conformity with applicable provisions of the Contract Documents. Failure of Design-Builder to request adjustment(s) of the Contract Time in strict conformity with applicable provisions of the Contract Documents shall be deemed Design-Builder's waiver of the same.

**§ 8.3.2 Limitations Upon Adjustment of Contract Time on Account of Delays.** Any adjustment of the Contract Time on account of an Excusable Delay or a Compensable Delay shall be limited as set forth herein. No adjustment of the Contract Time shall be made on account of any Excusable Delays or Compensable Delays unless such delay(s) actually and directly impact Work or Work activities on the critical path of the then current and updated Approved Construction Schedule as of the date on which such delay first occurs and Contractor gives written notice to the Owner of such event or cause giving rise to the delay and provides substantiation and documentation in support of the request as required by this Article and Article 9.6. The Owner shall not be deemed in breach of, or otherwise in default of any obligation hereunder, if the Owner shall deny a request by the Design-Builder for an adjustment of the Contract Time for any delay which does not actually and directly impact Work on the then current and updated Approved Construction Schedule. In submitting a request for an adjustment of Contract Time, and as a condition

precedent to the Owner's review of such request, Design-Builder shall insert into the then current and updated Approved Construction Schedule a "fragnet" analysis representing the event which Design-Builder claims to result in delay to the critical path as depicted in such updated Approved Construction Schedule. If an Excusable Delay and a Compensable Delay occur concurrently, the maximum extension of the Contract Time shall be the number of days from the commencement of the first delay to the cessation of the delay which ends last. If an Unexcusable Delay occurs concurrently with either an Excusable Delay or a Compensable Delay, the maximum extension of the Contract Time shall be the number of days, if any, which the Excusable Delay or the Compensable Delay exceeds the period of time of the Unexcusable Delay.

## **ARTICLE 9 PAYMENT APPLICATIONS AND PROJECT COMPLETION**

### **§ 9.1 Contract Sum**

The Contract Sum is stated in the Design-Build Amendment.

### **§ 9.2 Schedule of Values**

Where the Contract Sum is based on a stipulated sum or Guaranteed Maximum Price, the Design-Builder, prior to the first Application for Payment after execution of the Design-Build Amendment shall submit to the Owner a schedule of values allocating the entire Contract Sum to the various portions of the Work and prepared in such form and supported by such data to substantiate its accuracy as the Owner may require. This schedule, unless objected to by the Owner, shall be used as a basis for reviewing the Design-Builder's Applications for Payment.

### **§ 9.3 Applications for Payment**

**§ 9.3.1** At least ten days before the date established for each progress payment, the Design-Builder shall submit to the Owner an itemized Application for Payment for completed portions of the Work. The application shall be notarized, if required, and supported by data substantiating the Design-Builder's right to payment as the Owner may require, such as copies of requisitions from the Architect, Consultants, Subcontractors, and material suppliers, and shall reflect Five Percent (5%) retainage.

**§ 9.3.1.1** Applications for payment may include requests for payment on account of changes in the Work authorized by unilateral Change Orders or Force Account Work for the portion of such costs that are not disputed by the Owner.

**§ 9.3.1.2** Applications for Payment shall not include requests for payment for portions of the Work for which the Design-Builder does not intend to pay the Architect, Consultant, Subcontractor, material supplier, or other persons or entities providing services or work for the Design-Builder, unless such Work has been performed by others whom the Design-Builder intends to pay, or are subject to backcharge or offset by the Design-Builder under the applicable contract agreement.

**§ 9.3.2** Unless otherwise provided in the Design-Build Documents, payments shall be made for services provided as well as materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. Payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Design-Builder with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

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

### **§ 9.4 Certificates for Payment**

The Owner shall, within seven days after receipt of the Design-Builder's Application for Payment, issue to the Design-Builder a Certificate for Payment indicating the amount the Owner determines is properly due, and notify the Design-Builder in writing of the Owner's reasons for withholding certification in whole or in part as provided in Section 9.5.1.

## **§ 9.5 Decisions to Withhold Certification**

**§ 9.5.1** The Owner may withhold a Certificate for Payment in whole or in part to the extent reasonably necessary to protect the Owner due to the Owner's determination that the Work has not progressed to the point indicated in the Design-Builder's Application for Payment, or the quality of the Work is not in accordance with the Design-Build Documents. If the Owner is unable to certify payment in the amount of the Application, the Owner will notify the Design-Builder as provided in Section 9.4. If the Design-Builder and Owner cannot agree on a revised amount, the Owner will promptly issue a Certificate for Payment for the amount that the Owner deems to be due and owing. The Owner may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued to such extent as may be necessary to protect the Owner from loss for which the Design-Builder is responsible because of

- .1 defective Work, including design and construction, not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Design-Builder;
- .3 failure of the Design-Builder to make payments properly to the Architect, Consultants, Subcontractors or others, for services, labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or a separate contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time due to Unexcusable Delays, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 repeated failure to carry out the Work in accordance with the Design-Build Documents.

Any withholding stated above shall not exceed 150% of the amount in dispute or the amount as may be necessary to protect the Owner from loss or reasonably anticipated loss.

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

**§ 9.5.3** If the Owner withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Design-Builder and to the Architect or any Consultants, Subcontractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder to whom the Design-Builder failed to make payment for Work properly performed or material or equipment suitably delivered. In no event shall any joint payment be construed to create any (1) contract between the Owner and Architect, Consultant, Contractor, or supplier of any tier, (2) obligations from the Owner to such Contractor, Architect, Consultant, Subcontractor, or supplier, or (3) rights in such person or entities against the Owner.

## **§ 9.6 Progress Payments**

**§ 9.6.1** After the Owner has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Design-Build Documents. All progress payments shall be made in accordance with Public Contract Code section 20104.50.

**§ 9.6.2** The Design-Builder shall pay each Architect, Consultant, Subcontractor, and other person or entity providing services or work for the Design-Builder no later than the time period required by applicable law, but in no event more than seven days after receipt of payment from the Owner the amount to which the Architect, Consultant, Subcontractor, and other person or entity providing services or work for the Design-Builder is entitled, reflecting percentages actually retained from payments to the Design-Builder on account of the portion of the Work performed by the Architect, Consultant, Subcontractor, or other person or entity. The Design-Builder shall, by appropriate agreement with each Architect, Consultant, Subcontractor, and other person or entity providing services or work for the Design-Builder, require each Architect, Consultant, Subcontractor, and other person or entity providing services or work for the Design-Builder to make payments to subconsultants and subcontractors in a similar manner.

