

# **PROGRESSIVE DESIGN-BUILD AGREEMENT FOR WATER AND WASTEWATER PROJECTS**

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**Document No. 545**

# Progressive Design-Build Agreement for Water and Wastewater Projects

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This **AGREEMENT** is made as of the \_\_\_\_\_ day of \_\_\_\_\_ in the year of 2024, by and between the following two parties, for services in connection with the Project identified below:

**OWNER:**

City of Brentwood  
150 City Park Way  
Brentwood, CA 94513

**DESIGN-BUILDER:**

W. M. Lyles Co.  
525 W. Alluvial Ave.  
Fresno, CA 93711

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**PROJECT:**

Solid Waste Organics Diversion Project  
2301 Elkins Way  
Brentwood, CA 94513.

**DESIGN CONSULTANT:**

Anaergia Technologies, LLC  
705 Palomar Airport Rd., Ste. 200  
Carlsbad, CA 92011

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder agree as set forth herein.

## **Article 1**

### **General**

- 1.1 Duty to Cooperate.** Owner and Design-Builder commit at all times to cooperate fully with each other and proceed on the basis of trust and good faith to permit each party to realize the benefits afforded under this Agreement.
- 1.2 Definitions.** Terms, words and phrases used in this Agreement shall have the meanings given them in DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition) ("General Conditions of Contract").
- 1.3 Design Services.** Design-Builder shall, consistent with applicable state licensing laws, provide design services, including architectural, engineering, and other design professional services required by this Agreement. Such design services shall be provided through qualified, licensed design professionals who are either (i) employed by Design-Builder, or (ii) procured by Design-Builder from independent sources. Nothing in this Agreement is intended to create any legal or contractual relationship between Owner and any party other than the Design Builder.

## **Article 2**

### **Design-Builder's Services and Responsibilities**

#### **2.1 General Services.**

**2.1.1** Owner shall provide Design-Builder with Owner's Project Criteria describing Owner's program requirements and objectives for the Project as set forth in Exhibit A. Owner's Project Criteria may include Owner's use, space, price, time, site, performance, and expandability requirements. The Owner's preliminary budget and completion schedule requirements for the Project are set forth below. The below Project Criteria may not be altered by Design Builder without the express written agreement of the Owner.

**2.1.1.1** Preliminary Budget (Phases 1 and 2 combined): \$80,000,000 - \$90,000,000. Phase 1 Lump Sum Price as included in Article 7.1.1. Phase 2 pricing to be established at conclusion of Phase 1.

**2.1.1.2** Completion Schedule: Schedule to be provided for Phase 1 Services with this Agreement. Phase 2 Schedule will be included in Phase 2 Amendment to this Agreement..

**2.1.2** If Owner's Project Criteria have not been developed prior to the execution of this Agreement, Design-Builder will assist Owner in developing Owner's Project Criteria. If Owner has developed Owner's Project Criteria prior to executing this Agreement, Design-Builder shall review and prepare a written evaluation of such criteria, including recommendations to Owner for different and innovative approaches to the design and construction of the Project. The parties shall meet to discuss Design-Builder's written evaluation of Owner's Project Criteria Report and agree upon what revisions, if any, should be made to such criteria.

**2.1.3** Design-Builder shall have responsibility for the design, construction and performance of the Project and to ensure compliance with all applicable Governmental Rules, Regulations, and Requirements.

**2.1.4** Design-Builder shall supervise, coordinate, and direct the Work using Design-Builder's best skill and attention. Design-Builder shall be solely responsible for, and have control over, the entire design effort, construction means, methods, techniques, sequences, procedures, and the coordination of all portions of the Work in accordance with the Project Criteria.

**2.1.5** Design-Builder shall be responsible for inspection of all portions of the Work and to determine that such portions conform to the requirements of the Contract Documents and are ready to receive subsequent Work.

**2.1.6** Design-Builder shall take field measurements, verify field conditions, and carefully compare with the Contract Documents such field measurements, conditions, and other information known to Design-Builder before commencing the Work. Errors, inconsistencies, or omissions discovered at any time shall be promptly reported in writing to the Owner.

**2.1.7** The Design-Builder represents and warrants that it has the qualifications, experience, resources, and facilities necessary to properly perform the services required under this Agreement in a thorough, competent and professional manner. All work performed and services provided hereunder by the Design-Builder shall conform to, at a minimum, generally accepted standards and practices in the State of California as applicable to a design-builder with prior successful experience in work similar in size and scope and complexity of the Work of the Contract Documents.

## **2.2 Phased Services.**

**2.2.1** Phase 1 Services. Design-Builder shall perform the services of design, pricing, and other services for the Project based on Owner's Project Criteria, including, but not limited to Sections 2.1.1.1 and 2.1.1.2 set forth above, as may be revised in accordance with Section 2.1 hereof, as set forth in Exhibit C, Scope of Services. Design-Builder shall perform such services to the level of completion required for Design-Builder and Owner to establish the Contract Price for Phase 2, as set forth in Section 2.3 below. The Contract Price for Phase 2 shall be developed during Phase 1 on an "open-book" basis with detailed and appropriate documentation provided for the Owner's review. Design-Builder's Compensation for Phase 1 Services is set forth in Article 7 herein. The level of completion required for Phase 1 Services is defined in Exhibit C, Scope of Services (either as a percentage of design completion or by defined deliverables).

**2.2.2** Phase 2 Services. Design-Builder's Phase 2 services shall consist of the completion of design services for the Project, the procurement of all materials and equipment for the Project, the performance of construction services for the Project, the start-up, testing, and commissioning of the Project, and the provision of warranty services, all as further described in the Contract Price Amendment. Upon receipt of Design-Builder's proposed Contract Price for Phase 2, Owner may proceed as set forth in Section 2.3.

**2.3 Proposal.** Upon completion of the Phase 1 Services and any other Basis of Design Documents upon which the parties may agree, Design-Builder shall submit a proposal to Owner (the "Proposal") for the completion of the design and construction for the Project for the Contract Price, using a Guaranteed Maximum Price (GMP) approach. Contract Price shall be consistent with the Project Criteria, including, but not limited to Sections 2.1.1.1 and 2.1.1.2 above. Commencement of the Phase 2 Services shall not occur without written approval of the Contract Price by Owner in the form of an executed amendment to this Agreement as set forth in Section 2.3.2.2

and the Owner shall not be responsible for any costs associated with Phase 2 unless and until such amendment is executed

**2.3.1** The Proposal shall include the following in addition to items described in Phase 1 Scope of Work, unless the parties mutually agree otherwise:

**2.3.1.1** As set forth in Article 7, the Contract Price items shall specify amounts for all material elements of the project.

**2.3.1.2** The Basis of Design Documents, which may include, by way of example, Owner's Project Criteria, which are set forth in detail and in Exhibit B;

**2.3.1.3** A list of the assumptions and clarifications made by Design-Builder in the preparation of the Proposal, which list is intended to supplement the information contained in the drawings and specifications and is specifically included as part of the Basis of Design Documents;

**2.3.1.4** The Scheduled Substantial Completion Date upon which the Proposal is based, to the extent said date has not already been established under Section 6.2.1 hereof, and a schedule upon which the Scheduled Substantial Completion Date is based and a Project Schedule for the Work, including all dates to be specified in the Project Criteria and/or Article 6;

**2.3.1.5** If applicable, a list of Allowance Items, Allowance Values, and a statement of their basis to be specified in Section 7.7;

**2.3.1.6** If applicable, a schedule of alternate prices;

**2.3.1.7** If applicable, a schedule of unit prices;

**2.3.1.8** If applicable, a statement of Additional Services which may be performed but which are not included in the Proposal, and which, if performed, shall be the basis for an increase in the Contract Price and/or Contract Time(s);

**2.3.1.9** If applicable, a Savings provision to be specified in Section 7.6.4;

**2.3.1.10** The time limit for acceptance of the Proposal; and

**2.3.1.11** An Owner's permit list (Exhibit D), a list detailing the permits and governmental approvals that Owner will bear responsibility to obtain.

**2.3.2** Review and Adjustment to Proposal.

**2.3.2.1** After submission of the Proposal, Design-Builder and Owner shall meet to discuss and review the Proposal. If Owner has any comments regarding the Proposal or finds any inconsistencies or inaccuracies in the information presented, it shall promptly give written notice to Design-Builder of such comments or findings. If appropriate, Design-Builder shall, upon receipt of Owner's notice, make appropriate adjustments to the Proposal.

**2.3.2.2** Acceptance of Proposal. If Owner accepts the Proposal, as may be amended by Design-Builder, the Contract Price and its basis shall be set

forth in an amendment to this Agreement, when mutually agreed between the parties (Contract Price Amendment). Once the parties have agreed upon the Contract Price and Owner has issued a Notice to Proceed with Phase 2, Design-Builder shall perform the Phase 2 Services, all as further described in the Contract Price Amendment.

**2.3.2.3** Failure to Accept the Proposal. If Owner rejects the Proposal or fails to notify Design-Builder in writing on or before the date specified in the Proposal that it accepts the Proposal, the Proposal shall be deemed withdrawn and of no effect. In such event, Owner and Design-Builder shall meet and confer as to how the Project will proceed, with Owner having the following options:

- i. Owner may suggest modifications to the Proposal, whereupon, if such modifications are accepted in writing by Design-Builder, the Proposal shall be deemed accepted and the parties shall proceed in accordance with Section 2.3.2.2 above;
- ii. Owner may authorize Design-Builder to continue to proceed with the Work on the basis of reimbursement as provided in Section 7.1.2 hereof without a Contract Price, in which case all references in this Agreement to the Contract Price shall not be applicable; or
- iii. Owner may terminate this Agreement for convenience in accordance with Article 9 hereof.

If Owner fails to exercise any of the options under Section 2.3.2.3 within ten (10) days of receipt of Design-Builder's notice, then this Agreement shall be deemed completed. If Owner terminates the relationship with Design-Builder under Section 2.3.2.3 iii), or if this Agreement is deemed completed under this paragraph, then Design-Builder shall have no further liability or obligations to Owner under this Agreement.

## **Article 3**

### **Contract Documents**

**3.1 The Contract Documents are comprised of the following:**

- 3.1.1** Properly Executed Change Orders / GMP revisions (more recent controlling)
- 3.1.2** GMP and Task Orders
- 3.1.3** Executed Progressive Design-Build Agreement (DBIA Document No. 545), including Exhibits
- 3.1.4** General Conditions (DBIA Document No. 535)
- 3.1.5** Technical Specifications
- 3.1.6** Issued for Construction Project Plans/Drawings (detailed plans having greater precedence)

### 3.1.7 Basis of Design documents

## **Article 4**

### **Interpretation and Intent**

- 4.1 Design-Builder and Owner, at the time of acceptance of the Proposal by Owner in accordance with Section 2.3 hereof, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents for any conflicts or ambiguities. Design- Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement, or if applicable, prior to Owner's acceptance of the Proposal.
- 4.2 The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after Owner's acceptance of the Proposal, Design-Builder and Owner shall attempt to resolve any ambiguity, conflict, or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 3.1 hereof. In case of a conflict within a part of a Contract Document, the provision with the more restrictive/most stringent interpretation shall govern.
- 4.3 Terms, words, and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in the General Conditions of Contract.
- 4.4 If Owner's Project Criteria contain design specifications: (a) Design-Builder is entitled to reasonably rely on the accuracy of the information represented in the design specifications and their compatibility with other information set forth in Owner's Project Criteria, including any design performance specifications; and (b) Design-Builder shall be entitled to an adjustment in its Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate design specification.
- 4.5 The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

## **Article 5**

### **Ownership of Work Product**

- 5.1 **Ownership.** All Work Products originated and prepared by Design-Builder or its sub-contractors of any tier under this Contract shall be and remain the property of Owner for its use in any manner it deems appropriate provided, however, that any use unintended under the Contract, or modification or alteration of the Work Products without the direct involvement of the Design-Builder shall be without Liability to

Design-/Builder. Work Products are all works, tangible or not, created under this Contract for Owner including, without limitation, documents, material, data, reports, manuals, specifications, artwork, drawings, sketches, computer programs and databases, schematics, photographs, video and audiovisual recordings, sound recordings, marks, logos, graphic designs, notes, websites, domain names, inventions, processes, formulas, matters and combinations thereof, and all forms of intellectual property therein. To the extent applicable under the U.S. Copyright Act, all works created by Design-Builder under this Contract are work-made-for-hire created for the sole benefit and ownership of Owner. Owner hereby grants to Design-Builder a license, revocable at will of Owner, to use and copy such documents during the term of this Contract for the sole purpose of performing the Services. All copies of tangible materials or writings embodying such intellectual properties shall be turned over to City upon termination of this Contract or completion of work pursuant to this Contract. Design-Builder hereby assigns, and agrees to assign to Owner, all goodwill, copyrights, and trademarks in all Work Products originated and prepared by Design-Builder under this Contract. Design-Builder further agrees to execute any documents necessary for Owner to perfect, memorialize, or record Owner's ownership of rights provided herein. This paragraph shall survive expiration or termination of this Contract. Any misuse or misapplication of the Design-Builder's Work Product shall be at Owner's sole risk.

- 5.2 Obligations on Subcontractor.** Any subcontract entered into by Design-Builder relating to this Contract, to the extent allowed hereunder, shall include a like provision (on Owner's ownership in Work Products) for work to be performed under this Contract to Contractually bind or otherwise oblige its subcontractor performing work under this Contract such that Owner's ownership rights of all Work Products are preserved and protected as intended herein. Failure of Design-Builder to comply with this requirement or to obtain the compliance of its subcontractor with such obligations shall subject Design-Builder to all remedies allowed under law and termination of this Contract, including, but not limited to the Design Builder's indemnification obligations to the Owner set forth herein.
- 5.3 Use of Work Products and Trade Secrets by Third Parties.** Design-Builder shall not make available, provide or disclose any Work Product to any third party without prior written consent of Owner. Design-Builder further agrees that it will not disclose nor cause others to disclose any of Owner's trade secrets or other potentially patentable matters including inventions, discoveries, improvements, and methods, developed during the performance of this Contract. Design-Builder shall be liable for any loss of patentable rights as a result of such disclosure whether such disclosure is inadvertent or not.
- 5.4 No Transfer of Pre-Existing Intellectual Property.** Nothing herein may be construed to transfer to Owner any ownership, interest or right in any of the Design-Builder's intellectual property, trade secrets or know-how that is pre-existing before commencement of this Contract, or that is derived independent of Design-Builder's performance of this Contract.
- 5.5 Non-Infringement Warranty.** Design-Builder hereby represents and warrants that performance of all obligations under this Contract does not infringe in any way, directly or contributorily, upon any third party's intellectual property rights, including, without limitation, patents, copyrights, trademarks, trade secrets, right of publicity and proprietary information. This section shall survive expiration or termination of this Contract.
- 5.6** Where any Work Product furnished by Design-Builder is in a form of software or firmware ("Vehicle"), and if any part of the such Vehicle (a) becomes the subject of an Action, (b) is adjudicated as infringing a third party's Intellectual Property



right, or (c) has its use enjoined or license terminated; Design-Builder shall, with the Owner's consent, do one of the following immediately. Design-Builder shall at its expense either:

1. Procure for the Owner the right to continue using said part of the Vehicle; OR
2. Replace the Vehicle with a functionally equivalent, non-infringing product.

Exercise of any of the above-mentioned options shall not cause undue business interruption to the Owner or diminish the intended benefits and use of the Work Product by the Owner under the specifications herein.

- 5.7** Rights and remedies available to the Owner hereinabove shall survive the expiration or other termination of this Contract. Further, the rights and remedies are cumulative of those provided for elsewhere in this Contract and those allowed under the laws of the United States and the State of California, including, but not limited to the Design Builder's indemnification obligations to the Owner set forth herein. This Paragraph shall survive the expiration or other termination of this Contract.
- 5.8** Unless expressly stated otherwise, for all pre-existing third-party and Design-Builder's intellectual property (if any), including software, required to operate or use any Work Product delivered by Design-Builder, Design-Builder hereby grants and will cause others to grant Owner (including its agents and consultants) an irrevocable license to use such pre-existing intellectual property internally by Owner (including its agents and consultants).
- 5.9** **Owner's Indemnification for Use of Work Product.** Owner recognizes that in the event of an early termination of the Work, whether for convenience or for cause, Design-Builder may not have the opportunity to finish or to finalize its Work Product. Therefore, if Owner uses or re-uses the Work Product, in whole or in part by retaining another certified architect and/or engineer other than the Design Builder for the preparation of plans using/reusing the Work Product, then the Owner shall defend, indemnify and hold harmless the Design Builder and subcontractors and design professionals from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product by such future architect/engineer, to the fullest extent permitted by applicable law. This provision shall not relieve the Design-Builder of performing the Work in accordance with Article 2.3 Standard of Care of the General Conditions up to the termination of the Work.