**§ 9.6.3** The Owner will, on request and if practicable, furnish to the Architect, a Consultant, Subcontractor, or other person or entity providing services or work for the Design-Builder, information regarding percentages of completion or amounts applied for by the Design-Builder and action taken thereon by the Owner on account of portions of the Work done by such Architect, Consultant, Subcontractor or other person or entity providing services or work for the Design-Builder.



§ 9.6.4 The Owner has the right to request written evidence from the Design-Builder that the Design-Builder has properly paid the Architect, Consultants, Subcontractors, or other person or entity providing services or work for the Design-Builder, amounts paid by the Owner to the Design-Builder for the Work. If the Design-Builder fails to furnish such evidence within seven days, the Owner shall have the right to contact the Architect, Consultants, and Subcontractors to ascertain whether they have been properly paid. The Owner shall have no obligation to pay or to see to the payment of money to a Consultant or Subcontractor, except as may otherwise be required by law.

§ 9.6.5 Design-Builder payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 9.6.6 Neither a Certificate for Payment, a progress payment, partial or entire use or occupancy of the Project, nor any other action other than specific, executed Modification by the Owner shall constitute acceptance of Work not in accordance with the Design-Build Documents.

§ 9.6.7 Not Used.

### § 9.7 Failure of Payment

§ 9.7.1. Not Used.

§ 9.7.2 If the Owner is entitled to reimbursement or payment from the Design-Builder under or pursuant to the Design-Build Documents, such payment shall be made promptly upon demand by the Owner. Notwithstanding anything contained in the Design-Build Documents to the contrary, if the Design-Builder fails to promptly make any payment due the Owner, or the Owner incurs any costs and expenses to cure any default of the Design-Builder or to correct defective Work, the Owner shall have an absolute right to offset such amount against the Contract Sum and may, in the Owner's sole discretion, elect either to: (1) deduct an amount equal to that which the Owner is entitled from any payment then or thereafter due the Design-Builder from the Owner, or (2) issue a written notice to the Design-Builder reducing the Contract Sum by an amount equal to that which the Owner is entitled.

### § 9.8 Substantial Completion

§ 9.8.1 The date of Substantial Completion is the date certified by the Owner in accordance with this Section 9.8 when the Work is sufficiently complete in accordance with the Design-Build Documents so the Owner can take Beneficial Occupancy of the Project. Substantial Completion shall be determined by the Owner, its architect and consultants upon request by the Contractor in accordance with the Contract Documents. The good faith and reasonable determination of Substantial Completion by the Owner and its consultants shall be controlling and final.

§ 9.8.1.1 **Beneficial Occupancy** Notwithstanding any common law principal to the contrary or otherwise, occupancy by the Owner shall be "beneficial" when occupancy for the intended purpose is fully usable, safe and convenient, considering all visual, sound, odor and aesthetic factors; the Project is weather-tight and fully functional; all portions of the Project, including finishes, painting, hardware, services, systems, and utilities are complete and fully operational; commissioning of all systems has been completed; and any remaining punchlist work may be conveniently and effectively performed at times other than during business hours of the Owner. Notwithstanding the foregoing, the Design-Builder shall not be required to exceed the requirements of the Contract Documents to achieve Beneficial Occupancy.

§ 9.8.2 When the Design-Builder considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Design-Builder shall prepare and submit to the Owner a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Design-Builder to complete all Work in accordance with the Design-Build Documents.

§ 9.8.3 Upon receipt of the Design-Builder's list, the Owner shall make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Owner's inspection discloses any item, whether or not included on the Design-Builder's list, which is not sufficiently complete in accordance with the Design-Build Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Design-Builder shall complete or correct such item upon notification by the Owner. In such case, the Design-Builder shall then submit a request for another inspection by the Owner to determine Completion.

§ 9.8.4 If the Design-Builder requests determination of Substantial Completion and it is determined by the Owner that the Work does not then justify certification of Substantial Completion and re-inspection is required at a

subsequent time to make such determination, the Design-Builder shall be responsible for all costs of such reinspection, including without limitation, the fees of the Owner's consultants and the City inspector. The District may deduct such costs from the Contract Sum then due or thereafter due to the Design-Builder.

**§ 9.8.5** When the Work or designated portion thereof is substantially complete, the Design-Builder will prepare for the Owner's signature a Certificate of Substantial Completion that shall, upon the Owner's signature, establish the date of Substantial Completion; establish responsibilities of the Owner and Design-Builder for security, maintenance, heat, utilities, damage to the Work and insurance; and fix the time within which the Design-Builder shall finish all items on the list accompanying the Certificate. Warranties required by the Design-Build Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion or the Design-Build Documents.

**§ 9.8.6** The Certificate of Substantial Completion shall be submitted by the Design-Builder to the Owner for written acceptance of responsibilities assigned to it in the Certificate. Upon the Owner's acceptance, and consent of surety, if any, the Owner shall record a Notice of Completion (NOC) and make payment of retainage applying to the Work or designated portion thereof. Payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Design-Build Documents, in accordance with the provisions of Public Contract Code section 7107.

**§ 9.8.7** The Design-Builder shall not be deemed to have achieved Substantial Completion under the Design-Build Documents unless (1) Design-Builder has completed the Work in strict accordance with the Design-Build Documents, (2) Design-Builder has completed the Work to such an extent that any furniture, fixtures, and equipment to be installed by Owner is able to be properly and completely installed, and (3) Design-Builder has obtained (a) approvals from all applicable governmental authorities, and (b) a final Certificate of Occupancy (COO) such that Owner can fully use the work of improvement for its intended purpose, including the ability to apply for applicable licensing of the facility.

#### **§ 9.9 Partial Occupancy or Use**

**§ 9.9.1** The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Design-Builder and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Design-Builder have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Design-Build Documents. When the Design-Builder considers a portion substantially complete, the Design-Builder shall prepare and submit a list to the Owner as provided under Section 9.8.2. Consent of the Design-Builder to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Design-Builder.

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

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

#### **§ 9.10 Final Completion and Final Payment**

**§ 9.10.1** Upon receipt of the Design-Builder's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Owner will promptly make such inspection. When the Owner finds the Work acceptable under the Design-Build Documents and the Contract fully performed, the Owner will, subject to Section 9.10.2, promptly issue a final Certificate for Payment.