## **Article 6**

### **Contract Time**

- 6.1** **Date of Commencement.** The Phase 1 Services shall commence within five (5) days of Design- Builder's receipt of Owner's Notice to Proceed unless the parties mutually agree otherwise in writing. The Work shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed for Phase 2 Services ("Date of Commencement") if the Proposal is accepted and the Contract Price Amendment is amended to this Agreement unless the parties mutually agree otherwise in writing.
- 6.2** **Substantial Completion and Final Completion.**
- 6.2.1** Substantial Completion of the entire Work shall be achieved no later than the date to be established by mutual written agreement between the parties in Phase 2 Amendment.

**6.2.2** Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable. Final Completion is the date when all Work is complete pursuant to the definition of Final Completion set forth in Section 1.2.19 of the General Conditions of Contract.

**6.2.3** All of the dates set forth in this Article 6 ("Contract Time(s)") shall be subject to adjustment in accordance with the General Conditions of Contract.

**6.3 Time is of the Essence.** Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

**6.4 Reserved.**

## **Article 7**

### **Contract Price**

**7.1 Contract Price.**

**7.1.1** Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the lump sum of One Million, One Hundred Sixty-six Thousand, Six Hundred Dollars (\$1,166,600) for the Phase 1 Services, as more fully defined in the Contract Documents and Exhibit C of this Agreement, subject to adjustments made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Phase 1 Services compensation is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

**7.1.2** For Phase 2 Services, Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price ("Contract Price") equal to the Design-Builder's Fee (as defined in Section 7.3 hereof) plus the cost of the Work (as defined in Section 7.4 hereof) subject to the GMP established in Section 7.6 hereof or as set forth in the Contract Price Amendment and any adjustments made in accordance with the General Conditions of Contract.

**7.2 Lump Sum (Phase 1).** Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the Lump sum established in Section 7.1.1 above, subject to adjustments made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer, and other taxes mandated by applicable Legal Requirements.

**7.3 Design-Builder's Fee (Phase 2).**

**7.3.1** Design-Builder's Fee for Phase 2 Services shall be comprised of the following percentages of the Cost of the Work:

**7.3.2** General Conditions Fee based on a percentage, as defined in the

Phase 2 Amendment to this Agreement.

**7.3.3** Design-Builder Self Performance Fee based on a percentage as defined in the Phase 2 Amendment to this Agreement.

**7.3.4** Design-Builder Subcontract Fee based on a percentage as defined in the Phase 2 Amendment to this Agreement.

**7.4 Cost Reimbursable/Time and Material Work (Phase 2).**

**7.4.1** The term Cost of the Work shall mean costs reasonably and actually incurred by Design-Builder in the proper performance of the Work.

**7.4.2** The Cost Reimbursable/Time and Material work shall include:

**7.4.2.1 Direct Costs — Labor**

- i. Labor costs include actual paid wages of field construction workers (including necessary overtime as approved by Owner) incurred for the Work. Wages paid must meet the hourly rates requirements established by regulation. Labor is to include up to working general foremen, who are directly assigned to the changed/extra work. Employees identified as superintendents or are non- working general foreman shall not be charged as labor on changed/extra work. Labor costs for equipment operators and helpers shall be reported only when such costs are not included in the invoice for equipment rental.
- ii. Design-Builder personnel stationed at the Design-Builder's home or branch office shall be charged to the Cost of Work only when working on tasks directly material to the Work. All non-field office-based Design-Builder support personnel who will provide service and advice from time-to-time throughout the Contract will be considered to be covered by the Fee portion of the GMP total and markup portion of changes unless there is prior written approval by Owner.
- iii. Design Professional staff (Architects and Engineers) directly involved in developing the design and construction documents and approved by Owner may be charged to the Cost of the Work.
- iv. Labor costs include costs paid or incurred by the Design-Builder for payroll taxes, insurance, contributions, assessments, and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations, and pensions, provided such costs are based on wages and salaries included in the cost of work. Copies of certified payrolls may be required by Owner.

**7.4.2.2 Direct Costs - Materials and Equipment**

**7.4.2.2.1** Actual costs, including transportation of materials and equipment incorporated or to be incorporated into the construction. Owner has the right to confirm that costs submitted do not exceed

fair market value and pay only fair market value if costs submitted are not reasonable. Unused excess materials, if any, shall be handed over to Owner at the completion of the Work. Owner shall not pay for unreasonable quantities of excess materials. No payment will be made for materials and equipment not incorporated in the Work, unless specifically authorized by Owner.

**7.4.2.2.2** Actual costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Design-Builder at the Project Site. Owner has the right to confirm that costs submitted do not exceed fair market value and pay only fair market value if costs submitted are not reasonable. Items not fully consumed during the performance of the Work shall be returned to Owner, unless directed otherwise.

**7.4.2.3** Rental charges for temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Design-Builder at the Project Site, whether rented from the Design-Builder or others, and costs of transportation. Installation, minor repairs and replacements, dismantling and removal thereof. Provisions regarding rental of the Design-Builder's equipment or equipment rented from third parties are as outlined in the following paragraphs:

**7.4.2.3.1** Proposed rental rates and related fair market values for Design-Builder- owned (affiliate owned, subsidiary owned or related party owned) equipment with a rental rate of more than \$1,000.00 (total) over the estimated term of the rental and/or rental period over 12 months shall not exceed 80% of the Rental Blue Book, and shall be submitted to and approved in advance and in writing by Owner. Owner may request that this rental approval request include the current hours or mileage reading from the equipment, the projected usage of each piece of equipment and purchase price of that equipment new. With this information, the Design-Builder may also be requested to perform a lease versus purchase analysis before a decision is made by Owner. The rental rates are subject to audit and adjustment by Owner.

**7.4.2.3.2** Rental charges for equipment which is not owned by Design-Builder or any of its affiliates, subsidiaries, or other related parties and is rented from third parties for use in proper completion of the Work will be reimbursed at actual costs. For equipment with a rental rate of more than one thousand dollars (\$1,000.00) (total) over the estimated term of the rental and/or over twelve months (12), the Design-Builder may be requested to provide documentation (a lease vs. purchase analysis) to justify the reason for renting the equipment rather than purchasing it. Any lease/purchase arrangements must have advance concurrence from Owner before entering into such an arrangement and/or charging lease/purchase rental charges as a reimbursable job cost.

**7.4.2.3.3** All costs incurred for minor maintenance and repairs shall be reimbursed at actual costs. Such costs include routine and preventative maintenance, minor repairs, and other incidental costs. Repairs and/or replacement of a capital nature are

considered to be covered by the rental rates. Major repairs and overhauls are not considered routine, and the cost of such repairs shall not be reimbursable under the Contract.

**7.4.2.3.4** Rental equipment shall be paid for on an hourly, daily, weekly, monthly or standby rate (or some combination) whichever arrangement is in Owner's best interest. Owner may agree to establish a Fair Market Rate for Design-Builder items in lieu of actual cost. Such agreements to use a Fair Market Rate must be approved in advance by Owner.

**7.4.2.3.5** All losses resulting from lost, damaged or stolen tools and equipment (including rental equipment) shall be the sole responsibility of the Design-Builder, and the cost of such losses shall not be reimbursable under the Contract.

**7.4.2.3.6** The Design-Builder shall maintain a detailed inventory for all equipment worth one thousand dollars (\$1,000.00) or more when put into service on this Contract. This inventory shall be submitted to Owner upon request. For each non- rental piece of equipment, the inventory should contain original purchase price or acquisition cost, acquisition date, mileage or hour reading at acquisition and disposition, and final disposition. At the completion of the Contract, the Design- Builder shall transfer possession of any remaining job-owned equipment to Owner. Or, at Owner's option, the Design-Builder may keep any such equipment for an appropriate credit to job cost, which will be mutually agreed to by Owner and the Design-Builder.

**7.4.2.3.7** Normal and reasonable cost to set up the field office during Pre- Construction. However, for changes this on-going cost is included in the markup for overhead on Change Orders.

**7.4.2.4** Other Miscellaneous Reimbursable Costs may include:

**7.4.2.4.1** That portion directly attributable to this Contract of premiums for required insurance and bonds. All premiums for any insurance and bonds required by the Contract shall reflect the net actual costs to the Design-Builder after taking into consideration cost adjustments due to experience modifiers, premium discounts, policy dividends, retrospective rating plan premium adjustments, assigned risk pool rebates, refunds, etc.

**7.4.2.4.2** Sales or similar taxes imposed by a governmental authority, which are related to the Work and the Design-Builder's Responsibility.

**7.4.2.4.3** Fees and assessments for permits, licenses, and inspections which the Design-Builder is required to pay according to the Contract.

**7.4.2.4.4** Fees for testing laboratories for tests required by the Contract to be performed by or on behalf of the Design-Builder.

**7.4.2.4.5** Other necessary and reasonable costs incurred in the performance of the Work if and only to the extent Design-Builder

has obtained prior written approval from Owner.

**7.4.2.4.6** Cash discounts obtained on payments made by the Design-Builder shall accrue to Owner and shall be credited as a deduction from **the Cost of the Work**.

**7.4.2.4.7** Reasonable travel and subsistence expenses of Design-Builder personnel incurred while traveling on Work-related duties.

**7.4.2.5** Costs Not To Be Reimbursed include (and are not limited to):

**7.4.2.5.1** Design-Builder's capital expenses, including interest on the Design- Builder's capital employed for the Work.

**7.4.2.5.2** Except as noted previously, costs due to the fault or negligence of the Design-Builder's, subcontractors, anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable, including but not limited to costs for the correction of damaged, defective or nonconforming work, disposal and replacement of materials and equipment incorrectly ordered or supplied and making good damage to property not forming part of the Work. Owner may consider reimbursement for the cost of work-in-place damaged by others when the Design-Builder cannot determine who caused the damage provided the Design- Builder took adequate measures to protect the work and determine who damaged the work. The Design-Builder is required in such cases to fully and convincingly document its efforts to determine the responsibility for and cost of the damage before requesting consideration from Owner to use the Contractor's Allowance. Design- Builder shall immediately commence with the repair of such damaged work without waiting for and regardless of any Owner approval to use Contractor's Allowance.

**7.4.2.5.3** Any liquidated damages, fines, judgments or similar expenses incurred by the Design-Builder.

**7.4.2.5.4** Any Warranty issues or call backs.

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

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

**7.4.2.5.7** If the parties have agreed on a Guaranteed Maximum Price, costs that would cause the Guaranteed Maximum Price, as adjusted in accordance with the Contract Documents, to be exceeded.

**7.4.2.5.8** Overtime wages paid to salaried personnel shall not be paid by Owner.

## **7.5 Markups for Changes.**

### **7.5.1 Design-Builder's Overhead and Profit**

**7.5.1.1** Calculate fifteen percent (15%) overhead and profit for the Design-Builder based upon the estimated or actual direct cost of that portion of the changed work to be performed by the Design-Builder.

**7.5.1.2** Calculate Ten percent (10%) overhead and profit for the Design-Builder based upon the estimated or actual direct cost of the portion of the changed work to be performed by a subcontractor, supplier, or sub-subcontractor.

**7.5.1.3** Calculate five percent (5%) overhead and profit for the Design-Builder based upon the estimated or actual direct cost of the portion of the changed work to be the cost of such additional Design Work performed by a Design Professional.

### **7.5.2 Subcontractor, Supplier, or Sub-subcontractor Overhead and Profit**

**7.5.2.1** Calculate fifteen percent (15%) overhead and profit for the subcontractor, its suppliers, or its sub-subcontractors based upon the estimated or actual direct cost of that portion of the changed work to be performed by a subcontractor, supplier, or sub-subcontractor. This percentage for overhead and profit is the aggregate total markup payable by Owner for any subcontractor and its suppliers and its sub-subcontractors of any tier.

### **7.5.3 Bonding Markup**

**7.5.3.1** The bonding markup shall be the actual cost, not to exceed one percent (1%), for additional bonding for the Design-Builder.

**7.5.3.2** No bonding markup will be applied to Allowance items of work.

### **7.5.4 Markup Credit for Credit or Reduction in Scope Changes**

**7.5.4.1** Design-Builder shall return to Owner a mark-up credit of 5% of the credit amount of the Credit or Reduction in Scope Change.

**7.5.4.2** If Owner reduces the scope sufficiently to accomplish a schedule reduction of more than 30 days, Design-Builder shall return to Owner a markup credit of 10% of the credit amount of the Credit or Reduction in Scope Change.

## **7.6 The Guaranteed Maximum Price.**

**7.6.1** Design-Builder guarantees that it shall not exceed the GMP to be defined and established in the Phase 2 Amendment to this Agreement. Documents used as a basis for the GMP shall be identified in the Contract Price Amendment to this Agreement. Design-Builder does not guarantee any specific line item provided as part of the GMP and has the sole discretion to apply payment due to overruns in one line item to savings due to underruns in any other line item. Design-Builder agrees, however, that it will be responsible for paying all costs of completing the Work which exceed the GMP, as adjusted in accordance with the Contract

Documents.

**7.6.2** Contractor's Allowance amount, if any, shall be included as a specified amount in the GMP. It is further understood and agreed that such Allowance funds are to be used for costs to complete work considered to be within the original scope of work but which exceed the established estimated costs. Use of Contractor's Allowance funds are for work which could not have been reasonably anticipated based upon the information available at the time the cost estimate was established. Use of Contractor's Allowance funds are not for the purpose of incorporating additional scope desired by Owner after the cost estimate has been established. Use of Contractor's Allowance funds are for the following:

**7.6.2.1** Those items that were included in the proposal drawings and specifications that Contractor missed in proposing the GMP.

**7.6.2.2** Those items that were included in the proposal drawings and specifications that the Contractor underpriced in proposing the GMP.

**7.6.2.3** Schedule acceleration or schedule mitigation as required to meet contract milestones, or as deemed necessary by the Contractor to improve the project schedule when required.

**7.6.2.4** Increased general conditions or general requirements costs. This may include items such as additional temporary fence moves, increased costs for temporary protection of installed work, increased costs for weather protection, increased staffing for general conditions, etc.

**7.6.2.5** To cover higher costs for replacing a subcontractor which are not covered by subcontractor default insurance or surety.

**7.6.2.6** Other items not outlined above, if approved in advance in writing by Owner.

**7.6.3** All Contractor's Allowance fund charges must have Owner's advance written approval before being transferred to a line item. All remaining funds in the Contractor's Allowance upon completion shall revert to Owner.

**7.6.4** Savings.

**7.7.4.1** If the sum of the actual Cost of the Work and Design-Builder's Fee (and, if applicable, any prices established under Section 7.1.3 hereof) is less than the GMP, as such GMP may have been adjusted over the course of the Project, the difference ("Savings") may be shared upon the mutual written agreement of the Parties with percentages and amounts to be negotiated as part of the Phase 2 Proposal and incorporated into the Phase 2 Amendment to this Agreement.

**7.6.4.2** Savings shall be calculated and paid as part of Final Payment under Section 8.4 hereof, with the understanding that to the extent Design-Builder incurs costs after Final Completion which would have been payable to Design-Builder as a Cost of the Work, the parties shall recalculate the Savings in light of the costs so incurred, and Design-Builder shall be paid by Owner accordingly.

## **7.7 Allowance Items and Allowance Values.**



**7.7.1** Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth in the Contract Price Amendment or the Proposal.

**7.7.2** Design-Builder and Owner have worked together to review the Allowance Items and Allowance Values based on design information then available to determine that the Allowance Values constitute reasonable estimates for the Allowance Items. Design-Builder and Owner will continue working closely together during the preparation of the design to develop Construction Documents consistent with the Allowance Values. Nothing herein is intended in any way to constitute a guarantee by Design-Builder that the Allowance Item in question can be performed for the Allowance Value.

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

**7.7.4** The Allowance Value includes the direct cost of labor, materials, equipment, transportation, taxes, and insurance associated with the applicable Allowance Item. All other costs, including design fees, Design-Builder's overall project management and general conditions costs, overhead and Fee, are deemed to be included in the original Contract Price, and are not subject to adjustment notwithstanding the actual amount of the Allowance Item.

**7.7.5** Whenever the actual costs for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 7.7.4. The amount of the Change Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

## **Article 8**

### **Procedure for Payment**

**8.1 Payment for Preliminary Services.** Design-Builder and Owner agree upon the following method for partial and final payment to Design-Builder for the services hereunder:

**8.2 Contract Price Progress Payments.**

**8.2.1** Design-Builder shall submit to Owner on the first (1st) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

**8.2.2** Owner shall make payment within thirty (30) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.3 of the General Conditions of Contract. Except as provided for under the California prompt pay statutes, the Design-Builder shall not charge and the Owner shall not be liable for any late fees or interest.

**8.2.3** If Design-Builder's Fee under Section 7.3 hereof is a fixed amount, the amount of Design-Builder's Fee to be included in Design-Builder's monthly Application for Payment and paid by Owner shall be proportional to the percentage

of the Work completed, less payments previously made on account of Design-Builder's Fee.

### **8.3 Retainage on Progress Payments.**

**8.3.1** Five percent (5%) of each Progress Payment will be retained until the Design Build Work has been completed and accepted by Owner per the Contract Documents. After fifty percent (50%) of the Design Build Work has been completed, including approved Change Orders, the Design- Builder may request a reduction in the withholding of retention. Owner will review the progress to date and the remaining Work. If it appears that the Design Build Work will be successfully completed and is progressing on schedule, Owner may at its sole discretion, reduce the retention on subsequent Design Build Work. Thereafter, Owner may, at its complete discretion, and in a fashion which protects the interest of Owner, increase the retention but in no event, to more than a 5% retention.

**8.3.2** Early Release of Retention: The Design-Builder may request early release of retention for subcontractors who have fully and satisfactorily completed their work on a clearly defined portion of the Work. After a subcontractor completes its entire Scope of Work and fulfills all of its obligations as set forth in the Contract Documents, and upon the Design-Builder providing Owner the necessary lien waiver and waives of all claims rights relative to said Subcontractor's Work, the Design- Builder may submit a written request for release of retention for said subcontractor. The Design- Builder shall also provide written confirmation and certify that it has successfully completed their work under its subcontract. Owner will review such requests for release of retention and verify completion of all punchlist work attributed to said subcontractor. After review and approval of the written request for release of retention by Owner, the Design-Builder may include in its regular monthly billing the amount of retention requested to be released. Owner shall hold all retention other than the Early Released Retention until final payment is made in accordance with the Contract Document. Owner shall at all times be entitled to continue to withhold 150% of any disputed/incomplete work in accordance with applicable law.

**8.3.3** Substitution of Securities. At the request and expense of the Design-Builder, in accordance with California Public Contract Code Section 22300, in lieu of Owner withholding the five percent (5%) retention, the Design-Builder may: (1) substitute a deposit of securities at least equivalent to the retention to be paid, or (2) request Owner to pay retention directly to an escrow agent. If the Design-Builder requests that retention be paid into an escrow account, the Design-Builder and Owner shall enter into an escrow agreement in the exact form set forth in the Public Contract Code Section 22300. All forms or correspondence pertaining to Security Deposit in Lieu of Withhold shall be addressed to Owner for review by the legal counsel for Owner.

**8.4 Final Payment.** Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.6 of the General Conditions of Contract. Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment (less any amount the parties may have agreed to set aside for warranty work) within thirty (30) days after Owner's receipt of the Final Application for Payment, provided that: (a) Design-Builder has satisfied the requirements for final payment set forth in Section 6.6.6 of the General Conditions of Contract.

**8.5 Record Keeping and Finance Controls.** Design-Builder acknowledges that this Agreement is to be administered on an "open book" arrangement relative to Costs of the Work. Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles

and as may be provided in the Contract Documents. During the performance of the Work and for a period of three (3) years after Final Payment, Owner and Owner's accountants shall be afforded access to, and the right to audit from time to time, upon reasonable notice, Design- Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda, and other data relating to the Work, all of which Design-Builder shall preserve for a period of three (3) years after Final Payment. Such inspection shall take place at Design-Builder's offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by the Owner and Design-Builder as part of this Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, but the composition of such multiplier or markup is not subject to audit. Any lump sum agreed to by the Owner and Design-Builder as part of this Agreement is not subject to audit.

## **Article 9**

### **Termination for Convenience**

**9.1** The Owner, through City Council, may terminate for convenience any part of the remaining work under the Contract at any time, or from time to time, by written notice to the Design-Builder. Such notice shall specify the extent to which the performance of work is terminated and the effective date of such termination.

**9.1.1** Upon receipt of such notice, the Design-Builder shall:

**9.1.1.1** Immediately discontinue work on the date and to the extent specified in the notice and place no further orders or subcontracts for materials, services, or facilities, other than as may be required for completion of such portion of work that is not terminated;

**9.1.1.2** Promptly obtain cancellation upon terms satisfactory to Owner of all purchase orders, subcontracts, rentals or any other contracts existing for the performance of the terminated work or assign those contracts to Owner as directed;

**9.1.1.3** Assist Owner in the maintenance, protection, and disposition of work in progress, plant, tools, equipment, property, and materials acquired by the Design-Builder or furnished by the Design-Builder under this Contract; and

**9.1.1.4** Complete performance of any portion of the Work which is not terminated.

**9.1.2** Upon any such termination, Owner shall pay Design- Builder substantiated costs incurred prior to the effective date of termination in accordance with the following:

**9.1.2.1** All amounts due and not previously paid to the Design-Builder for work completed in accordance with the Contract prior to such notice of termination, and for work thereafter completed as specified in such notice, up to but not exceeding the contract value for the work using the progress schedule, schedule of values and other project controls as applicable;

**9.1.2.2** Reasonable administrative costs of settling and paying claims arising out of the termination of work under subcontracts or purchase orders.

**9.1.2.3** Reasonable costs incurred in demobilization and the disposition of residual material, plant and equipment; and

**9.1.2.4** A profit on items (2) and (3) herein, as provided for in the "Change Orders" provision.

**9.1.2.5** There shall be no claim or right to lost profits on unperformed work under any theory or any circumstances. Except for the amounts allowed under items (1) through (4) above, there shall be no other right or claim for loss, cost, damage, expense or liability. These limits apply to a termination for convenience and also to any termination for default subsequently determined wrongful and therefore treated as a termination for convenience.

**9.1.3** Design-Builder shall submit within twenty-one (21) days after receipt of notice of termination a proposal for an adjustment to its compensation including all incurred costs described herein. Should the logistics of such a termination preclude pricing any item of cost, the Design- Builder shall estimate costs to the best of its ability. Owner shall review, analyze, and verify such proposal, and negotiate an equitable adjustment, subject to City Council approval as needed, and the Contract shall be amended in writing accordingly.

**9.1.4** No compensation will be paid to the Design/Builder for unabsorbed or under absorbed overhead, nor shall the Design-Builder be paid for loss of anticipated profits in any form.

**9.1.5** If an agreement cannot be reached concerning an equitable adjustment, Owner may issue a unilateral Change Order.

## **Article 10**

### **Representatives of the Parties**

**10.1 Not Used.** To be established in the Phase 2 Amendment to the Agreement.

## **Article 11**

### **Bonds and Insurance**

**11.1 Insurance.** Design-Builder and Owner shall procure the insurance coverages set forth in the Insurance Exhibit attached hereto and in accordance with Article 5 of the General Conditions of Contract.

**11.2 Bonds and Other Performance Security.** Prior to commencing with the Phase 2 work, Design-Builder shall provide the following performance bond and labor and material payment bond or other performance security on the City's standard bond forms, which are attached hereto as Exhibits J and K.

Performance Bond.

Required     Not Required

Payment Bond.

Required     Not Required

## **Article 12**

### **Other Provisions**

**12.1 Other provisions**, if any, are as follows:

**12.2 Listing of Exhibits and documents incorporated herein:**

The following are the Exhibits to this Design Build Agreement (DBIA Document No. 545):

DBIA Document No. 535, Standard Form of General Conditions of Contract Between Owner and Design-Builder (2010 Edition) ("General Conditions of Contract")

Exhibit A - List of Reference Documents (Phase 2)  
Exhibit B - Owner's Project Criteria (Phase 2)  
Exhibit C - Phase 1 Scope of Services  
Exhibit D - Permits and Approvals (Phase 2)  
Exhibit E - Supporting Pricing Information (Phase 2)  
Exhibit F - NOT USED  
Exhibit G - Insurance Terms  
Exhibit H - NOT USED  
Exhibit I - NOT USED  
Exhibit J - Form of Performance Bond (Phase 2)  
Exhibit K - Form of Payment Bond (Phase 2)  
Exhibit L - NOT USED  
Exhibit M - Wage Determination Schedules (Phase 2)  
Exhibit N - Description of General Condition Costs (Phase 2)  
Exhibit O - Design-Builder Self Performance Fee and Subcontract Fee (Phase 2)  
Exhibit P - NOT USED

## **Article 13**

### **Consequential Damages and Limitation of Liability**

**13.1 Consequential Damages.** Notwithstanding anything herein to the contrary (Except as set forth in Section 13.2 below), Neither Design-Builder nor Owner shall be liable to the other for any consequential losses or damages, whether arising in contract, warranty, tort (including

negligence), strict liability or otherwise, including but not limited to losses of use, profits, business, reputation, or financing.

**13.2** The consequential damages limitation set forth in Section 13.1 above is not intended to affect the payment of liquidated damages or lost early completion bonus, if any, set forth in Article 8 of the General Conditions, which both parties recognize has been established, in part, to reimburse Owner or reward Design-Builder for some damages that might otherwise be deemed consequential. In addition, this waiver would not limit the parties, defense and indemnification obligations, fines, penalties and other charges assessed by applicable governmental authorities, and/or claims covered by insurance to the extent that there are insurance proceeds available.

**13.3 Limitation of Liability.** Except as specifically set forth in this clause, to the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Design-Builder, its Design Consultants, and Subcontractors, and their respective officers, directors, employees and agents, and any of them, to and claim or suit brought by the Owner and anyone claiming by, through or under Owner, for any and all claims, losses, liabilities, costs or damages whatsoever arising out of, resulting from or in any way related to the performance or unexcused nonperformance of the Work, shall not exceed fifty percent (50%) of the Contract Price. The parties agree that specific consideration has been given by Design-Builder for this limitation and that it is deemed adequate. This limitation of liability shall not reduce the availability of, or the ability of the City or any other party to pursue and recover amounts from insurance required to be provided by Design-Builder, and any fines or penalties levied or imposed by any Governmental Entity to the extent arising out of any Design-Builder Fault. In addition, Design-Builder's liability shall not be limited for its indemnity obligations as provided in this Agreement, including but not limited to, any third party claim or claim by Owner for damage to persons or property, as well as the payment of any defense costs, including attorneys' fees, to, for, or on behalf of the City with respect to such claims nor shall this limitation of liability limit be applicable to recovery under the performance and payment bonds provided for the Project.

## **Article 14**

### **Partnering**

**14.1 Partnering Sessions.** The Owner and Design-Builder shall use good faith efforts to develop a partnering relationship in order to promote cooperation and effective coordination in the performance of this Agreement. The Owner and Design-Builder shall conduct at least one pre-construction partnering workshop and at least one other workshop during the construction period as will be further defined in the Phase 2 amendment ("Partnering Sessions").

In executing this Agreement, Owner and Design-Builder each individually represents that it has the necessary financial resources to fulfill its obligations under this Agreement, and each has the necessary approvals to execute this Agreement, and perform the services described herein.

**OWNER:**

City of Brentwood  
*(Name of Owner)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

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

**DESIGN-BUILDER:**

W. M. Lyles Co.  
*(Name of Design-Builder)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

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

City Attorney Approved as to Form:

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

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

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

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

ATTEST:

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

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

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

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

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**STANDARD FORM OF GENERAL  
CONDITIONS OF CONTRACT  
BETWEEN OWNER AND  
DESIGN-BUILDER**



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# Article 1

## General

### 1.1 Mutual Obligations

1.1.1 **Owner and Design-Builder** commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents.

### 1.2 Basic Definitions

1.2.1 **Agreement or Contract** refers to the executed contract between Owner and Design-Builder under either DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition) or DBIA Document No. 545, *Progressive Design-Build Agreement for Water and Wastewater Projects* (2016 Edition).

1.2.2 **Basis of Design Documents** are as follows: For DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition) and DBIA Document No. 545, *Progressive Design-Build Agreement for Water and Wastewater Projects* (2016 Edition), the Basis of Design Documents are Exhibit B "Owner's Project Criteria", and those documents specifically listed in, as applicable, in Exhibit A "List of Reference Documents".

1.2.3 **Change Directive** is a directive issued by the Owner to the Design-Builder to recognize that there is a potential Change Order to the Contract and provide the Design-Builder with direction on a path forward on the potential changed work.

1.2.4 **Change Order** is a contractually binding amendment to the Contract, which shall comply with the Change Order provisions of the Contract Documents.

1.2.5 **Contract Documents** are those documents identified in Article 3 of the DBIA Document No. 545.

1.2.6 **Contractor's Allowance** is an amount added to the GMP for Phase 2 to allow for costs as described in Article 7.6.2 of the Design-Build Agreement.

1.2.7 **Contractor's Construction Schedule** is the Design-Builder's schedule for the Phase 2 scope of work that complies with the scheduling requirements of the Contract Documents.

1.2.8 **Construction Documents** are the documents, consisting of Drawings and Specifications, to be prepared or assembled by the Design-Builder consistent with the Basis of Design Documents unless a deviation from the Basis of Design Documents is specifically set forth in a Change Order executed by both the Owner and Design-Builder, as part of the design review process contemplated by Section 2.4 of these General Conditions of Contract.

1.2.9 **Cost of Work** shall mean the cost reasonably and actually incurred by Design-Builder in the proper performance of Phase 2 Services.

1.2.10 **Day or Days** shall mean calendar days unless otherwise specifically noted in the Contract Documents.

1.2.11 **Design-Builder** is the party to the Contract that is responsible for design, construction, commissioning and acceptance testing, and training and other services as defined by the Contract Documents. Any and all references to Contractor and Contractor's obligations are applicable to the Design-Builder.

1.2.12 **Design-Build Team** is comprised of the Design-Builder, the Design Consultant, and key Subcontractors identified by the Design-Builder.

**1.2.13 Design-Builder Self Performance Fee** is that portion of Design-Builders fee for Phase 2 services as defined in Article 7 of the DBIA Document No. 545.

**1.2.14 Design-Builder Subcontract Fee** is that portion of Design-Builders fee for Phase 2 services as defined in Article 7 of the DBIA Document No. 545.

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

**1.2.16 Design Services** are those services as defined in Article 2 of the General Conditions and in the Contract Documents.

**1.2.17 Engineer of Record** is the qualified licensed design professional responsible for the Design Services.

**1.2.18 Final Acceptance** occurs once all requirements of Final Completion have occurred and the Owner issues a Letter of Final Acceptance.

**1.2.19 Final Application for Payment** is the Design-Builder's request for final payment after Final Acceptance has occurred and a Letter of Final Acceptance has been issued by the Owner.

**1.2.20 Final Completion** is the date on which all Work is complete in accordance with the Contract Documents, including but not limited to, any items identified in the punch list prepared under Section 6.6. and the submission of all documents and satisfaction of all requirements set forth in Section 6.6.6.

**1.2.21 Force Majeure Events** are those events set forth in Article 8 of the General Conditions.

**1.2.22 General Conditions of Contract** refer to this DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition).

**1.2.23 General Conditions Fee** is that portion of Design-Builders fee for Phase 2 services as defined in Article 7 of the DBIA Document No. 545.

**1.2.24 GMP Exhibit** means that exhibit attached to DBIA Document No. 545, *Progressive Design-Build Agreement for Water and Wastewater Projects* (2016 Edition), which exhibit will have been agreed upon by Owner and Design-Builder prior to the execution of the Agreement. Guaranteed Maximum Price or GMP is a total not-to-exceed amount offered and guaranteed by the Design-Builder for complete performance of the Work of the Contract.

**1.2.25 GMP Proposal** means that proposal developed by Design-Builder in accordance with Section 2.3 of DBIA Document No. 545, *Progressive Design-Build Agreement for Water and Wastewater Projects* (2016 Edition).

**1.2.26 Hazardous Conditions** are any materials, wastes, substances and chemicals deemed to be hazardous under applicable Legal Requirements, or the handling, storage, remediation, or disposal of which are regulated by applicable Legal Requirements.

**1.2.27 Legal Requirements** are all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any government or quasi-government entity having jurisdiction over the Project or Site, the practices involved in the Project or Site, or any Work.