**§ 9.10.2** Neither final payment nor any remaining retained percentage shall become due until the Design-Builder submits to the Owner (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work, for which the Owner or the Owner's property might be responsible or encumbered, (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Design-Build Documents to remain in force after final payment is currently in effect, (3) a written statement that the Design-Builder knows of no substantial reason that the insurance will not be renewable to cover the period required by the Design-Build Documents, (4) consent of surety, if any, to final payment, (5) as-

constructed record copy of the Construction Documents marked to indicate field changes and selections made during construction, (6) manufacturer's warranties, product data, and maintenance and operations manuals, and (7) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, or releases and waivers of liens, claims, security interests, or encumbrances, arising out of the Contract, to the extent and in such form as may be designated by the Owner. If an Architect, a Consultant, or a Subcontractor, or other person or entity providing services or work for the Design-Builder, refuses to furnish a release or waiver required by the Owner, the Design-Builder may furnish a bond satisfactory to the Owner to indemnify the Owner against such liens, claims, security interests, or encumbrances. If such liens, claims, security interests, or encumbrances remains unsatisfied after payments are made, the Design-Builder shall refund to the Owner all money that the Owner may be compelled to pay in discharging such liens, claims, security interests, or encumbrances, including all costs and reasonable attorneys' fees.

§ 9.10.3 Not Used.

§ 9.10.4 Not Used.

§ 9.10.5 Not Used.

§ 9.10.6 The Design-Builder hereby assigns to the Owner as of the time of Final Completion of the Work any and all manufacturer's warranties relating to materials and labor used in the Work and further agrees to perform the Work in such manner so as to preserve and not jeopardize or diminish any and all such manufacturer's warranties.

## **ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY**

### **§ 10.1 Safety Precautions and Programs**

The Design-Builder shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract and shall submit to Owner a written Project Safety Program.

### **§ 10.2 Safety of Persons and Property**

§ 10.2.1 The Design-Builder shall be responsible for precautions for the safety of, and reasonable protection to prevent damage, injury or loss to

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Design-Builder or the Architect, Consultants, or Subcontractors, or other person or entity providing services or work for the Design-Builder; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, or structures and utilities not designated for removal, relocation or replacement in the course of construction.

§ 10.2.2 The Design-Builder shall comply with, and give notices required by, applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, bearing on safety of persons or property, or their protection from damage, injury or loss.

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

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

§ 10.2.5 The Design-Builder shall promptly remedy damage and loss to property referred to in Sections 10.2.1.2 and 10.2.1.3, caused in whole or in part by the Design-Builder, the Architect, a Consultant, a Subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Design-Builder is responsible under Sections 10.2.1.2 and 10.2.1.3; except damage or loss attributable to acts or omissions of the Owner, or anyone directly or indirectly employed by the Owner, or by anyone for whose acts the

Owner may be liable, and not attributable to the fault or negligence of the Design-Builder. The foregoing obligations of the Design-Builder are in addition to the Design-Builder's obligations under Section 3.1.4.

§ 10.2.6 The Design-Builder shall designate a responsible member of the Design-Builder's organization, at the site, whose duty shall be the prevention of accidents. This person shall be the Design-Builder's superintendent unless otherwise designated by the Design-Builder in writing to the Owner.

§ 10.2.7 The Design-Builder shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

§ 10.2.8 **Injury or Damage to Person or Property.** If the Owner or Design-Builder suffers injury or damage to person or property because of an act or omission of the other, or of others for whose acts such party is legally responsible, written notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

### § 10.3 Hazardous Materials

§ 10.3.1 The Design-Builder is responsible for compliance with any requirements included in the Design-Build Documents regarding hazardous materials. If the Design-Builder encounters a hazardous material or substance, the removal or remediation of which is not the responsibility of the Design-Builder under the Design-Build Documents, including but not limited to asbestos or polychlorinated biphenyl (PCB), the Design-Builder shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner in writing.

§ 10.3.2 Upon receipt of the Design-Builder's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Design-Builder and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Design-Build Documents, the Owner shall furnish in writing to the Design-Builder the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Design-Builder will promptly reply to the Owner in writing stating whether or not the Design-Builder has reasonable objection to the persons or entities proposed by the Owner. If the Design-Builder has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Design-Builder has no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Design-Builder. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Design-Builder's reasonable additional costs of shut-down, delay and start-up.

§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify, defend and hold harmless the Design-Builder, the Architect, Consultants, and Subcontractors, and employees of any of them, from and against claims, damages, losses and expenses arising out of or resulting from performance of the Work in the affected area, if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to, or destruction of, tangible property (other than the Work itself), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for materials or substances the Design-Builder brings to the site unless such materials or substances are expressly required by the Owner's Criteria; provided, however, the Owner shall have no responsibility for materials or substances that were required if such materials or substances were mishandled by the Design-Builder, Subcontractors, or any person or entity for whom either is responsible. The Owner shall be responsible for materials or substances expressly required by the Owner's Criteria, except to the extent of the Design-Builder's fault or negligence in the use and handling of such materials or substances.

§ 10.3.5 The Design-Builder shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Design-Builder brings to the site and negligently handles, or (2) where the Design-Builder fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

**§ 10.3.6** If, without negligence or failure to comply with the requirements of the Design-Build Documents, on the part of the Design-Builder, a Consultant, Architect, Contractor, Subcontractor or any person or entity for whom they are responsible, the Design-Builder is held liable by a government agency for the cost of remediation of a hazardous material or substance, or for fines, penalties or other costs related thereto (“Hazardous Material Costs”), by reason of performing Work as required by the Design-Build Documents and in no way due to the negligence or willful misconduct by Design-Builder, a Consultant, Architect, Contractor, Subcontractor or any person or entity for whom they are responsible, the Owner shall indemnify the Design-Builder for all Hazardous Material Costs, except to the extent that such Hazardous Material Costs is due to the negligence or willful misconduct of the Design-Builder, a Consultant, Architect, Contractor, Subcontractor or any person or entity for whom they are responsible.

**§ 10.4 Emergencies**

In an emergency affecting safety of persons or property, the Design-Builder shall act, at the Design-Builder’s discretion, to prevent threatened damage, injury or loss.

**ARTICLE 11 UNCOVERING AND CORRECTION OF WORK**

**§ 11.1 Uncovering of Work**

The Owner may request to examine a portion of the Construction Services that the Design-Builder has covered to determine if the Construction Services have been performed in accordance with the Design-Build Documents. If such Construction Services are in accordance with the Design-Build Documents, the Owner and Design-Builder shall execute a Change Order to adjust the Contract Time and Contract Sum, as appropriate. If such Construction Services are not in accordance with the Design-Build Documents, the costs of uncovering and correcting the Construction Services shall be at the Design-Builder’s expense and the Design-Builder shall not be entitled to a change in the Contract Time unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs and the Contract Time will be adjusted as appropriate.

**§ 11.2 Correction of Work**

**§ 11.2.1 Before or After Substantial Completion.** The Design-Builder shall promptly correct Construction Services rejected by the Owner or failing to conform to the requirements of the Design-Build Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for any design consultant employed by the Owner whose expenses and compensation were made necessary thereby, shall be at the Design-Builder’s expense.

**§ 11.2.2 After Substantial Completion**

**§ 11.2.2.1** In addition to the Design-Builder’s obligations under Section 3.1.12, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Design-Build Documents, any of the Construction Services are found not to be in accordance with the requirements of the Design-Build Documents, the Design-Builder shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Design-Builder a written acceptance of such condition. The Owner shall give such notice in writing promptly after discovery of the condition. During the one-year period for correction of the Construction Services, if the Owner fails to notify the Design-Builder and give the Design-Builder an opportunity to make the correction, the Owner waives the rights to require correction by the Design-Builder and to make a claim for breach of warranty. If the Design-Builder fails to correct nonconforming Construction Services within a reasonable time during that period after receipt of notice from the Owner, the Owner may correct it in accordance with Section 7.9.

**§ 11.2.2.2** Not Used.

**§ 11.2.2.3** The one-year period for correction of Construction Services shall not be extended by corrective Work performed by the Design-Builder pursuant to this Section 11.2.

**§ 11.2.3** The Design-Builder shall remove from the site portions of the Work that are not in accordance with the requirements of the Design-Build Documents and are neither corrected by the Design-Builder nor accepted by the Owner.

§ 11.2.4 The Design-Builder shall bear the cost of correcting destroyed or damaged construction of the Owner or separate contractors, whether completed or partially completed, caused by the Design-Builder's correction or removal of Construction Services that is not in accordance with the requirements of the Design-Build Documents.

§ 11.2.5 Nothing contained in this Section 11.2 shall be construed to establish a period of limitation with respect to other obligations the Design-Builder has under the Design-Build Documents. Establishment of the one-year period for correction of Construction Services as described in Section 11.2.2 relates only to the specific obligation of the Design-Builder to correct the Construction Services, and has no relationship to the time within which the obligation to comply with the Design-Build Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Design-Builder's liability with respect to the Design-Builder's obligations other than specifically to correct the Construction Services.

### § 11.3 Acceptance of Nonconforming Work

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

## ARTICLE 12 COPYRIGHTS AND LICENSES

§ 12.1 Drawings, specifications, and other documents furnished by the Design-Builder, including those in electronic form, are Instruments of Service. The Design-Builder, and the Architect, Consultants, Subcontractors, and any other person or entity providing services or work for any of them, shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements, or for similar purposes in connection with the Project, is not to be construed as publication in derogation of the reserved rights of the Design-Builder and the Architect, Consultants, and Subcontractors, and any other person or entity providing services or work for any of them. The foregoing notwithstanding, the Design-Builder grants to Owner, without further compensation from Owner, a perpetual license to use the Design-Build Documents for completion of, or alterations, additions, renovations or other modifications to, the Project. Upon the termination of this Agreement, the Owner may use any portion of the Design-Builder's work product, including Instruments of Service (whether they are completed or in progress), for any purpose, in the sole and exclusive discretion of the Owner.

§ 12.2 The Design-Builder and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project.

§ 12.3 Upon execution of the Agreement, the Design-Builder grants to the Owner a limited, irrevocable and non-exclusive license to use the Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under the Design-Build Documents. The license granted under this section permits the Owner to authorize its consultants and separate contractors to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Design-Builder rightfully terminates this Agreement for cause as provided in Section 13.1.4 or 13.2.1 the license granted in this Section 12.3 shall terminate.

§ 12.3.1 The Design-Builder shall obtain non-exclusive licenses from the Architect, Consultants, and Subcontractors, which will allow the Design-Builder to satisfy its obligations to the Owner under this Article 12. The Design-Builder's licenses from the Architect and its Consultants, Contractor and Subcontractors shall also allow the Owner, in the event this Agreement is terminated for any reason other than the default of the Owner or in the event the Design-Builder's Architect, Consultants, Contractor or Subcontractors terminate their agreements with the Design-Builder for cause, to obtain a limited, irrevocable and non-exclusive license solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner (1) agrees to pay to the Architect, Consultant or Subcontractor all amounts due, and (2) provide the Architect, Consultant or Subcontractor with the Owner's written agreement to indemnify and hold harmless the Architect, Consultant or Subcontractor from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's alteration or use of the Instruments of Service.

**§ 12.3.2** In the event the Owner alters the Instruments of Service without the author's written authorization or uses the Instruments of Service without retaining the authors of the Instruments of Service, the Owner releases the Design-Builder, Architect, Consultants, Contractor and Subcontractors and any other person or entity providing services or work for any of them, from all claims and causes of action arising from or related to such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Design-Builder, Architect, Consultants, Contractor Subcontractors and any other person or entity providing services or work for any of them, from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's alteration or use of the Instruments of Service under this Section 12.3.2. The terms of this Section 12.3.2 shall not apply if the Owner rightfully terminates this Agreement for cause under Sections 13.1.4 or 13.2.2.

## **ARTICLE 13 TERMINATION OR SUSPENSION**

### **§ 13.1 Termination or Suspension Prior to Execution of the Design-Build Amendment**

**§ 13.1.1** Not Used.

**§ 13.1.2** If the Owner suspends the Project for more than 90 consecutive days, the Design-Builder shall be compensated for the Work performed prior to notice of such suspension. When the Project is resumed, the Design-Builder shall be compensated for expenses incurred in the interruption and resumption of the Design-Builder's Work. The Design-Builder's compensation for, and time to complete, the remaining Work shall be equitably adjusted. Design-Builder shall not be entitled to payment of profit on unperformed Work or other Disallowed Costs.

**§ 13.1.3** Not Used.

**§ 13.1.4** Either party may terminate this Agreement upon not less than 30 days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination. The parties agree that the sole basis for Design-Builder's right to terminate this Agreement for cause is Owner's failure to make payment of undisputed amounts due Design-Builder under this Agreement.

**§ 13.1.5** The Owner may terminate this Agreement upon not less than seven days' written notice to the Design-Builder for the Owner's convenience and without cause.

**§ 13.1.6** In the event of termination not the fault of the Design-Builder, the Design-Builder shall be compensated for Work satisfactorily performed prior to termination and any other expenses directly attributable to termination for which the Design-Builder is not otherwise compensated. In no event shall the Design-Builder's compensation under this Section 13.1.6 be greater than the compensation set forth in Section 2.1. Design-Builder shall not be entitled to payment of profit on unperformed Work or other Disallowed Costs.

### **§ 13.2 Termination or Suspension Following Execution of the Design-Build Amendment**

#### **§ 13.2.1 Termination by the Design-Builder**

**§ 13.2.1.1** The Design-Builder may terminate the Contract if the Work is stopped for a period in excess of 90 consecutive days (unless EIR Mitigation triggers other time constraints) through no act or fault of the Design-Builder, the Architect, a Consultant, the Contractor, or a Subcontractor, or their agents or employees, or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped; or
- .2 An act of government, such as a declaration of national emergency that requires all Work to be stopped.