**1.2.28 Notice to Proceed** is the written notice from the Owner to the Design-Builder establishing the dates for Design Services and/or construction, and which authorizes the Design-Builder to commence with Design Services and/or construction.

**1.2.29 Owner** shall mean the City of Brentwood, acting through its City Council.

**1.2.30 Owner's Project Criteria** are developed by or for Owner to describe Owner's program requirements and objectives for the Project, including use, space, price, time, site and expandability requirements, as well as submittal requirements and other requirements governing Design-Builder's performance of the Work. Owner's Project Criteria may include conceptual documents, design criteria, design performance specifications, design specifications, and LEED® or other sustainable design criteria and other Project-specific technical materials and requirements. They may be found in Exhibit B, "Owner's Project Criteria".

**1.2.31 Owner's Representative** shall mean the City Manager or his/her designee who shall be authorized to act on behalf of the Owner for purposes of administering this Agreement.

**1.2.32 Phase 1 Services** include design and pre-construction services for the Project.

**1.2.33 Phase 2 Services** include completion of design, construction and acceptance for the Project.

**1.2.34 Preliminary Services Fee** is that portion of the Design-Builder's fee for Phase 1 Services as defined in Article 7 of the DBIA Document No. 545.

**1.2.35 Project** shall mean the Organics Processing Project, and includes the total design and construction of the Work under the contract and all other work, labor, equipment, and materials necessary to accomplish the Project.

**1.2.36 Site or Project Site** is the land or premises on which the Project is located, and includes all areas designated for staging, storage, parking and temporary offices as indicated in the Contract Documents.

**1.2.37 Subcontractor** is any person or entity retained by Design-Builder as an independent contractor to perform a portion of the Work and shall include materialmen and suppliers.

**1.2.38 Sub-Subcontractor** is any person or entity retained by a Subcontractor as an independent contractor to perform any portion of a Subcontractor's Work and shall include materialmen and suppliers.

**1.2.39 Substantial Completion or Substantially Complete** means the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete in accordance with the Contract Documents so that Owner can occupy and use the Project or a portion thereof for its intended purposes, provided, however, that Substantial Completion shall be deemed to have been achieved no later than the date of issuance of a Temporary Certificate of Occupancy issued by the local building official, if a Temporary Certificate of Occupancy is applicable to the Project."

**1.2.40 Work** is comprised of all Design-Builder's design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment, services and labor reasonably inferable from the Contract Documents.

**1.2.41 Work Package** is a set of documents and defined scope for material or equipment procurement, procurement of a trade contractor, or construction work assembled to bid to the construction community with the intent of creating competitive pricing.

## **Article 2**

### **Design-Builder's Services and Responsibilities**

#### **2.1 General Services.**

**2.1.1** The Design-Builder will designate in writing a contact person ("Design-Builder's Representative") for coordination and communication with Owner. The Design-Builder's Representative shall have the authority to make decisions for the Design-Builder firm and shall have binding signatory power for changes in work. The Design-Builder's Representative and/or his or her designee shall be on the Project Site at all times during work activity. Design-Builder's Representative shall be reasonably available to Owner and shall have the necessary expertise and experience required to supervise the Work. Design-Builder's Representative shall communicate regularly with Owner and shall be vested with the authority to act on behalf of Design-Builder. Design-Builder's Representative may be replaced only with the mutual agreement of Owner and Design-Builder.

**2.1.2** An orderly system for communication between Owner and the Design-Builder is essential to the satisfactory completion of the Work. Owner will transmit, directly or through others, written instructions, responses or other communications to the Design-Builder's Representative or other persons identified in writing by the Design-Builder to receive such communications. The Design-Builder shall, by a letter to Owner, designate (by name) one or more staff members to receive oral and written field communications when the Design-Builder's Representative is away from the Project Site and to act as the designated representative. During the times that the Design-Builder's Representative may be temporarily absent, a staff member shall be authorized to act immediately on orders or instructions issued by Owner. If Owner finds it necessary to communicate with the Design-Builder Personnel authorized to receive such communications and none are available to receive such communications, Owner may suspend all of the Design-Builder's operations at the Project Site until such communications can be accomplished. Formal communications from the Design-Builder to Owner that are necessary for the performance of the Contract, including documents described in the Contract Documents, and any other written communications, will be addressed to Owner, unless otherwise specified in the Contract Documents. All written communications or submittals shall be signed by the Design-Builder's Representative or designee in serialized format, and Design-Builder shall maintain logs available to Owner for review and reconciliation upon request.

**2.1.3** The Design-Builder represents it has the proper business and professional background, knowledge, experience and expertise necessary to provide the Services. Design-Builder further represents that it and all Design-Builder's subcontractors possess all required professional licenses in the State of California to provide all Services necessary for the Project.

**2.1.4** Design-Builder makes certain representations in the Contract Documents, including without limitation, the representations in this clause. Design-Builder is deemed to make these representations by and as a condition of submission of Design-Builder's proposal. Design-Builder agrees that it has single point responsibility for the design and construction of this Project. Following award and execution of the Contract, these representations are deemed republished throughout the performance of the Work of the Contract and shall also be treated as express warranties.

**2.1.5** Design-Builder has at the time of proposal, and will throughout performance, carefully and adequately reviewed the Contract Documents and acknowledges that these Contract Documents establish the scope, level of quality, construction intent and the procedures for the Design-Builder's design and construction of the Work to a state of 100% completion. Design-Builder shall carefully study and compare each of the Contract Documents with the others and with information furnished by Owner, and shall promptly report in writing to Owner any errors, inconsistencies, or omissions in the Contract Documents or inconsistencies with program performance requirements or applicable Code requirements observed by Design-Builder.

**2.1.6** During Phase 1, Design-Builder will carefully examine the Project Site and the adjacent areas, adequately investigate the nature and location of the Work to be performed and will satisfy itself and as to the general and local conditions which will be applicable, including but not limited to:

**2.1.6.1** Conditions related to Project Site access and topography, and to the transportation, disposal, handling and storage of materials;

**2.1.6.2** The availability of labor, water, power and roads;

**2.1.6.3** Observable physical conditions at the Project Site and existing Project Site conditions, including seasons and climate;

**2.1.6.4** Size, utility capacities and connection options of external utilities;

**2.1.6.5** The surface conditions of the ground, including normal and usual soil conditions;

**2.1.6.6** The character and availability of the equipment and facilities which will be needed prior to and during the performance of the construction work; and

**2.1.6.7** All other conditions which may be material to the Design-Builder's performance of its obligations under this Contract.

**2.1.7** Design-Builder has at the time of proposal, and will throughout performance, have the experience and capability to efficiently and expeditiously accomplish the Work required under this Contract in a timely and satisfactory manner and at the standard of practice of a Design-Builder with substantial experience in the Work of the Contract.

**2.1.8** Design-Builder shall supervise, coordinate, and direct the Work using Design-Builder's skill and attention in a manner consistent with the applicable standard of care, as defined by DBIA Document No. 545, Section 2.1.7. Design-Builder shall be responsible for, and have control over the entire design effort, construction means, methods, techniques, sequences, procedures, and the coordination of all portions of the Work, including, but without limitation, site work, utilities, and building process systems.

**2.1.9** The Design-Builder shall coordinate, sequence, and organize its work so as to minimize the inconvenience and disruption to the general public to the greatest extent reasonable. Such coordination and mitigation shall include dissemination of information and meeting with or notification to the parties who will be affected by the Work, as appropriate, and shall be undertaken in cooperation with Owner, and in accordance with any specific Contract Document provisions or direction from Owner. Prior to commencement of the Work, the Design-Builder shall hold pre-installation coordination meetings and prepare coordination drawings that document the pre-planning of the Work. This process shall ensure the installation of the Work is undertaken in an efficient and professional manner in accordance with the Contract Documents. The Design-Builder's coordination shall include, but not be limited to, the following:

**2.1.9.1** Coordinate use of Project space and sequence of installation of equipment or other work that is indicated on the Contract Documents. Utilize space efficiently to eliminate conflicts in the installation of the Work and to maximize accessibility for maintenance and repairs.

**2.1.9.2** When necessary, prepare memoranda for distribution to each party involved in the Work outlining special procedures required for coordination and construction. Include such items as required notices, reports, construction restraints and attendance at meetings.

**2.1.9.3** Coordinate schedule and timing of required administrative procedures with other construction activities to avoid conflicts and ensure orderly progress of the Work

**2.1.9.4** The Design-Builder shall obtain the approval of Owner and notify all other affected persons or "Other Contractors" at least forty-eight (48) hours before starting work which may block access or otherwise cause undue difficulty to occupants or users of property affected, and shall restore such access to a usable condition or, with Owner's permission, provide replacement access as soon as possible.

**2.1.9.5** The Design-Builder shall obtain necessary information and identify equipment locations and other layouts, as available, to avoid interface conflicts and shall be familiar with applicable codes and requirements and perform its work in compliance therewith.

**2.1.9.6** Coordinate execution of the Work with those public utilities, governmental bodies, private utilities and "Other Contractors" performing work on and adjacent to the worksites. Eliminate or minimize delays in the Work and conflicts with those utilities, bodies and Contractors.

**2.1.10** Design-Builder shall be responsible for inspection of all portions of the Work, including those portions already performed under this Contract, to determine that such portions conform to the requirements of the Contract Documents and are ready to receive subsequent Work.

**2.1.11** The Design-Builder shall be responsible for design errors including, but without limitation, errors, inconsistencies or omissions in the Construction Documents. Design-Builder shall take field measurements, verify field conditions, and carefully compare with the Contract Documents such field measurements, conditions, and other information known to Design-Builder before commencing the Work. Errors, inconsistencies, or omissions discovered at any time shall be promptly reported in writing to Owner.

**2.1.12** Design-Builder further represents and warrants it will continuously furnish the necessary personnel to complete the Project on a timely basis as required in this Contract and that such personnel have the experience and expertise levels to adequately perform the work. Design-Builder's representations and warranties stated herein, shall also apply to Design-Builder's subcontractors.

**2.1.13** Design-Builder shall provide Owner with a monthly status report detailing the progress of the Work, including (i) whether the Work is proceeding according to schedule, (ii) whether discrepancies, conflicts, or ambiguities exist in the Contract Documents that require resolution, (iii) whether health and safety issues exist in connection with the Work; (iv) status of the Contractor's Allowance account to the extent provided for in the Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price; and (v) other items that require resolution so as not to jeopardize Design-Builder's ability to complete the Work for the Contract Price and within the Contract Time(s).

**2.1.14** Prior to commencement of the Work, Design-Builder shall prepare and submit a schedule in compliance with the scheduling requirements contained in Exhibit C. The schedule shall be revised as required by conditions and progress of the Work, but such revisions shall not relieve Design-Builder of its obligations to complete the Work within the Contract Time(s), as such dates may be adjusted in accordance with the Contract Documents. Owner's review of, and response to, the schedule shall not be construed as relieving Design-Builder of its complete and exclusive control over the means, methods, sequences and techniques for executing the Work.

**2.1.15** The parties will meet within seven (7) days after execution of the Agreement to discuss issues affecting the administration of the Work and to implement the necessary procedures, including those relating to schedule, submittals and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents.



**2.1.16** The Design-Builder shall conduct progress meetings in compliance with the Contract Documents, unless otherwise agreed in writing. The Design-Builder shall schedule a Preconstruction Conference following receipt of the Notice to Proceed for Phase 2 to discuss the Design-Builder's construction and scheduling requirements in Section 2.12. For all meetings, the Design-Builder shall make arrangements for meetings and prepare agendas with copies for participants. For meetings between Owner and the Design-Builder, Owner will record minutes and distribute. The Design-Builder shall be advised of and shall attend Contract meetings as deemed necessary by Owner and at no additional cost. The Design-Builder shall inform Owner at least forty-eight (48) hours in advance of any Project-related meeting(s) where Design-Builder intends to have a lawyer present.

## **2.2 Design Professional Services.**

**2.2.1** Design-Builder shall, consistent with applicable state licensing laws, provide through qualified, licensed design professionals employed by Design-Builder, or procured from qualified, independent licensed Design Consultants, the necessary design services, including architectural, engineering and other design professional services, for the preparation of the required drawings, specifications and other design submittals to permit Design-Builder to complete the Work consistent with the Contract Documents. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Design Consultant.

## **2.3 Standard of Care for Design Professional Services.**

**2.3.1** The standard of care for all design professional services performed to execute the Work shall be the care and skill ordinarily used by members of the applicable profession practicing under similar conditions at the same time and locality of the Project.

## **2.4 Design Development Services.**

**2.4.1** Upon receipt of the Notice to Proceed for Design Services, the Design-Builder shall instruct the Engineer of Record to commence the design and the preparation of the Construction Documents per the Contract Documents and the Scope of Work Services, Phase 1 (Exhibit C). The Construction Documents shall provide information customarily necessary in documents for projects of similar size, complexity, and quality. The Construction Documents shall include all information required to complete the construction of the Project, other than such details customarily developed by others during construction.

**2.4.2** Contract Schedule shall indicate the times for Owner to review the completion of each such portion of the Construction Documents and a reasonable time for review of same. Design-Builder and Owner shall, consistent with any applicable provision of the Contract Documents, agree upon any interim design submissions that Owner may wish to review, which interim design submissions may include design criteria, drawings, diagrams and specifications setting forth the Project requirements. Interim design submissions shall be consistent with the Basis of Design Documents, as the Basis of Design Documents may have been changed through the design process set forth in this Section. On or about the time of the scheduled submissions, Design-Builder and Owner shall meet and confer about the submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any changes to the Basis of Design Documents, or, if applicable, previously submitted design submissions. Changes to the Basis of Design Documents, including those that are deemed minor changes under Section 9.3.1, shall be processed in accordance with Article 9. Minutes of the meetings, including a full listing of all changes, will be maintained by Design-Builder and provided to all attendees for review. Following the design review meeting, Owner shall review and approve the interim design submissions and meeting minutes in a time that is consistent with the turnaround times set forth in Design-Builder's schedule.

**2.4.3** Design-Builder shall submit to Owner Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work. The

Construction Documents shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in a design review meeting and recorded in the meetings minutes. The parties shall have a design review meeting to discuss, and Owner shall review and approve, the Construction Documents in accordance with the procedures set forth in Section 2.4.1 above. Design-Builder shall proceed with construction in accordance with the approved Construction Documents and shall submit one set of approved Construction Documents to Owner prior to commencement of construction.

**2.4.4** Owner's review and approval of interim design submissions, meeting minutes, and the Construction Documents is for the purpose of mutually establishing a conformed set of Contract Documents compatible with the requirements of the Work. Neither Owner's review nor approval of any interim design submissions, meeting minutes, and Construction Documents shall be deemed to transfer any design liability from Design-Builder to Owner, or relieve the Design-Builder from its duty to utilize this standard of care in the performance of its duties.

**2.4.5** To the extent not prohibited by the Contract Documents or Legal Requirements, the Owner may request that the Design-Builder prepare interim design submissions and Construction Documents for a portion of the Work to permit construction to proceed on that portion of the Work prior to completion of the Construction Documents for the entire Work. Interim design submissions shall be consistent with the Basis of Design Documents, as the Basis of Design Documents may have been changed through the design process set forth in this Section. On or about the time of the scheduled submissions, Design-Builder and Owner shall meet and confer about the submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any changes to the Basis of Design Documents, or, if applicable, previously submitted design submissions. Following the design review meeting, Owner shall review and approve the interim design submissions and meeting minutes in a time that is consistent with the turnaround times set forth in Design-Builder's schedule.

## **2.5 Legal Requirements.**

**2.5.1** Design-Builder shall perform the Work in accordance with all Legal Requirements and shall provide all notices applicable to the Work as required by the Legal Requirements.

**2.5.2** Subject to notice and scheduling provisions, the Contract Price and/or Contract Time(s) may be adjusted to compensate Design-Builder for the effects of any changes in the Legal Requirements enacted after the date of the Agreement affecting the performance of the Work, or if a Guaranteed Maximum Price is established after the date of the Agreement, the date the parties agree upon the Guaranteed Maximum Price. Such effects may include, without limitation, revisions Design-Builder is required to make to the Construction Documents because of changes in Legal Requirements. This Section 2.5.2 shall not apply where there is a Force Majeure event resulting in changes to the Legal Requirements, in which case, Section 8.5 will apply.

## **2.6 Government Approvals and Permits.**

**2.6.1** Except as identified in an Owner's Permit List attached as Exhibit D to the Agreement, Design-Builder shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees required for the prosecution of the Work by any government or quasi-government entity having jurisdiction over the Project.