**§ 13.2.1.2** If one of the reasons described in Section 13.2.1.1 exists, the Design-Builder may, upon 30 days' written notice to the Owner, terminate the Contract and recover from the Owner payment for Work satisfactorily executed, including reasonable overhead and profit on Work satisfactorily performed and costs incurred by reason of such termination. Design-Builder shall not be entitled to payment of profit on unperformed Work or other Disallowed Costs.

**§ 13.2.1.3** The Design-Builder shall not stop Work nor terminate the Contract due to refusal of the Owner to issue payment for reasons identified in Section 9.5.1.

**§ 13.2.2 Termination by the Owner For Cause**

**§ 13.2.2.1** The Owner may terminate the Contract if the Design-Builder

- .1 Not Used.
- .2 repeatedly refuses or fails to supply an Architect, or enough properly skilled Consultants, Contractor, Subcontractors, or workers or proper materials;
- .3 fails to make payment to the Architect, Consultants, Contractor, or Subcontractors for services, materials or labor in accordance with their respective agreements with the Design-Builder;
- .4 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .5 is otherwise determined by the Owner to be in breach of a material provision of the Design-Build Documents.

**§ 13.2.2.2** When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Design-Builder and the Design-Builder's surety, if any, seven days' written notice to cure and Design-Builder or its surety failing to cure within such period (or if the cure cannot be reasonably accomplished in such seven day period, beginning the cure and thereafter diligently pursuing it to completion), may terminate employment of the Design-Builder and may, subject to any prior rights of the surety:

- .1 Exclude the Design-Builder from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Design-Builder;
- .2 Accept assignment of the Architect, Consultants, Contractor, and Subcontractor agreements pursuant to Section 3.9; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Design-Builder, the Owner shall furnish to the Design-Builder a detailed accounting of the costs incurred by the Owner in finishing the Work.

**§ 13.2.2.3** When the Owner terminates the Contract for one of the reasons stated in Section 13.2.2.1, the Design-Builder shall not be entitled to receive further payment until the Work is finished.

**§ 13.2.3 Suspension by the Owner for Convenience**

**§ 13.2.3.1** The Owner may, without cause, order the Design-Builder in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

**§ 13.2.3.2** The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 13.2.3.1. No adjustment shall be made to the extent

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Design-Builder is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract. Such equitable adjustment is subject to the limitations on costs and expenses recoverable under the Contract provisions.

**§ 13.2.4 Termination by the Owner for Convenience**

**§ 13.2.4.1** The Owner may, at any time, upon at least seven days' written notice to the Design-Builder terminate the Contract for the Owner's convenience and without cause. In such case, the Design-Builder shall be entitled to payment for: (i) Work actually performed and in place as of the effective date of such termination, with a reasonable allowance for profit and overhead on such Work, and (ii) reasonable termination expenses for reasonable protection of Work in place and suitable storage and protection of materials and equipment delivered to the site of the Work but not yet incorporated into the Work, provided that such payments exclusive of termination expenses shall not exceed the total GMP as reduced by payments previously made to the Design-Builder and as further reduced by the value of the Work as not yet completed. The Design-Builder shall not be entitled to profit and overhead on Work which was not performed as of the effective date of the termination or for any other damages, direct or indirect, including Disallowed Costs, which the Design-Builder or anyone claiming through the Design-Builder alleges resulted from the Owner's election to terminate under this Section 13.2.4.1. The Owner may, in its sole discretion, elect to have subcontracts assigned to it after exercising the right hereunder to terminate for the Owner's convenience.

**§ 13.2.4.2** Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Design-Builder shall



- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and,
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, enter into no further Project agreements or purchase orders.

§ 13.2.4.3 In case of such termination for the Owner's convenience, the Design-Builder shall be entitled to receive payment for Work properly executed, and reasonable, necessary costs incurred by reason of such termination, along with Design Builder's Fee on the Work completed. Regardless of whether termination is with or without cause, Owner shall not be liable to Design-Builder for consequential damages, incidental damages, special damages or lost profits for such termination, or Disallowed Costs.

§ 13.2.4.4 Upon a determination by a court of competent jurisdiction that termination for cause for the reasons set forth in subsections .2 through .5 of Section 13.2.2.1 was wrongful or otherwise improper, such termination shall be deemed a termination for convenience and the provisions of Article 13.2.4.3 shall apply.

#### **ARTICLE 14 CLAIMS AND DISPUTE RESOLUTION**

§ 14.1 **Claims** All Claims shall comply with the requirements of Government Code sections 900 *et seq.* and Public Contract Code Section 9204. Claims of three hundred seventy-five thousand dollars (\$375,000) or less shall additionally comply with the requirements of Public Contract Code Section 20104 *et seq.*

§ 14.1.1 **Public Contract Code § 9204.** Claims between the Owner and the Design-Builder shall be resolved in accordance with the procedures established in Public Contract Code § 9204 and this Article 14.

§ 14.1.2 **Claim.** The term "Claim" means a written demand by the Design-Builder sent by registered mail or certified mail with return receipt requested for:

- (1) An extension of the Contract Time, including relief from damages or penalties assessed by the Owner for delay;
- (2) Payment of money or damages arising from work done by, or on behalf of, the Design-Builder pursuant to the Contract and payment that is not otherwise expressly provided for in the Contract Documents or to which the Design-Builder is not otherwise entitled; or
- (3) Payment of an amount that is disputed by the Owner.

§ 14.1.3 **Submission of Claim.** A Claim arises upon the Owner's rejection of a request by the Design-Builder for a Change Order. The Design-Builder shall submit the Claim by registered mail or certified mail with return receipt requested to the Owner's Representative, with a copy to the Project Manager. The Design-Builder shall submit its Claim in writing, together with all Supporting Documentation as specified in Section 14.1.4 no later than the earlier of either: (1) thirty (30) days after the date the Claim arises; or (2) sixty (60) days after the date of Substantial Completion. It is the intent of the Owner to evaluate and resolve Claims with the Design-Builder as close to the events giving rise to such Claims as possible and to avoid stale or late Claims, including late notice and documenting of Claims, and to timely mitigate the issue, event, condition, circumstance and/or cause of the Claim and any adverse impacts or damages related thereto. Should the Design-Builder fail to submit a Claim by the deadline set forth in this Section, Design-Builder waives and releases such Claim, including all rights and remedies in connection therewith.

§ 14.1.4 **Contents of Claim.** A Claim must include all Supporting Documentation as set forth in Article 6 and a statement signed under penalty of perjury under the laws of the State of California by an authorized agent or officer of Design-Builder certifying that, to the best of his/her knowledge, information and belief, the Claim is substantiated and has merit. The Design-Builder recognizes and acknowledges that this requirement is not a mere formality but is intended to ensure that the Design-Builder only submits Claims that it believes are substantiated and have merit.