**2.6.2** Design-Builder shall provide reasonable assistance to Owner in obtaining those permits, approvals and licenses that are Owner's responsibility.

## **2.7 Design-Builder's Construction Phase Services.**

**2.7.1** Unless otherwise provided in the Contract Documents to be the responsibility of Owner or a separate contractor, Design-Builder shall provide through itself or Subcontractors the necessary

supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities to permit Design-Builder to complete construction of the Project consistent with the Contract Documents.

**2.7.2** Design-Builder shall perform all construction activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents. Design-Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

**2.7.3** Design-Builder shall employ only Subcontractors who are duly licensed and qualified to perform the Work consistent with the Contract Documents. Owner may reasonably object to Design-Builder's selection of any Subcontractor on the basis that the Design-Builder has not followed the Contract requirements or the procedures for selection of subcontractors, as set forth in Section 2.8. If the Owner does not consent to the selection of any subcontractor, which consent shall not be unreasonably withheld, then the Design-Builder shall select or replace the subcontractor in compliance with the Contract requirement, at no cost or time impact to the Owner.

**2.7.4** Design-Builder assumes responsibility to Owner for the proper performance of the Work of Subcontractors and any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Subcontractor or Sub-Subcontractor, including but not limited to any third-party beneficiary rights.

**2.7.5** Design-Builder shall coordinate the activities of all Subcontractors. If Owner performs other work on the Project or at the Site with separate contractors under Owner's control, Design-Builder agrees to reasonably cooperate and coordinate its activities with those of such separate contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

**2.7.6** Design-Builder shall keep the Site reasonably free from debris, trash and construction wastes to permit Design-Builder to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas. Upon Substantial Completion of the Work, or a portion of the Work, Design-Builder shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work or applicable portions thereof to permit Owner to occupy the Project or a portion of the Project for its intended use.

## **2.8 Design-Builder Subcontracts**

**2.8.1** The Design-Builder recognizes and accepts that the subcontractor and supplier selection and contracting procedures specified herein are intended to promote pricing or buyout of the construction in a fair and reasonable manner and to maintain fair and open competition.

**2.8.2** The Design-Builder shall develop lists of possible bidders to solicit bids for the Work Package(s). The Design-Builder shall conduct an outreach effort to attract broad interest among qualified bidders. It shall be the responsibility of the Design-Builder to contact potential bidders to develop a sufficient pool of bidders. The Design-Builder shall use its best efforts to ensure that a minimum of three bids are received for each proposed subcontract unless otherwise approved in writing by the Owner. .

**2.8.3** If the Design-Builder is proposing to use a prequalification process, the Design-Builder shall provide pre-bid subcontractor prequalification criteria to Owner for review. Prequalification criteria shall be consistent with those published by the California Department of Industrial Relations. Prequalification criteria will be submitted in writing to Owner for its review prior to use. Owner will confirm that such prequalification criteria are fair and reasonable. Owner may request notification of prequalification selections, before notifying any subcontractor of those selections.

**2.8.4** Before making award to a subcontractor or material supplier, the Design-Builder shall

obtain approval from Owner, which shall not be unreasonably withheld.

**2.8.5** All subcontracts will be between the Design-Builder and the subcontractors. Subcontracts should be written to protect Owner from impacts and claims arising from the work. The Design-Builder shall strive to require each subcontractor to be bound to the Design-Builder by the terms of the Contract Documents, and to assume toward the Design-Builder all applicable obligations and responsibilities which the Design-Builder, by these Documents, assumes toward Owner. Said Contract shall preserve and protect the rights of Owner under the Contract Documents with respect to the Work to be performed by the subcontractors that the subcontracting thereof will not prejudice such rights. Where appropriate, the Design-Builder shall require each subcontractor to enter into similar Contracts with their subcontractors. The Design-Builder shall make available to each proposed subcontractor, prior to the execution of the subcontract, copies of the Contract Documents and the Contractor's Construction Schedule, to which the subcontractor shall similarly make copies of such Contract Documents available to their sub-subcontractors. Each subcontractor will be bound by this Section. Subcontractors also shall be provided access to all RFI's, Schedule Updates, and any other information that arises during the performance of the work. No subcontract or purchase order shall bind or purport to bind Owner.

The Design-Builder shall make no substitution for any subcontractor, person or entity previously selected without the prior written approval of Owner, which shall not be unreasonably withheld.

## **2.9 Design-Builder's Responsibility for Project Safety.**

**2.9.1** Design-Builder recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to (i) all individuals at the Site, whether working or visiting, (ii) the Work, including materials and equipment incorporated into the Work or stored on-Site or off-Site, and (iii) all other property at the Site or adjacent thereto. Design-Builder assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work. Design-Builder shall, prior to commencing construction, designate a Safety Representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work. Unless otherwise required by the Contract Documents, Design-Builder's Safety Representative shall be an individual stationed at the Site who may have responsibilities on the Project in addition to safety. The Safety Representative shall make routine daily inspections of the Site and shall hold weekly safety meetings with Design-Builder's personnel, Subcontractors and others as applicable.

**2.9.2** Design-Builder and Subcontractors shall comply with all Legal Requirements relating to safety, including but not limited to, all pertinent safety laws and regulations and orders of the State of California, Department of Industrial Relations, Division of Industrial Safety, and U.S. Department of Labor, OSHA, as well as any Owner-specific safety requirements set forth in the Contract Documents, provided that such Owner-specific requirements do not violate any applicable Legal Requirement. Design-Builder will immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to Owner's Representative and, to the extent mandated by Legal Requirements, to all government or quasi-government authorities having jurisdiction over safety-related matters involving the Project or the Work.

**2.9.3** Design-Builder's responsibility for safety under this Section is not intended in any way to relieve Subcontractors and Sub-Subcontractors of their own contractual and legal obligations and responsibility for (i) complying with all Legal Requirements, including those related to health and safety matters, and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injuries, losses, damages or accidents resulting from their performance of the Work.

**2.9.4** The Design-Builder shall conduct all operations in a manner that will cause no interference with normal operations of the Owner. In all operations, the Design-Builder shall be governed by the regulations and rules of Owner and shall cooperate fully with Owner. All temporary blockages for the movement of construction materials or equipment shall be coordinated with and approved by Owner in advance of any closure. The Design-Builder shall provide and maintain temporary and permanent fences, barriers, lights, bridges, and signs and provide such flaggers and guards as

necessary to give adequate warning to the public and all individuals on or using the premises.

**2.9.5** The Design-Builder shall conduct the operations in a manner that avoids injury or damage to adjacent property and improvements. Property such as, but not limited to, buildings, trees, shrubbery, lawns, pole lines, fences, guard rails, guideposts, culvert and Project markers, signs, structures, and other objects on or adjacent to the Project Site, that are not designated for removal, shall be protected from injury or damage. If damaged or removed due to Design-Builder's operations, they shall be restored or replaced in as nearly the original condition and location as is reasonably possible. When ordered by Owner, the Design-Builder shall provide and install suitable safeguards to protect any object from injury or damage.

## **2.10 Design-Builder's Warranty.**

**2.10.1** Design-Builder warrants to Owner that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship.

**2.10.2** All Work shall be warranted by the Design-Builder against defective workmanship and materials for the warranty period specified elsewhere in the Contract or one (1) year after the date of the Final Acceptance of the Work by Owner, whichever is later. Neither Final Acceptance nor the final payment nor any provision in the Contract Documents shall relieve the Design-Builder of responsibility for faulty material or quality of Work. The Design-Builder shall replace or repair any such defective Work in a manner satisfactory to Owner, after notice to do so from Owner and within such reasonable time specified in the notice.

**2.10.3** Disclaimers and Limitations: Manufacturer's disclaimers and limitations on product warranties do not relieve Design-Builder of warranty on work that incorporates products. Manufacturer's disclaimers and limitations on product warranties do not relieve suppliers, manufacturers, and subcontractors required to countersign special warranties with Design-Builder.

**2.10.4** Related Damages and Losses: When correcting failed or damaged warranted construction, remove and replace construction that has been damaged as a result of such failure or must be removed and replaced to provide access for correction of warranted construction.

**2.10.5** Reinstatement of Warranty: When work covered by warranty has failed and been corrected by replacement or rebuilding, reinstate warranty by written endorsement. Reinstated warranty shall be equal to original warranty with equitable adjustment for depreciation.

**2.10.6** Replacement Cost: Upon determination that work covered by warranty has failed, replace or rebuild work to acceptable condition complying with requirements of Contract Documents. Design-Builder is responsible for cost of replacing or rebuilding defective work regardless of whether Owner has benefited from use of work through portion of its anticipated useful service life.

**2.10.7** Warranty for labor and materials required by the Contract Documents shall have their warranty period begin on the date of Final Acceptance for a period of one (1) year or as covered by special warranties, whichever is longer. The Design-Builder shall provide any and all technical support necessary to provide oversight, training and coordination of Owner personnel who perform the maintenance for installations performed under these specifications such that the Warranty durations specified in those sections and elsewhere in the Contract Documents will not begin until Final Acceptance of all work required by the Contract. All arrangements required to be made with any supplier shall be made by the Design-Builder.

**2.10.8** The Design-Builder shall replace or repair any such defective work in a manner satisfactory to Owner, after notice to do so from Owner and within such reasonable time specified in the notice.

**2.10.9** Expressed warranties made to Owner shall not deprive Owner of other rights Owner may have under other provisions of Contract Documents and are in addition to and run concurrent with

other warranties made by Design-Builder under requirements of Contract Documents.

**2.10.10** Rejection of Warranties: Owner reserves right to reject warranties and to limit selection to products with warranties not in conflict with requirements of Contract Documents.

**2.10.11** Where Contract Documents require special warranty, or similar commitment on work or part of work, Owner reserves right to refuse to accept work, until Design-Builder presents written evidence that entities required to countersign such commitments have done so or are willing to do so.

**2.10.12** Form of Submittal: At Final Completion compile each required warranty properly organized and executed by Design-Builder, or by Design-Builder, subcontractor, supplier, or manufacturer.

## **2.11 Correction of Defective Work.**

**2.11.1** Design-Builder agrees to correct any Work that is found to not be in conformance with the Contract Documents, including that part of the Work subject to Section 2.10 hereof, within a period of one year from the date of Substantial Completion of the Work or any portion of the Work, or within such longer period to the extent required by any specific warranty included in the Contract Documents.

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

**2.11.3** The one-year period referenced in Section 2.10 above applies only to Design-Builder's obligation to correct nonconforming Work and is not intended to constitute a period of limitations for any other rights or remedies Owner may have regarding Design-Builder's other obligations under the Contract Documents.

## **2.12 Construction Coordination and Schedule**

### **2.12.1 General**

A. Administrative and procedural requirements for planning, monitoring, and documenting the progress of construction during performance of the Work, including the following:

1. Contractor's construction schedule; and
2. Construction Progress Schedule reports.

### **2.12.2 Definitions**

A. Activity: A discrete part of a project that can be identified for planning, scheduling, monitoring, and controlling the construction project. Activities included in a construction schedule consume time and resources.

1. Critical Activity: An activity on the critical path that must start and finish on the planned early start and finish times.

2. Predecessor Activity: An activity that precedes another activity in the network.
  3. Successor Activity: An activity that follows another activity in the network.
- B. CPM: Critical path method, which is a method of planning and scheduling a construction project where activities are arranged based on activity relationships. Network calculations determine when activities can be performed and the critical path of Project.
- C. Critical Path: The longest connected chain of interdependent activities through the network schedule that establishes the minimum overall Project duration and contains no float.
- D. Day: Calendar Day unless specifically noted as Work Day.
- E. Event: The starting or ending point of an activity.
- F. Float: The measure of leeway in starting and completing an activity.
1. Float time is not for the exclusive use or benefit of either City or Contractor, but is a jointly owned, expiring Project resource available to both parties as needed to meet schedule milestones and Contract completion date.
  2. Free float is the amount of time an activity can be delayed without adversely affecting the early start of the successor activity.
  3. Total float is the measure of leeway in starting or completing an activity without adversely affecting the planned Project completion date.
  4. Use of float suppression techniques such as software constraints, preferential sequencing, special lead/lag logic restraints, extended activity times, or imposed dates, other than as required by the Contract, shall be cause for the rejection of any schedule submitted by the Contractor.

### **2.12.3 Submittals**

- A. Submittals shall include shop drawings and a schedule for delivery, including fabrication time.
- B. Format for Submittals: Submit required submittals in the following format:
1. PDF electronic schedule file.
  2. Working electronic copy of schedule file.
  3. PDF file of narrative reports.
- C. Submit a startup construction schedule within 15 days after receipt of the Owner's Notice to Proceed for Phase 2 Services, submit a preliminary schedule indicating planned operations during first 60 days of Phase 2.
1. Include cost of activities expected to be completed before submission and acceptance of the complete schedule.
  2. Acceptance of cost-loaded, construction startup schedule will not constitute acceptance of schedule of values for cost-loaded activities.
  3. The startup schedule shall include a schedule for the procurement of materials

and equipment and a schedule for Submittals.

D. Submit a complete Contractor's Construction Schedule (Baseline) in compliance with Section 2.12.6 with a network diagram within 30 days after receipt of the Owner's Notice to Proceed for Phase 2 Services. Show the complete network analysis system with logic ties for all major activities.

1. Size: as required to display entire network for entire construction period.

2. This schedule submittal will be reviewed by the Owner and returned to the Design-Builder within thirty (30) Days after submission. After receipt of review comments, Design-Builder shall resubmit a mutually acceptable system.

E. Submit a working electronic copy Contractor's Construction Schedule using software indicated in this Section, and labeled to comply with requirements for submittals. Provide hard copy in size able to display entire schedule for entire construction period.

F. Submit each of the reports listed following concurrent with CPM schedule. For each activity in reports include activity number, activity description, cost, original duration, remaining duration, early start date, early finish date, late start date, late finish date, and total float in calendar days.

1. Activity Report: List of all activities sorted by activity number and then early start date, or actual start date if known.

2. Logic Report: List of preceding and succeeding activities for all activities, sorted in ascending order by activity number and then early start date, or actual start date if known.

3. Total Float Report: List of all activities sorted in ascending order of total float.

4. Critical path layout and report.

G. Submit a Narrative Report with each schedule submittal describing the following:

1. Project duration and variation from schedule;

2. Schedule status;

3. Milestone summary;

4. Critical Path Analysis;

5. Schedule progress;

6. Started, in-progress, and completed activities;

7. Change Notices and RFI's;

8. Delays and Impacts;

9. Weather conditions;

10. Progress photos.

H. Submit Construction Progress Schedule with each Application for Payment indicating progress on all activities and implications on overall schedule. Construction Progress



Schedule (schedule update) is meant to only monitor the actual progress of work relative to the approved Baseline Schedule. It is not a substitute to the approved Baseline Schedule. Any schedule update that changes logic and duration or Contract Completion Date of the approved Baseline Schedule is not acceptable. Approved Baseline Schedule shall only be revised or superseded by a fully executed Revised Baseline Schedule Change Order.

I. Submit Recovery Schedule when periodic update indicates the Work is 14 or more calendar days behind the current accepted schedule, indicating means by which Contractor intends to regain compliance with the schedule.

1. The Contractor shall take all necessary measures to make up for such delay either by increasing staff, plant or facilities, or by amending its Work methods, whichever is applicable, with no change to the Contract Price.
2. Indicate changes to working hours, working days, crew sizes, and equipment required to achieve compliance, and date by which recovery will be accomplished.

#### **2.12.4 Quality Assurance:**

A. Comply with the requirements specified in the Contract Documents for Quality Assurance and Quality Control Requirements.

B. Scheduler Qualifications: An experienced scheduler in CPM scheduling and reporting, with capability of producing CPM reports and diagrams within 24 hours of Owner's request.

C. Preconstruction Conference: Refer to Section 2.1.16. Review methods and procedures related to the preliminary construction schedule and Contractor's construction schedule, including the following:

1. Review software limitations and content and format for reports.
2. Verify availability of qualified personnel needed to develop and update schedule.
3. Discuss constraints, including phasing, interim milestones and maintaining City water deliveries.
4. Review delivery dates for City-furnished products.
5. Review schedule for work of City's separate contracts.
6. Review submittal requirements and procedures.
7. Review time required for review of submittals and resubmittals.
8. Review requirements for tests and inspections by independent testing and inspecting agencies.
9. Review time required for Project closeout and City startup and commissioning activities.
10. Review and finalize list of construction activities to be included in schedule.
11. Review procedures for updating schedule.
12. Review site safety, security, site access, operation hours, environmental monitoring, permits and requirements.

#### **2.12.5 Coordination:**

A. The Contractor has the obligation and responsibility at all times to plan and monitor all of its activities, anticipating and scheduling its staff, subcontractors, materials, plant and Work methods in a manner that is likely to ensure completion of the Work in accordance with the terms and conditions of the Contract.

B. Contractor will coordinate preparation and processing of schedules and reports with performance of construction activities and with scheduling and reporting of separate contractors. Contractor must notify Owner when equipment of components arrive, or are expected to arrive; their assistance may be needed in uncrating or exposing materials for inspection.

C. Coordinate Contractor's construction schedule with the Schedule of Values, submittal schedule, progress reports, payment requests, and other required schedules and reports.

1. Secure time commitments for performing critical elements of the Work from entities involved.

2. Coordinate each construction activity in the network with other activities and schedule them in proper sequence.

D. The Contractor must have the scheduler onsite regularly or in collaboration with someone onsite. The Project Manager or Project Engineer can serve this role for the Contractor.

#### **2.12.6 Contractor's Construction Schedule, General:**

A. Time Frame: Extend schedule from date established for Notice to Proceed for Phase 2 to date of Substantial Completion.

1. Contract completion date shall not be changed by submission of a schedule that shows an early completion date, unless specifically authorized by Change Order.

B. Activities: Establish a separate numbered activity for each main element of the Work. Comply with the following:

1. Activity Duration: Define activities so no work activity is longer than 20 days, unless specifically allowed by Owner. Administrative activities may be longer than 20 days. The durations shall be determined based upon resource planning under contractually-defined on-site work conditions. In calculating activity durations, normal inclement weather shall be considered.

2. Critical Path Activities: Include procurement process activities for long lead items and major items, requiring a cycle of more than 60 days, as separate activities in schedule. Critical path cycle activities include, but are not limited to, submittals, acceptance, purchasing, fabrication, and delivery.

3. Submittal Review Time: Include review and resubmittal times indicated in Submittal Requirements, in schedule. Coordinate submittal review times in Contractor's construction schedule with submittal schedule. Contractor must submit all submittals 90 days prior to startup to allow for review and approval by the City, unless another time frame is specified elsewhere in the Contract Documents.

4. Startup and Testing Time: Include no fewer than 30 days for startup and testing. Include a pre-commissioning meeting to discuss plan with Owner 3 to 6 months before startup and testing is scheduled to begin.

5. Substantial Completion: Indicate completion in advance of date established for

Substantial Completion, and allow no fewer than 30 days for Owner's administrative procedures necessary for certification of Substantial Completion.

6. Punch List and Final Completion: Include not more than 45 days for completion of punch list items and final completion.

C. Constraints: Include constraints and work restrictions indicated in the Contract Documents and as follows in schedule, and show how the sequence of the Work is affected.

1. Phasing: Arrange list of activities on schedule by phase.

2. Products Ordered in Advance: Include a separate activity for each product, including delivery dates. Delivery dates should stipulate the supplier's quoted delivery date.

3. Work Restrictions: Show the effect of the following items on the schedule:

(a) Uninterruptible services;

(b) Partial occupancy before Substantial Completion;

(c) Use of premises restrictions;

(d) inclement weather;

(e) Environmental control/ permitting;

(f) Specified work sequences and constraints; and

4. Work Stages: Indicate important stages of construction for each major portion of the Work, including, but not limited to, the following:

(a) Submittals;

(b) Fabrication;

(c) Deliveries;

(d) Installation;

(e) Functional testing;

(f) Start-up;

(g) Commissioning;

(h) Performance testing;

(i) Training;

(j) Tests and inspections;

- (k) Curing;
- (l) Startup and placement into final use and operation;
- (m) Project closeout and final cleaning; and
- (n) Demobilization.

5. Construction Areas: Identify each major area of construction for each major portion of the Work. Indicate where each construction activity within a major area must be sequenced or integrated with other construction activities to provide for the following:

- (a) Earthworks and excavation;
- (b) Structural completion;
- (c) Completion of mechanical installation;
- (d) Completion of electrical and instrumentation installation;
- (e) Completion of SCADA integration;
- (f) Functional testing;
- (g) Start-up;
- (h) Commissioning;
- (i) Performance testing;
- (j) Training; and
- (k) Substantial Completion.

6. Other constraints and Work Restrictions.

D. Milestones: Include milestones indicated in the Contract Documents in schedule, including, but not limited to, the Notice to Proceed, proposed Shutdowns, Substantial Completion, and final completion, and the appropriate interim milestones.

E. Computer Scheduling Software: Prepare schedules using current version of a program that has been developed specifically to manage construction schedules.

F. Contract Modifications:

1. For each proposed contract modification that may impact the overall schedule, prepare a time-impact analysis using a network fragment to demonstrate the effect of the proposed change on the overall project schedule. Logically connect approved Contract changes into the CPM schedule. Each change will be identified by number and description, and activities/milestones will be added to record the following:

- (a) Start and finish dates of the changed Work.

2. Initial Issue of Schedule: Prepare initial network diagram from a sorted activity list indicating straight "early start-total float." Identify critical activities.

3. Schedule Updating: The CPM Progress Schedule shall show the projected completion date of the Work based on the progress information inserted into it, without changes to the schedule logic or the original duration of any activity. The Contractor should update the schedule monthly to reflect changes and show accurate timelines.

**2.12.7 Contractor's Look-Ahead Schedules:**

A. Contractor will develop and maintain a detailed look-ahead schedule and follow the following procedures:

1. Contractor shall list all completed, in progress, and upcoming activities for previous week, the current week, and the next two weeks upcoming;
2. Contractor shall show significant activities with actual start and completion dates;
3. Contractor shall present the look-ahead schedule at the weekly progress meetings as described in Project Meetings.

## **Article 3**

### **Owner's Services and Responsibilities**

**3.1 Duty to Cooperate.**

**3.1.1** Owner shall, throughout the performance of the Work, cooperate with Design-Builder and perform its responsibilities, obligations and services in a timely manner to facilitate Design-Builder's timely and efficient performance of the Work and so as not to delay or interfere with Design-Builder's performance of its obligations under the Contract Documents.

**3.1.2** Owner shall provide timely reviews and approvals of interim design submissions and Construction Documents consistent with the turnaround times set forth in Design-Builder's schedule.

**3.1.3** Owner shall give Design-Builder timely notice of any Work that Owner notices to be defective or not in compliance with the Contract Documents.

**3.2 Furnishing of Services and Information.**

**3.2.1** Notwithstanding the provision of certain documents from the Owner, the Design-Builder shall investigate the Project Site to ascertain conditions affecting necessary procedure and sequence of work operations for execution of the Contract, and to ascertain Project Site conditions, character, quality and quantity of surface and subsurface materials that will be encountered. The Design-Builder shall verify all dimensions in the field and shall check field conditions continuously during construction. Owner assumes no responsibility whatsoever in respect to the Design-Builder's interpretation of subsurface investigations. There is no guarantee or warranty, either expressed or implied, that conditions indicated in the Contract Documents, are representative of those existing throughout the Work, or any part of it, or that unexpected developments may not occur.

**3.2.2** All soil and test hole data, groundwater elevations, and soil analyses shown on the Plans or included in the Contract Documents apply only at the location of the test holes and to the depths indicated. Soil test reports for test holes which have been drilled are available for inspection at the office of Owner. Additional subsurface exploration may be performed by the Design-Builder at its own expense.

**3.2.3** The indicated groundwater elevation is that which existed on the date specified in the data. It is the Design-Builder's responsibility to determine and allow for the groundwater elevation on the

date the Work is performed. A difference in groundwater elevation between what is shown in the soil boring logs and what is actually encountered during construction will not be considered as a basis for extra work.

**3.2.4** If discovery is made of items of archaeological or paleontological interest, the Design- Builder shall immediately cease excavation in the area of discovery and shall not continue until ordered by Owner. When resumed, excavation operations within the area of discovery shall be as directed by Owner. Discoveries which may be encountered may include, but not be limited to, dwelling sites, stone implementations or other artifacts, animal bones, human bones, and fossils.

**3.2.5** Rights of entry for the Work will be provided by Owner pursuant to the Contract Documents. Unless otherwise provided in the Contract Documents, the Design-Builder shall make arrangements, pay for, and assume all responsibility for acquiring, using, and disposing of additional work areas and facilities that may be temporarily required to perform the Work.

### **3.3 Financial Information.**

**3.3.1** Design-Builder shall cooperate with the reasonable requirements of Owner's lenders or other financial sources. Notwithstanding the preceding sentence, after execution of the Agreement Design-Builder shall have no obligation to execute for Owner or Owner's lenders or other financial sources any documents or agreements that require Design-Builder to assume obligations or responsibilities greater than those existing obligations Design-Builder has under the Contract Documents.

### **3.4 Owner's Representative.**

**3.4.1** Owner's Representative shall be responsible for providing Owner-supplied information and approvals in a timely manner to permit Design-Builder to fulfill its obligations under the Contract Documents. Owner's Representative shall also provide Design-Builder with prompt notice if it observes any failure on the part of Design-Builder to fulfill its contractual obligations, including any errors, omissions or defects in the performance of the Work. Owner's Representative shall communicate regularly with Design-Builder and shall be vested with the authority to act on behalf of Owner.

### **3.5 Government Approvals and Permits.**

**3.5.1** Owner shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees set forth in the Owner's Permit List attached as Exhibit D to the Agreement.

**3.5.2** Owner shall provide reasonable assistance to Design-Builder in obtaining those permits, approvals and licenses that are Design-Builder's responsibility.

### **3.6 Owner's Separate Contractors.**

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

## **Article 4**

### **Hazardous Conditions and Differing Site Conditions**

#### **4.1 Hazardous Conditions.**

**4.1.1** Except as otherwise permitted in the Contract Documents, the Design-Builder agrees to sole responsibility for compliance with applicable present and future rules, regulations, restrictions,

ordinances, statutes, laws and/or other orders of any applicable governmental entity regarding the use, storage, handling, distribution, processing and/or disposal of hazardous wastes, extremely hazardous wastes, hazardous substances, hazardous materials, hazardous chemicals, toxic chemicals, toxic substances, pollutants, contaminants, or other similarly regulated substances (hereinafter referred to as "hazardous substances"). Said hazardous substances shall include, but shall not be limited to gasoline, diesel and other fuels, lubricating oils and solvents.

**4.1.2** In the case of any hazardous substance spill, leak, discharge or improper storage on the premises, or contamination of same, by action or inaction of the Design-Builder, or anyone directly or indirectly employed or under contract to the Design-Builder, the Design-Builder agrees to make, or cause to be made, any necessary repairs or corrective actions, as well as to clean up and remove any leakage, contamination or contaminated ground. In the case of any hazardous substance spill, leak, discharge or contamination caused in whole or part by the Design-Builder, or by any of its subcontractors, employees, or agents, which affects Owner's property, or property(ies) of Owner's tenant(s), the Design-Builder agrees to make, or cause to be made, any necessary repairs, or take corrective actions, to clean-up and remove any such spill, leakage or contamination to the extent required by applicable law or regulation.

**4.1.3** If, after reasonable notice, the Design-Builder fails to repair, clean-up, properly dispose of, or take any other corrective action(s) as required by the Contract Documents, Owner may (but shall not be required to) take all steps it deems reasonably necessary to properly repair, clean-up or otherwise correct the condition(s) resulting from the spill, leak or contamination. Any such repair, clean-up or corrective action(s) taken by Owner shall be at Design-Builder's sole cost and expense, including any and all costs (including any administrative costs) which Owner incurs, or pays, as a result of any repair, clean-up or corrective action it takes.

**4.1.4** If the Design-Builder introduces hazardous substances into already installed underground storage tanks, pipelines or other improvements on the specified premises for the purpose of storage, distribution, use, treatment or disposal of any hazardous substances, the Design-Builder agrees, upon the expiration and/or termination of this Contract, to remove and/or clean up, at the sole option of Owner, the above-referred to improvements. Said removal and/or clean-up shall be at Design-Builder's sole cost and expense, and shall be undertaken and completed in full compliance with all federal, state and local laws and regulations, as well as in compliance with the reasonable directions of Owner.

4.1.5 Design-Builder shall promptly supply Owner with copies of all notices, reports, correspondence and submissions made by the Design-Builder to any governmental entity regarding any hazardous substance spill, leak, discharge or clean-up, including all tests results.

**4.1.5** Notwithstanding the foregoing sections of this General Condition:

**4.1.5.1** Design-Builder shall not be held responsible for the presence or remediation of asbestos, asbestos-related materials, or any other hazardous substance, in any form whatsoever, as such materials and substances are defined by the Environmental Protection Agency or any other public authority, found on any property or structure that is the subject of services performed by Design-Builder under the Contract.

**4.1.5.2** The Design-Builder's obligation to remediate hazardous substances is limited to the Work identified in the Contract Documents. The Design-Builder has no obligation to identify, abate and/or remediate hazardous substances not directly affected by the Work; however, the Design-Builder will identify, abate and/or remediate hazardous substances not included in the scope of work as directed in writing by Owner for a mutually agreed price.

**4.1.5.3** The Design-Builder will be compensated for approved additional costs resulting from changes in regulations, restrictions, ordinances, statutes, laws and/or other orders of any governmental entity regarding the use, storage, handling, distribution, processing and/or disposal of hazardous wastes, extremely hazardous wastes, hazardous substances, hazardous materials, hazardous chemicals, toxic chemicals, toxic

substances, pollutants, contaminants, or other similarly regulated substances.

**4.1.5.4** Owner will retain title to all pre-existing hazardous substances removed as part of the Design-Builder's work, and title shall not transfer to the Design-Builder. Owner agrees to sign all manifests as Owner of all such pre-existing hazardous substances. Hazardous substances introduced onto the Project Site by the Design-Builder shall remain titled to the Design-Builder.

**4.1.6** This General Condition and the obligation(s) contained therein, shall survive the expiration or earlier termination of this Contract.

## **4.2 Differing Site Conditions.**

**4.2.1** Concealed or latent physical conditions or subsurface conditions at the Site that (i) materially differ from the conditions indicated in the Contract Documents or (ii) are of an unknown and unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the Work are collectively referred to herein as "Differing Site Conditions" The Design-Builder shall promptly, and before any of the following conditions are disturbed, notify Owner, first verbally and later within seven (7) days of the verbal notification, with a properly documented notice.

**4.2.2** Owner shall investigate such conditions, and if it finds that such conditions do materially differ and could not have been discovered, or reasonably inferred, from the Contract Documents or a thorough inspection of the Project Site by the Design-Builder, and such conditions cause an impact to the Contract pricing, or Work Completion Time, Owner may issue a Change Directive.

**4.2.3** Should an agreement not be reached on a Change Order, pursuant to Article 9, the Owner may issue a Change Directive to have the Work performed. Such an Order is unilateral and the Work will be performed on a Time and Material basis. The Design-Builder shall be required to keep detailed records of all costs related to performing the Work and compensation for said work will be reconciled in a Change Order upon agreement of a lump sum price or completion of the Work, whichever occurs first.

# **Article 5**

## **Insurance and Bonds**

### **5.1 Design-Builder's Insurance Requirements.**

**5.1.1** Design-Builder is responsible for procuring and maintaining the insurance for the coverage amounts as set forth in Insurance Exhibit G to the Agreement – in Phase 1 and in Phase 2 (Additional Insurance Required). Coverage shall be secured from insurance companies authorized to do business in the state in which the Project is located, and with a minimum rating as set forth in the Insurance Exhibit.

**5.1.2** Design-Builder's insurance policies shall specifically delete any design-build or similar exclusions that could compromise coverage's because of the design-build delivery of the Project.

**5.1.3** Prior to commencing any design and construction services hereunder, Design-Builder shall provide Owner with certificates and pertinent additional insured and other endorsements evidencing that (i) all insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect for the duration required by the Contract Documents and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days prior written notice is given to Owner and all other insureds. If any of the foregoing insurance coverage's is required to remain in force after final payment, additional certificate(s) and endorsement(s) evidencing continuation of such coverage shall be submitted with the Final Application for Payment.



**5.1.4** Owner and Design-Builder waive against each other and Owner's separate contractors, Design Consultants, Subcontractors, agents and employees of each and all of them, all damages covered by property insurance provided herein, except such rights as they may have to the proceeds of such insurance. Design-Builder and Owner shall, where appropriate, require similar waivers of subrogation from Owner's separate contractors, Design Consultants and Subcontractors and shall require each of them to include similar waivers in their contracts. These waivers of subrogation shall not contain any restriction or limitation that will impair the full and complete extent of its applicability to any person or entity unless agreed to in writing prior to the execution of this Agreement.