§ 14.1.5 **Subcontractor Claims.** Pursuant to Public Contract Code § 9204(d)(5), a Subcontractor may request in writing, either on its own behalf or on behalf of a lower tier Subcontractor, that the Design-Builder submit to the Owner a claim for work which was performed by the Subcontractor or by a lower tier Subcontractor on behalf of the Subcontractor. The Subcontractor requesting that the claim be submitted to the Owner shall furnish reasonable documentation to support the claim. Regardless of whether or not the Design-Builder decides to submit the Subcontractor's claim to the Owner, Design-Builder shall provide a copy of the Subcontractor's written request,

including all supporting documentation, to the Project Manager/Construction Manager within ten (10) days of Design-Builder's receipt of the request. In the event the Design-Builder agrees to submit a Subcontractor's claim to the Owner, the Design-Builder shall submit such claim as a request for a Change Order in accordance with Article 6, unless such claim was previously submitted to the Owner as a request for a Change Order. Within forty-five (45) days of receipt of the Subcontractor's written request, the Design-Builder shall notify the Subcontractor in writing as to whether the Design-Builder submitted the claim to the Owner and, if the Design-Builder did not submit the claim, the Design-Builder shall provide the Subcontractor with a written statement of the reasons for not having done so and shall concurrently provide a copy of such written statement to the Project Manager/Construction Manager. In the event the Design-Builder includes supporting documentation with such written statement, the Design-Builder shall concurrently provide a copy of such supporting documentation to the Project Manager/Construction Manager. If the Design-Builder submits a Claim on behalf of a Subcontractor, the Claim shall include a statement in writing and signed by an authorized agent or officer of the Design-Builder under penalty of perjury under the laws of the State of California that Design-Builder has evaluated the Claim and Supporting Documentation and certifies that, to the best of his/her knowledge, information and belief, the Claim is substantiated and has merit. The Design-Builder recognizes and acknowledges that this requirement is not a mere formality but is intended to ensure that the Design-Builder only submits Claims that it believes are substantiated and have merit.

**§ 14.1.6 Owner Review of Claim.** Upon receipt of a Claim, the Owner shall review the Claim and, within a period not to exceed forty-five (45) days, shall provide Design-Builder a written statement identifying what portion of the Claim is disputed and what portion is undisputed. Upon receipt of a Claim, the Owner and the Design-Builder may, by mutual written agreement, extend the forty-five (45) day time period. The Owner shall process and make payment of any undisputed portion of a Claim within sixty (60) days after the Owner issues its written statement. Failure by the Owner to provide a written statement in response to a Claim from the Design-Builder within the forty-five (45) day time period, or within an agreed upon extended time period, shall result in the Claim being deemed rejected in its entirety. A Claim that is rejected by reason of the Owner's failure to respond, or failure to timely respond, to the Claim shall not constitute an adverse finding regarding the merits of the Claim or the claimant's responsibility or qualifications.

**§ 14.1.7 Meet and Confer Meeting.** If the Design-Builder disputes the Owner's written response made pursuant to Section 14.1.6, or if the Owner fails to respond within the time frame prescribed in Section 14.1.6, the Design-Builder, within fifteen (15) days of the Owner's written response or, if the Owner fails to respond, within fifteen (15) days after the Owner's response was due, may demand, in a writing sent to the Owner's Representative or designee by registered mail or certified mail, return receipt requested, with a copy to the Project Manager, an informal conference to meet and confer for settlement of the issues in dispute. The Owner shall schedule a meet and confer conference within thirty (30) days of its receipt of the Design-Builder's written demand.

**§ 14.1.8 Mediation.** Within ten (10) business days following the conclusion of the meet and confer conference, if the Claim or any portion of the Claim remains in dispute, the Owner shall provide the Design-Builder a written statement identifying the portion of the Claim that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the Claim shall be processed and made within sixty (60) days after the Owner issues its written statement. Any disputed portion of the Claim, as identified by the Design-Builder in writing, shall be submitted to nonbinding mediation. The expenses and fees of the mediator and the administrative fees shall be divided among the parties equally. Each party shall pay its own legal fees, witness fees, and other expenses. The Owner and the Design-Builder shall mutually agree to a mediator within ten (10) business days after the disputed portion of the Claim has been identified in writing. The foregoing notwithstanding, pursuant to Public Contract Code § 9204(f), the parties may mutually agree in writing to waive mediation.

**§ 14.1.9 Design-Builder's Obligation to File a Government Code Claim.** Nothing in this Contract, including this Article 14, waives, modifies or tolls the Design-Builder's obligation to present a timely claim under Government Code § 910, et seq. Therefore, in addition to complying with the contractual Claims procedures, the Design-Builder is required to present claims to the Owner pursuant to Government Code § 910, et seq. If after the requirements of Sections 14.1.6, 14.1.7 and 14.1.8 are satisfied, and all or a portion of the Claim remains unresolved, and if the Government Code claim is rejected by the Owner, the Design-Builder may proceed under Sections 14.1.10 and 14.1.11.

**§ 14.1.10 Claims of \$375,000 or Less.** The provisions of Public Contract Code § 20104.4 shall apply. Pursuant to Public Contract Code § 20104.4(a), within sixty (60) days, but no earlier than thirty (30) days, following the filing of responsive pleadings, the court shall submit the matter to nonbinding mediation unless waived by mutual stipulation

of both parties. Pursuant to Public Contract Code § 9204(d)(2)(D), a mediation conducted pursuant to Section 14.1.8 shall excuse the obligation under Public Contract Code § 20104.4(a) to mediate after litigation has been commenced unless otherwise agreed to by the parties in writing.

**§ 14.1.11 Arbitration.** Except as provided in Section 14.1.10, any other claims, disputes, disagreements or other matters in controversy between the Owner and the Design-Builder arising out of, or related, in any manner, to the Design-Build Documents, or the interpretation, clarification or enforcement thereof, shall be resolved by arbitration conducted by a single Arbitrator in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") in effect as of the date that a Demand for Arbitration is filed, except as expressly modified herein. The locale for any arbitration commenced hereunder shall be the regional office of the AAA closest to the Project site or at a location as mutually agreed by the parties. The award rendered by the Arbitrator shall be final and binding upon the Owner and the Design-Builder, as well as any other parties joined in the proceedings. In connection with any arbitration proceeding commenced hereunder, the discovery rights and procedures provided for in California Code of Civil Procedure §1283.05 shall be applicable, and the same shall be deemed incorporated herein by this reference. A Demand for Arbitration shall be filed and served within a reasonable time after the occurrence of the claim, dispute or other disagreement giving rise to the Demand for Arbitration, but in no event shall a Demand for Arbitration be filed or served after the date when the institution of legal or equitable proceedings based upon such claim, dispute or other disagreement would be barred by the applicable statute of limitations. In the event more than one Demand for Arbitration is made by either the Owner or the Design-Builder, all such controversies shall be consolidated into a single arbitration proceeding, unless otherwise agreed to by the Owner and the Design-Builder. The Design-Builder's Surety, the Architect, Consultants, Contractor and/or Subcontractors or material suppliers to the Design-Builder and other third parties may be permitted to join in and be bound by an arbitration commenced hereunder if required by the terms of their respective agreements with the Design-Builder, except to the extent that such joinder would unduly delay or complicate the expeditious resolution of the claim, dispute or other disagreement between the Owner and the Design-Builder, in which case an appropriate severance order shall be issued by the Arbitrator. The expenses and fees of the Arbitrator shall be divided equally among the parties to the arbitration. Each party to any arbitration commenced hereunder shall be responsible for and shall bear its own attorneys' fees, witness fees and other cost and expense incurred in connection with such arbitration. The foregoing notwithstanding, the Arbitrator may award arbitration costs, including Arbitrator's fees but excluding attorneys' fees, to the prevailing party. The confirmation, enforcement, vacation or correction of an arbitration award rendered hereunder shall be the Superior Court of the State of California for the county in which the Site is situated. The substantive and procedural rules for such post-award proceedings shall be as set forth in California Code of Civil Procedure §1285 et seq.

**§ 14.1.12 Continuing Contract Performance.** Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 13, the Design-Builder shall proceed diligently with performance of the Work and Contract and the Owner shall continue to make undisputed payments in accordance with the Design-Build Documents.

#### **§ 14.2 Initial Decision**

**§ 14.2.1** An initial decision shall be required as a condition precedent to mediation of all Claims between the Owner and Design-Builder initiated prior to the date final payment is due, excluding those arising under Sections 10.3 and 10.4 of the Agreement, unless 30 days have passed after the Claim has been initiated with no decision having been rendered. Unless otherwise mutually agreed in writing, the Owner shall render the initial decision on Claims.

#### **§ 14.2.2 Procedure**

**§ 14.2.2.1 Claims Initiated by the Owner.** If the Owner initiates a Claim, the Design-Builder shall provide a written response to Owner within ten days after receipt of the notice required under Section 14.1.3. Thereafter, the Owner shall render an initial decision within ten days of receiving the Design-Builder's response: (1) withdrawing the Claim in whole or in part, (2) approving the Claim in whole or in part, or (3) suggesting a compromise.

**§ 14.2.2.2 Claims Initiated by the Design-Builder.** If the Design-Builder initiates a Claim, the Owner will take one or more of the following actions within ten days after receipt of the notice required under Section 14.1.3: (1) request additional supporting data, (2) render an initial decision rejecting the Claim in whole or in part, (3) render an initial decision approving the Claim, (4) suggest a compromise or (5) indicate that it is unable to render an initial decision because the Owner lacks sufficient information to evaluate the merits of the Claim.

§ 14.2.3 In evaluating Claims, the Owner may, but shall not be obligated to, consult with or seek information from persons with special knowledge or expertise who may assist the Owner in rendering a decision. The retention of such persons shall be at the Owner's expense.

§ 14.2.4 If the Owner requests the Design-Builder to provide a response to a Claim or to furnish additional supporting data, the Design-Builder shall respond, within ten days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the Owner when the response or supporting data will be furnished or (3) advise the Owner that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Owner will either reject or approve the Claim in whole or in part.

§ 14.2.5 The Owner's initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) identify any change in the Contract Sum or Contract Time or both. The initial decision shall be binding on the parties pending final resolution under the dispute resolution process. Any payment due on an undisputed portion of the Claim shall be processed and made in accordance with the terms of this Agreement.

§ 14.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 14.2.7.1.

§ 14.2.7 In the event of a Claim against the Design-Builder, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Design-Builder's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 14.2.7.1 Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision.

§ 14.3 **No Attorneys' Fees.** Except as expressly provided for in the Design-Build Documents, or authorized by law, neither the Owner nor the Design-Builder shall recover from the other any attorneys' fees or other costs associated with or arising out of any legal, administrative or other proceedings filed or instituted in connection with or arising out of the Design-Build Documents or the performance of either the Owner or the Design-Builder thereunder.

§ 14.4 **No Interest.** Notwithstanding any other provision of law, the Owner and Design-Builder shall not be liable for payment of interest on any disputed amounts pending final adjudication of such disputes.

#### § 14.5 **Claims for Consequential Damages**

The Design-Builder and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Design-Builder for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 13. Nothing contained in this Section 14.1.7 shall be deemed to preclude recovery by Owner of: (i) an award of liquidated damages, when applicable, in accordance with the requirements of the Design-Build Documents, or (ii) any damages arising out of claims made against the Owner by a third party, provided that such claim (a) pertains to the Project, and (b) arises out of, or results from death, bodily injury or property damage, or any other claim within the scope of the Design-Builder's defense or indemnity obligations herein.

### **ARTICLE 15 MISCELLANEOUS PROVISIONS**

#### § 15.1 **Governing Law**

The Contract shall be governed by the laws of the State of California.

#### § 15.2 **Successors and Assigns**

§ 15.2.1 The Owner and Design-Builder, respectively, bind themselves, their partners, successors, assigns and legal representatives to the covenants, agreements and obligations contained in the Design-Build Documents. Except as

provided in Section 15.2.2, Owner shall not assign the Contract without written consent of Design-Builder. Design-Builder shall not assign this Agreement without written consent of Owner.

§ 15.2.2 All notices required to be provided to the Owner shall be provided to the Owner as follows: via email addressed:

Beach Cities Health District  
1200 Del Amo Street  
Redondo Beach, CA 90277  
Attn: Chief Executive Officer  
[tom.bakaly@bchd.org](mailto:tom.bakaly@bchd.org)

with a copy to:

Gibbs Giden LLP  
12100 Wilshire Boulevard, Suite 300  
Los Angeles, CA 90025  
Attn: Sharon Suarez, Esq.  
[ssuarez@gibbsgiden.com](mailto:ssuarez@gibbsgiden.com)

§ 15.2.3 If the Owner requests the Design-Builder, Architect, Consultants, or Subcontractors to execute certificates, other than those required by Section 3.1.10, the Owner shall submit the proposed language of such certificates for review at least 14 days prior to the requested dates of execution. If the Owner requests the Design-Builder, Architect, Consultants, or Subcontractors to execute consents reasonably required to facilitate assignment to a lender, the Design-Builder, Architect, Consultants, or Subcontractors shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to them for review at least 14 days prior to execution. The Design-Builder, Architect, Consultants, and Subcontractors shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of their services.