## **5.2 Bonds and Other Performance Security.**

**5.2.1** The Design-Builder shall file surety bonds with Owner to be approved by the office of the City Attorney in the amount and for the purposes noted below. Bonds issued by a surety who is listed in the latest version of U.S. Department of Treasury Circular 570, who is authorized to issue bonds in California, and whose bonding limitation shown in said circular is sufficient to provide bonds in the amount required by the Contract. Bonds from all other sureties shall be accompanied by all of the documents enumerated in Code of Civil Procedure 995.660(a). The Design-Builder shall pay all bond premiums, costs, and incidentals.

**5.2.2** Prior to commencement of the Phase 2 Services, the Design-Builder shall provide Payment and Performance bonds on forms provided by Owner in Exhibits J and K. The "Payment Bond" (Material and Labor bond) shall be for one hundred percent (100%) of the Contract price, as amended from time to time, to satisfy claims of material suppliers and mechanics and laborers employed by it on the Work.

**5.2.3** The Performance Bond shall be for one hundred percent (100%) of the Contract price as amended from time to time. The Design-Builder shall submit all bonds within fifteen (15) calendar days of the award of Contract.

**5.2.4** Should any bond become insufficient, the Design-Builder shall renew the bond within 10 days after receiving notice from Owner.

**5.2.5** Should any surety at any time be unsatisfactory to the Owner, notice will be given the Design-Builder to that effect. No further payment shall be deemed due or will be made under the Contract until a new surety shall qualify and be accepted by the Owner

**5.2.6** Changes in the Work or extensions of time made pursuant to the Contract shall in no way release the Design-Builder or surety from its obligations. Notice of such changes or extensions shall be waived by the surety.

## **Article 6**

### **Payment**

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

**6.1.1** Unless otherwise agreed by the parties, within ten (10) days of execution of the Agreement Design-Builder shall submit for Owner's review and approval a schedule of values for all of the Work. The Schedule of Values will (i) subdivide the Work into its respective parts, (ii) include values for all items comprising the Work and (iii) serve as the basis for monthly progress payments made to Design-Builder throughout the Work.

**6.1.2** The Owner will timely review and approve the schedule of values so as not to delay the

submission of the Design-Builder's first application for payment. The Owner and Design-Builder shall timely resolve any differences so as not to delay the Design-Builder's submission of its first application for payment.

## **6.2 Monthly Progress Payments.**

**6.2.1** On or before the date established in the Agreement, Design-Builder shall submit for Owner's review and approval its Application for Payment requesting payment for all Work performed as of the date of the Application for Payment. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents, including but not limited to:

**6.2.1.1** Unconditional releases of lien in the statutory form for all subcontractors and suppliers, through the prior payment application; and if Design/Builder is unable to do so for any subcontractor or supplier, Design/Builder shall provide a written explanation of the reasons.

**6.2.1.2** Actual invoices for materials and equipment must be submitted with the Application for Payment (for cost reimbursable contracts).

- i. Unless otherwise provided in the Contract Documents, up to one hundred percent (100%) of the invoiced amount may be paid on account of materials delivered and suitably stored at the Project Site for subsequent incorporation in the Work.
- ii. Unless otherwise provided in the Contract Documents, one hundred percent (100%) of the invoiced amount may be paid on account of engineered or process related equipment or electrical equipment delivered and suitably stored at the Project Site for subsequent incorporation in the Work, not to exceed eighty percent (80%) of the total value of the equipment being invoiced for. The remaining twenty percent (20%) will be paid once the equipment is incorporated into the work.
- iii. Payment will not be made for any materials or equipment unless each individual piece of the material or equipment becomes a permanent part of the Work or the material or equipment is required by the Contract Documents and is specifically manufactured for the Project and could not be readily utilized or diverted to another job. Actual invoices for materials and equipment must be submitted with the Application for Payment.

**6.2.2** Owner may withhold a payment in whole or in part to the extent reasonably necessary to protect Owner due to Owner's determination that the Work has not progressed to the point indicated in the Application for Payment or that the quality of work is not in accordance with the Contract Documents. Owner may also withhold a payment because of subsequently discovered evidence which may nullify the whole or a part of an Application for Payment previously issued to such extent as may be necessary to protect Owner from loss for which the Design-Builder is responsible.

**6.2.3** The Design-Builder's Fee shall be included in each Application for Payment in an amount equal to the percentage, as proposed by the Design-Builder and included in the Contract, of the sum of the Cost of the Work including the General Conditions Costs submitted in the Application for Payment not to exceed the value allowed by the GMP revisions/change orders.

**6.2.4** Reimbursable Cost of Work to be compensated for under a Cost Reimbursable basis method shall be priced and supported in the Application for Payment as outlined in the Cost of Work provisions of the Progressive Design-Build Agreement (DBIA Document No. 545). Cost of Work will be paid subject to Owner approval of acceptable backup for costs incurred, which shall include, but not be limited to timesheets, certified labor reports, materials and equipment receipts, and service receipts. Time and Material work shall be priced in the same manner as Reimbursable Cost

of Work.

**6.2.5** Where a lump sum price is agreed upon in writing, a cost breakdown of the Contract Lump Sum Value shall be submitted to the Owner for review and approval within thirty (30) Days after the Notice to Proceed. The approved cost breakdown schedule (Schedule of Values) will be the basis for determining the value of the monthly progress payment. The total value of all construction activities (including mobilization and demobilization) shall equal the total construction Contract Lump Sum Value.

**6.2.6** Where Allowances have been used, the Design-Builder may be paid for Allowance items on the either a cost reimbursable or lump sum basis. The Design-Builders mark-up shall be all-inclusive of supervision and coordination and no additional compensation shall be allowed. An Allowance shall not be considered a change for the purposes of granting time extensions. Unused portions of a stipulated Allowance will not be paid to the Design-Builder and shall be deducted from the contract value at the completion of the Project via a deductive GMP change order.

**6.2.7** Upon prior written approval from the Owner, the Application for Payment may request payment for equipment and materials not yet incorporated into the Project, provided that (i) Owner is satisfied that the equipment and materials are suitably stored at either the Site or another acceptable location, (ii) the equipment and materials are protected by suitable insurance and (iii) upon payment, Owner will receive the equipment and materials free and clear of all liens and encumbrances.

**6.2.8** The Application for Payment shall constitute Design-Builder's representation that the Work described herein has been performed consistent with the Contract Documents, has progressed to the point indicated in the Application for Payment, and that title to all Work will pass to Owner free and clear of all claims, liens, encumbrances, and security interests upon the incorporation of the Work into the Project, or upon Design-Builder's receipt of payment, whichever occurs earlier.

### **6.3 Withholding of Payments.**

**6.3.1** On or before the date established in the Agreement, subject to the Retention provisions, Owner shall pay Design-Builder all amounts properly due. If Owner determines that Design-Builder is not entitled to all or part of an Application for Payment as a result of Design-Builder's failure to meet its obligations hereunder, it will notify Design-Builder in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Owner intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Owner's concerns. Design-Builder and Owner will attempt to resolve Owner's concerns prior to the date payment is due.

**6.3.2** Notwithstanding anything to the contrary in the Contract Documents, Owner shall pay Design-Builder all undisputed amounts in an Application for Payment within the times required by the Agreement. At all times, the Owner may withhold up to 150% of the value of any disputed, incomplete, and/or defective Work required by the Contract Documents in accordance with applicable law.

### **6.4 Design-Builder's Payment Obligations.**

**6.4.1** Design-Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Builder has received from Owner on account of their work. Design-Builder will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted. Design-Builder will indemnify and defend Owner against any claims for payment, stop payment notices, and mechanic's liens as set forth in Section 7.3 hereof.

### **6.5 Substantial Completion.**

**6.5.1** Design-Builder shall notify Owner when it believes the Work, or to the extent permitted in the Contract Documents, a portion of the Work, is Substantially Complete. Within five (5) days of Owner's receipt of Design-Builder's notice, Owner and Design-Builder will jointly inspect such Work

to verify that it is Substantially Complete in accordance with the requirements of the Contract Documents. If such Work is Substantially Complete, Owner shall prepare and issue a Certificate of Substantial Completion that will set forth (i) the date of Substantial Completion of the Work or portion thereof, (ii) the remaining items of Work that have to be completed before final payment, (iii) provisions (to the extent not already provided in the Contract Documents) establishing Owner's and Design-Builder's responsibility for the Project's security, maintenance, utilities and insurance pending final payment, and (iv) an acknowledgment that warranties commence to run on the date of Substantial Completion, except as may otherwise be noted in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall not relieve the Design-Builder of the responsibility to complete all work in accordance with the Contract Documents. Failure to include any items on the punch list shall not alter the responsibility of the Design-Builder to complete all work in accordance with the Contract Documents.

**6.5.2** Substantial Completion occurs when all of the following conditions have been met:

**6.5.2.1** The Design-Builder has submitted and Owner has approved in writing, such approval not to be unreasonably withheld, a certification by the Design-Builder and the lead Design Firm that construction of the Project, excepting the items on the Final Punch List, is complete and in all respects is in compliance with this Agreement.

**6.5.2.2** A preliminary or temporary certificate of occupancy has been issued for the Project, where required by applicable law.

**6.5.2.3** The Design-Builder has delivered to Owner a red-lined set of "as-built" construction record drawings as required by the Contract Documents.

**6.5.2.4** All Utilities specified or required under this Agreement to be arranged for by the Design-Builder are connected and functioning properly.

**6.5.2.5** The Design-Builder and Owner have agreed in writing upon the Final Punch List (or, if they are unable to agree, Owner shall have prepared and issued the Final Punch List to the Design-Builder within 15 business days of the Design-Builder having submitted its proposed Final Punch List to Owner).

**6.5.2.6** The Design-Builder has delivered to Owner written certification from the equipment manufacturers (including information technology systems and instrumentation and controls) that all major items of machinery and equipment included in the Project have been properly installed, performance tested, and commissioned in accordance with the manufacturers' recommendations, warranties, and requirements.

**6.5.2.7** The Design-Builder has submitted written certification that all of the foregoing conditions have been satisfied and Owner has approved the Design-Builder's certification, which approval shall be effective as of the date of the Design-Builder's certification.

**6.5.3** Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work, Owner may at its sole discretion per DBIA Agreement No. 545, Section 8.3 release to Design-Builder portions of the retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion.

**6.5.4** Owner, at its option, may use a portion of the Work which has been determined to be Substantially Complete, provided, however, that (i) a Certificate of Substantial Completion has been issued for the portion of Work addressing the items set forth in Section 6.5.1 above, (ii) Design-Builder and Owner have obtained the consent of their sureties and insurers, and to the extent applicable, the appropriate government authorities having jurisdiction over the Project, and (iii) Owner and Design-Builder agree that Owner's use or occupancy will not interfere with Design-Builder's completion of the remaining Work.

## **6.6 Final Completion and Final Payment.**

**6.6.1** When the Design-Builder considers that the Work is complete and ready for final inspection, it shall submit a Notice of Final Completion to Owner for inspection with certification that:

**6.6.1.1** Work has been completed in accordance with Contract Documents and Certificate of Occupancy issued.

**6.6.1.2** Work has been inspected by the Design-Builder for compliance with Contract Documents and all Punch List work has been completed.

**6.6.1.3** All damaged or destroyed real, personal, public or private property has been repaired or replaced.

**6.6.1.4** All required as-builts and close out documents have been submitted and accepted.

**6.6.1.5** All operation and maintenance manuals and warranties have been submitted and accepted and all training and commissioning has been completed.

**6.6.1.6** Work is ready for final inspection by Owner.

**6.6.2** Owner will inspect to verify the status of completion with reasonable promptness after receipt of such certifications. The inspection of the Work will be done in accordance with the Contract provisions.

**6.6.3** If Owner finds incomplete or defective work:

**6.6.3.1** Owner may, at Owner's sole discretion, either terminate the inspection or prepare a punch list and notify the Design-Builder in writing, listing incomplete or defective work.

**6.6.3.2** The Design-Builder shall take immediate steps to remedy stated deficiencies. Upon completion and correction of all stated deficiencies, the Design-Builder shall send a second written certification to Owner that work is complete.

**6.6.3.3** Owner will then re-inspect the Work.

**6.6.3.4** Owner may, at Owner's sole discretion, have a separate contractor make corrections and deduct the cost of the corrections from the Design-Builder's final payment if the work is not promptly corrected.

**6.6.4** Final Acceptance

**6.6.4.1** Within 120 days after Substantial Completion, and after Owner has made the final inspection and is satisfied that the Work has been completed in accordance with the Agreement, and is satisfied that all submittals have been made and accepted, all as-builts and record documents have been completed and accepted, all Change Orders executed, all final quantities agreed to, and all other Contract Requirements, except for possible future warranty and guarantee work have been accomplished, Owner shall issue a document evidencing Final Acceptance.

**6.6.4.2** If Owner finds the Work to be complete, Owner will issue a Letter of Final Acceptance to the Design-Builder.

**6.6.4.3** The Work shall be under the charge and care of the Design-Builder until Owner issues the Letter of Final Acceptance unless otherwise approved by Owner. The Design-Builder shall take every precaution against injury or damage to the Work from the action of the elements or any other cause, whether arising from the execution or non-execution of the Work. The Design-Builder shall rebuild, repair, restore, and make good, at the Design-Builder's expense, all injuries or damage to the Work occurring before acceptance of the

Work.

**6.6.5** Upon issuance of a Letter of Final Acceptance, the Design-Builder shall submit a Final Application for Payment, and Owner shall make final payment by the time required in the Agreement, provided that Design-Builder has achieved Final Completion.

**6.6.6** At the time of submission of its Final Application for Payment, Design-Builder shall provide the following information:

**6.6.6.1** An affidavit that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, material, equipment, taxes or other items performed, furnished or incurred for or in connection with the Work which will in any way affect Owner's interests;

**6.6.6.2** A general release executed by Design-Builder waiving, upon receipt of final payment by Design-Builder, all claims, except those claims previously made in writing to Owner and remaining unsettled at the time of final payment;

**6.6.6.3** Consent of Design-Builder's surety, if any, to final payment;

**6.6.6.4** All operating manuals, warranties and other deliverables required by the Contract Documents; and

**6.6.6.5** Certificates of insurance confirming that required coverage's will remain in effect consistent with the requirements of the Contract Documents.

**6.6.7** Upon making final payment, Owner waives all claims against Design-Builder except claims relating to (i) Design-Builder's failure to satisfy its payment obligations, if such failure affects Owner's interests, (ii) Design-Builder's failure to complete the Work consistent with the Contract Documents, including defects appearing after Substantial Completion and (iii) the terms of any special warranties required by the Contract Documents. After the date of Final Acceptance of the Work by Owner, no additional Claims or Change Requests may be submitted by Design-Builder.

**6.6.8** Deficiencies in the Work discovered after Substantial Completion, whether or not such deficiencies would have been included on the Punch List if discovered earlier, shall be deemed warranty Work. Such deficiencies shall be corrected by Design-Builder under Sections 2.10 and 2.11 herein, and shall not be a reason to withhold final payment from Design-Builder, provided, however, that Owner shall be entitled to withhold from the Final Payment the reasonable value of completion of such deficient work until such work is completed.

## **Article 7**

### **Indemnification**

#### **7.1 Patent and Copyright Infringement.**

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

**7.1.2** If Owner is enjoined from the operation or use of the Work, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding, Design-Builder shall at its sole expense take

reasonable steps to procure the right to operate or use the Work. If Design-Builder cannot so procure such right within a reasonable time, Design-Builder shall promptly, at Design-Builder's option and at Design-Builder's expense, (i) modify the Work so as to avoid infringement of any such patent or copyright or (ii) replace said Work with Work that does not infringe or violate any such patent or copyright.

**7.1.3** Sections 7.1.1 and 7.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by Owner and not offered or recommended by Design-Builder to Owner or (ii) arising from modifications to the Work by Owner or its agents after acceptance of the Work. If the suit, claim or proceeding is based upon events set forth in the preceding sentence, Owner shall defend, indemnify and hold harmless Design-Builder to the same extent Design-Builder is obligated to defend, indemnify and hold harmless Owner in Section 7.1.1 above.

**7.1.4** The obligations set forth in this Section 7.1 shall constitute the sole agreement between the parties relating to liability for infringement of violation of any patent or copyright.