### § 15.3 Written Notice

Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice. Notice in electronic format may be given to the Owner's and Design Builder's representatives as identified, respectively, by electronic mail provided any such electronic notice includes a read receipt for transmission and is also followed by hard copy via regular U.S. Mail within three (3) business days.

### § 15.4 Rights and Remedies

§ 15.4.1 Duties and obligations imposed by the Design-Build Documents, and rights and remedies available thereunder, shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

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

### § 15.5 Tests and Inspections

§ 15.5.1 Tests, inspections and approvals of portions of the Work shall be made as required by the Design-Build Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Design-Builder shall make arrangements for such tests, inspections and approvals with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Design-Builder shall give the Owner timely notice of when and where tests and inspections are to be made so that the Owner may be present for such procedures.

§ 15.5.2 Required certificates of testing, inspection or approval shall, unless otherwise required by the Design-Build Documents, be secured by the Design-Builder and promptly delivered to the Owner.

## **§ 15.6 Media Contact**

Design-Builder shall not communicate with the media or post on social media regarding the Project without specific written authorization from Owner. All media inquiries shall be referred to Owner's Designated Representative.

## **§ 15.7 Capitalization**

Terms capitalized in the Contract include those that are (1) specifically defined, (2) the titles of numbered articles or (3) the titles of other documents published by the American Institute of Architects.

## **§ 15.8 Interpretation**

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

**§ 15.8.2** Unless otherwise stated in the Design-Build Documents, words which have well-known technical or construction industry meanings are used in the Design-Build Documents in accordance with such recognized meanings.

**§ 15.8.3** Unless otherwise provided in the Contract, the following rules of construction and interpretation apply to the contract; (a) headings and captions are for convenient reference only and in no way define or limit the terms of the Contract; (b) use of the word "including" shall not be interpreted to exclude anything else when following any general statement and shall not be construed to limit such statement to the specific items identified immediately after the word "including" to similar items, regardless of whether non-limiting language (e.g., "without limitation", "but not limited to") appear, rather use of the word "including" shall be deemed to refer to all other times that could reasonably fall within the broadest possible scope of the applicable general statement; (c) use of the words "termination" or "expiration" are interchangeable unless the context requires otherwise; (d) use of the words "will" and "shall" denote a mandatory duty, have the same meaning and are interchangeable unless the context requires otherwise; (e) use of the word "may" denotes a discretionary right, not an obligation or duty; (f) the singular of any word is interchangeable with the plural and vice-versa; (g) the neuter, masculine and feminine of any word are interchangeable with each other; (h) references to Articles, Paragraphs, Subparagraphs, or Clauses in the Design-Build Documents are references to Articles, Paragraphs, Subparagraphs, Sections or Clauses of the applicable Design-Build Document they respectively appear in, as the case may be; and (i) each exhibit attached to the Agreement is an integral part of and incorporated within the Contract.

**§ 15.8.4** Wherever possible, each provision of this Agreement shall be interpreted in a manner as to be effective and valid under applicable law. If, however, any provision of this Agreement, or portion thereof, is prohibited by law or found invalid under any law, only such provision or a portion thereof shall be ineffective, without in any manner invalidating or affecting the remaining provision of this Agreement or valid portions of such provision, which are hereby deemed severable.

## **§ 15.9 Not Construed Against Drafter**

The Owner and the Design-Builder each have negotiated and entered into the Contract with the advice of their own respective counsel and therefore, the Contract shall not be construed against one party or the other based on which party drafted any portion of the Contract.

## **§ 15.10 Design-Builder Qualifications**

The Design-Builder represents and warrants to the Owner the following (in addition to any other representations and warranties contained in the Design-Build Documents), as an inducement to the Owner to execute this Agreement, which representations and warranties shall survive the execution and delivery of this Agreement, any termination of this Agreement and the final completion of the Work:

- .1** that the Design-Builder is, and throughout the performance of the Work shall remain, financially solvent, able to pay all debts as they mature and possessed of sufficient working capital to complete the Work and perform all obligations hereunder;
- .2** that the Design-Builder is able to furnish the plant, tools, materials, supplies, equipment and labor required to complete the Work and perform his obligations hereunder and has sufficient experience and competence to do so;

.3 that the Design-Builder is qualified to do business in the state in which the Project is located and is properly licensed by, and registered with, all necessary governmental, public and quasi-public authorities having jurisdiction over the Design-Builder, the performance of the Work and the Project; and

.4 that execution of this Agreement and performance thereof is within the duly authorized powers of the Design-Builder and all resolutions or other authorization necessary for the Design-Builder to enter into this Agreement and for the signatory to sign this Agreement on behalf of the Design-Builder have been duly obtained and are currently in full force and effect.

**§ 15.11 Execution**

This Agreement may be executed in one or more counterparts, including counterparts delivered by facsimile or other electronic means, each of which will be deemed to be an original and all of which, when taken together, will be deemed to constitute one and the same agreement. The parties also agree that this Agreement may be signed electronically, and that any such electronic signatures, whether digital, encrypted, or otherwise, are intended to authenticate this writing and to have the same force and effect as manual signatures. As used herein, “electronic signatures” means any electronic sound, symbol, or process attached to or logically associated with a record and executed and adopted by a party with the intent to sign such record including, without limitations, (i) facsimile, (ii) email electronic signatures or (iii) electronic signatures obtained and/or exchanged through use of DocuSign.

**ARTICLE 16 SCOPE OF THE AGREEMENT**

**§ 16.1** This Agreement is comprised of the following documents listed below:

- .1 AIA Document A141™-2014, Standard Form of Agreement Between Owner and Design-Builder, as modified, dated April 24, 2024
- .2 **DESIGN-BUILD AMENDMENT, if and when executed**
- .3 **REQUEST FOR STATEMENT OF QUALIFICATIONS AND PROPOSAL dated February 28, 2024**
- .4 **COST PROPOSAL DATED \_\_\_\_\_, 2024**
- .5 **PRELIMINARY PROJECT SCHEDULE**
- .6 **SCHEDULE OF VALUES FOR PHASE 1 BILLING**
- .7 **HOURLY RATES**
- .8 **GUARANTEED MAXIMUM PRICE**
- .9 **DESIGN-BUILDER’S KEY PERSONNEL / STIPULATED RATE**
- .10 **INSURANCE REQUIREMENTS**

This Agreement is entered into as of the day and year first written above.

**OWNER**  
**BEACH CITIES HEALTH DISTRICT**

**DESIGN-BUILDER**

\_\_\_\_\_

\_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_



## EXHIBIT D – PRELIMINARY MASTER SCHEDULE