## **7.2 Tax Claim Indemnification.**

**7.2.1** If, in accordance with Owner's direction, an exemption for all or part of the Work is claimed for taxes, Owner shall indemnify, defend and hold harmless Design-Builder from and against any liability, penalty, interest, fine, tax assessment, attorneys' fees or other expenses or costs incurred by Design-Builder as a result of any action taken by Design-Builder in accordance with Owner's directive. Owner shall furnish Design-Builder with any applicable tax exemption certificates necessary to obtain such exemption, upon which Design-Builder may rely.

## **7.3 Payment Claim Indemnification.**

**7.3.1** Provided that Owner is not in breach of its contractual obligation to make payments to Design-Builder for the Work, Design-Builder shall indemnify, defend and hold harmless Owner from any claims or mechanic's liens brought against Owner or against the Project as a result of the failure of Design-Builder, or those for whose acts it is responsible, to pay for any services, materials, labor, equipment, taxes or other items or obligations furnished or incurred for or in connection with the Work. Within three (3) days of receiving written notice from Owner that such a claim or mechanic's lien has been filed, Design-Builder shall commence to take the steps necessary to discharge said claim or lien, including, if necessary, the furnishing of a mechanic's lien bond. If Design-Builder fails to do so, Owner will have the right to discharge the claim or lien and hold Design-Builder liable for costs and expenses incurred, including attorneys' fees.

## **7.4 Design-Builder's General Indemnification.**

**7.4.1** To the fullest extent permitted by law, Design-Builder shall defend, indemnify and hold harmless Owner and any and all of Owner's Council, Boards, officers, agents, employees, assigns and successors in interest from and against any and all third party suits, claims, causes of action, liability, losses, damages, demands or expenses (including, but not limited to, attorney's fees and costs of litigation) (collectively, "Loss") by reason of injury to, or death of, any person(s) (including Design-Builder and/or Design-Builder's agents or employees), or for damage to, or destruction of, any tangible property (including property of Design-Builder and/or Design-Builder's agents or employees), relating to the Design-Builder's and/or subcontractor's performance of the Work on the Project; Provided, however, that where such suits, claims, causes of action, liability, losses, damages, demands or expenses arise from or relate to Design-Builder's performance of a "Construction Contract" as defined by California Civil Code section 2783, this paragraph shall not be construed to require Design-Builder to indemnify or hold Owner harmless to the extent such suits, causes of action, claims, losses, demands and expenses are caused by the Owner's negligence or willful misconduct; Provided further that where such suits, claims, causes of action, liability, losses, damages, demands or expenses arise from Design-Builder's design professional services as defined by California Civil Code section 2782.8, Design-Builder's indemnity obligations shall be subject to the limitations on indemnity as set forth in said Section 2782.8.

**7.4.2** If an employee of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable has a claim against Owner, its officers, directors, employees, or agents, Design-Builder's indemnity obligation set forth in Section 7.4.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.

**7.4.3** Design-Builder's obligation to defend the Owner and the other referenced indemnitees arises at the time such Loss is tendered to Design-Builder by the Owner and continues at all times until finally resolved, and/or decided by an adjudicatory body or a court of competent jurisdiction.

## **7.5 Owner's General Indemnification.**

**7.5.1** Owner, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Design-Builder and any of Design-Builder's officers, directors, and employees, from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for bodily injury, or death, and property damage or destruction (other than to the Work itself) to the extent resulting from the negligent acts or omissions of Owner, or Owner's employees or agents and for whose acts Owner may be liable.

## **7.6 Survival of Indemnities.**

**7.6.1** The provisions of this Article 7 shall remain operative following a termination of all other performance under this Agreement unless specifically extinguished in a writing signed as approved by the Design-Builder, the Owner and its City Attorney.

# **Article 8**

## **Time**

### **8.1 Obligation to Achieve the Contract Times.**

**8.1.1** Design-Builder agrees that it will commence performance of the Work and achieve the Contract Time(s) in accordance with Article 6 of the Agreement.

**8.1.2** The Design-Builder shall be permitted reasonable, uninterrupted access to the Project Site subject to the operational protocols in place and as revised from time to time. The Design-Builder shall cooperate with Owner to reasonably accommodate Owner's other work on the Project Site. Design-Builder shall actively schedule plan and coordinate the sequence of the Work and shall not delegate such responsibility for coordination to subcontractors but rather shall actively and proactively schedule and lead subcontractor coordination.

**8.1.3** The Design-Builder shall diligently prosecute the Work to completion utilizing the Standard of Care defined in Section 2.1.7 of the DBIA Document 545. If Owner determines that the Design-Builder is failing to prosecute the Work in accordance with its approved schedule or the Project milestones, the Design-Builder shall, upon orders from Owner, immediately take steps to remedy the situation.

**8.1.4** The Design-Builder shall give Owner full information in advance as to its plans for performing each part of its work. If at any time, Design-Builder's actual progress is inadequate to meet the requirements of this Agreement, Owner may so notify Design-Builder who shall thereupon take such steps as may be necessary to improve its progress. A Recovery Schedule is required along with the submission of a monthly Progress Schedule Update if the monthly Progress Schedule Update shows a delay of more than two (2) weeks to the Contract Milestones. If within a reasonable period as determined by Owner, the Design-Builder does not improve performance to meet the currently approved Construction Schedule; Owner may require an increase in the Design-



Builder's labor force, the number of shifts, overtime operations, and additional days of work per week, all without additional cost to Owner. Neither such notice by Owner nor Owner's failure to issue such notice shall relieve Design-Builder of its obligation to achieve the quality of work and rate of progress required by this Agreement.

## **8.2 Delays to the Work.**

**8.2.1** If Design-Builder is delayed in the performance of the Work due to acts, omissions, conditions, events, or circumstances beyond its control and due to no fault of its own or those for whom Design-Builder is responsible, subject to compliance with Section 2.12, the Contract Time(s) for performance may be reasonably extended by Change Order. An excusable delay is a delay to the critical path of the Project and meets all of the following requirements:

**8.2.1.1** It was not the responsibility of the Design-Builder under the Contract Documents and was beyond the control of Design-Builder;

**8.2.1.2** It could not have been foreseen or avoided by Design-Builder;

**8.2.1.3** It could not have been mitigated by Design-Builder;

**8.2.1.4** It was not caused in whole or in part by Design-Builder, its subcontractors or agents;

**8.2.1.5** Design-Builder has provided prompt written notice to Owner of the delay act or event and thereafter satisfies all requirements in the Contract Documents for making a request for extension to the Project Schedules and Contract milestones.

**8.2.2** In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 above, Design-Builder may be entitled to an appropriate adjustment of the Contract Price. A delay which is excusable must also meet the requirements for a compensable delay in order to be compensable. A Force Majeure delay is an excusable non-compensable delay. A compensable delay must be excusable and meet all of the following requirements:

**8.2.2.1** The costs of delay requested could not be reasonably mitigated;

**8.2.2.2** It was a result of a change directed by Owner, a breach of the Agreement by Owner or resulting from the negligence of Owner;

**8.2.2.3** The Contract Documents do not preclude the claim for compensation;

**8.2.2.4** Design-Builder has satisfied all requirements in the Contract Documents for making a claim for compensation pursuant to a compensable delay in a timely manner.

**8.2.3** If the Contractor Change Request is based in whole or in part on a delay of any kind or nature, the complete itemized proposal shall include the following information in addition to all other required information:

**8.2.3.1** The date, nature and circumstances of each event regarded as a cause of the delay;

**8.2.3.2** If the Design-Builder claims acceleration costs of scheduled performance or delivery, the basis upon which acceleration arose;

**8.2.3.3** The identification of any documents and the substance of any oral communication known to the Design-Builder which substantiate, refute or concern such delay;

**8.2.3.4** A Critical Path Method (CPM) schedule, including design, construction and commissioning corrected to reflect actual performance, showing delay impacts as separate tasks and Design-Builder's mitigation of such impacts; and

**8.2.3.5** The specific elements of Contract performance for which the Design-Builder may seek an equitable adjustment, including:

- i. Identification of each Contract or schedule line item which has been or may be affected by such delay;
- ii. To the extent practicable, identification of the delay and disruption in the manner and sequence of performance, and the effect on continued performance, which have been or may be caused by such delay;
- iii. Identification of labor, materials, or both, or other cost items including overhead and subcontractor costs, which have been or may be added, deleted or wasted by such delay, and a statement that the Design- Builder is maintaining records by some generally accepted accounting procedure which allows the separately identifiable direct costs due to the delay, and those not incurred as a result of the delay, to be readily identified and segregated; and
- iv. Estimates of the necessary adjustments to Contract Amount, Contract Time and any other Contract provisions affected by the delay.

**8.2.4** Claims for a compensable delay shall not be allowed for any costs incurred if the Design-Builder fails to notify Owner in writing within seven (7) calendar days of the act or event causing the delay. The Design-Builder will have the burden of proving that the delay is both an excusable delay and a compensable delay. If an excusable delay is found to be a compensable delay, Owner will by Change Order extend the Work Completion Time for the increase in the time of performance and will adjust the total Contract Price. The Change Order will be the Design-Builder's sole remedy arising out of the compensable delay. Pursuant to California Civil Code section 1511, the Parties agree that any failure to submit a timely and properly documented notice of excusable or compensable delay shall constitute a waiver by Design-Builder of any claim for additional compensation, time or impact costs from Owner.

### **8.3 Reverse Liquidated Damages Due to Unreasonable City Delay.**

**8.3.1** In compliance with the provisions of California Public Contract Code section 7102, the Design-Build Entity will be compensated for damages incurred due to delays in completing the Work due solely to the fault of the City, where such delay is unreasonable under the circumstances and not contemplated by the parties and such delay is not the result of Additional Work. The Design-Build Entity and City agree that determining actual damages is impracticable and extremely difficult. As such, the Design-Build Entity shall be entitled to the appropriate time extension and to payment of liquidated damages in the final daily **value to be established in Phase 2 Amendment** per Day of delay in excess of the time specified for the Completion of the Work. Such amount shall constitute the only payment allowed and shall necessarily include all overhead (direct or indirect), all profit, all administrative costs, all bond costs, all labor, materials, equipment and rental costs, and any other costs, expenses and fees incurred or sustained as a result of such delay. The Design-Build Entity expressly agrees to be limited solely to the liquidated damages for all such delays as defined in this subsection.

### **8.4 Liquidated Damages Due to Design-Build Entity Delay.**

**8.4.1** Time is of the essence. Should Design-Build Entity fail to complete all or any part of the Work within the time specified in the Contract Documents, City will suffer damage, the amount of which is difficult, if not impossible, to ascertain and, pursuant to the authority of Government Code section 53069.85, City shall therefore be entitled to **the final daily value to be established in Phase 2 Amendment** per Day as liquidated damages for each Day or part thereof that actual completion extends beyond the time specified. Liquidated damages may be deducted from progress payments due Design-Build Entity, Project retention or may be collected directly from Design-Build Entity, or from Design-Build Entity's surety. These provisions for liquidated damages

shall not prevent City, in case of Design-Build Entity's default, from terminating the Design-Build Entity.

## **8.5 Force Majeure**

**8.5.1** The term "Force Majeure" as employed herein shall mean an excusable, non-compensable delay, to the extent that the event(s) delays the progress of critical path activities, are beyond the Design-Builder's control, were not foreseeable by Design- Builder and could not be reasonably mitigated by Design-Builder, such as but not limited to: acts of God (except as excluded herein), strikes (except those determined by Owner to be within the control of the Design-Builder), lockouts, or other industrial disturbances, acts of public enemies, terrorist acts, wars, blockades, insurrections, riots, epidemics, pandemics, earthquakes, hurricanes, tornadoes, orders by any court, board, department, commission or city or county of the United States or of any State, civil disturbances, explosions, rain or other adverse weather conditions, including fire (except fire which was the responsibility of the Design-Builder).

**8.5.2** Should either party be rendered unable, either wholly or in part, by an event of Force Majeure to fulfill its obligations as originally defined under the Contract, the obligation(s) affected by such event of Force Majeure shall be evaluated only during the continuance of the Force Majeure event. Suspension of Work is not required for a Force Majeure event. The party so affected shall give notice of the existence, extent and nature of such Force Majeure in writing to the other party within forty-eight (48) hours after the commencement of the Force Majeure event. The party so affected shall remedy such inability with all reasonable dispatch and shall use due diligence in this regard. Failure to give such notice shall result in the continuance of such party's obligation regardless of the extent of any existing Force Majeure event. Pursuant to California Civil Code section 1511, the Parties agree that any failure to submit a timely and properly documented notice and description of a Force Majeure event shall constitute a waiver by Design-Builder of any claim for additional compensation, time or impact costs from Owner.

**8.5.3** Nothing within this Article shall restrict the Owner's rights to pursue a termination or suspension pursuant to the Contract Documents.

## **Article 9**

### **Changes to the Contract Price and Time**

#### **9.1 Change Orders.**

**9.1.1** A Change Order is a written instrument issued after execution of the Agreement signed by Owner and Design-Builder, stating their agreement upon all of the following:

**9.1.1.1** The scope of the change in the Work;

**9.1.1.2** The amount of the adjustment to the Contract Price; and

**9.1.1.3** The extent of the adjustment to the Contract Time(s).

**9.1.2** All changes in the Work authorized by applicable Change Order shall be performed under the applicable conditions of the Contract Documents. Owner and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes.

**9.1.3** The Contract Pricing and Work Completion Time may only be changed by executed Change Order. Change Orders are bilateral signed by the Design-Builder and by Owner. Owner may also issue unilateral Change Orders, should there be an impasse on executing a bilateral agreement or time does not permit further negotiations.

**9.1.4** No extra work or change in the Contract Documents shall be made unless by a written

Change Order approved by Owner. No claim for any change to the Contract Pricing or Work Completion Time shall be valid unless so ordered. A Change Order signed by the Design-Builder conclusively establishes the Design-Builder's agreement therewith, including the adjustment in the Contract Pricing and the Work Completion Time. Owner reserves the right to contract with any person or firm other than the Design-Builder for any or all changed work.

**9.1.5** Unilateral Change Order. In case of failure on the part of Owner and the Design-Builder to arrive at an agreement on the amount of a credit or an extra cost for a proposed change to the Contract Documents, a unilateral Change Order will be processed in the amount believed by Owner to be reasonable and the Design-Builder shall proceed with the Work. If the Design-Builder believes that the amount set forth in the unilateral Change Order is not a reasonable payment for the Work required the Design-Builder may file a Claim and request for review in accordance with Article 10.

**9.1.6** No oral statement of any person including the Design-Builder's personnel shall in any manner or degree, modify or otherwise affect the terms of this Contract.

## **9.2 Work Change Directives.**

**9.2.1** A Work Change Directive is a written order prepared and signed by Owner directing a change in the Work prior to agreement on an adjustment in the Contract Price and/or the Contract Time(s).

**9.2.2** Owner and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for the Work Change Directive. Upon reaching an agreement, the parties shall prepare and execute an appropriate Change Order reflecting the terms of the agreement.

## **9.3 Minor Changes in the Work.**

**9.3.1** Minor changes in the Work do not involve an adjustment in the Contract Price and/or Contract Time(s) and do not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents. Design-Builder may make minor changes in the Work consistent with the intent of the Contract Documents, provided, however, that Design-Builder shall promptly inform Owner, in writing, of any such changes and record such changes on the documents maintained by Design-Builder.

## **9.4 Contract Price Adjustments.**

**9.4.1** The increase or decrease in Contract Price resulting from a change in the Work shall be determined by one or more of the following methods:

**9.4.1.1** Unit prices set forth in the Agreement or as subsequently agreed to between the parties;

**9.4.1.2** A mutually accepted lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Owner;

**9.4.1.3** Costs, fees and any other markups set forth in the Agreement; or

**9.4.1.4** If an increase or decrease cannot be agreed to as set forth in items 9.4.1.1 through 9.4.1.3 above and Owner issues a Work Change Directive, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit, as may be set forth in the Agreement.

**9.4.2** If unit prices are set forth in the Contract Documents or are subsequently agreed to by the parties, but application of such unit prices will cause substantial inequity to Owner or Design-Builder because of differences in the character or quantity of such unit items as originally contemplated, such unit prices shall be equitably adjusted.

**9.4.3** If Owner and Design-Builder disagree upon whether Design-Builder is entitled to be paid for any services required by Owner, or if there are any other disagreements over the scope of Work or proposed changes to the Work, Owner and Design-Builder shall resolve the disagreement pursuant to Article 10 hereof. As part of the negotiation process, Design-Builder shall furnish Owner with a good faith estimate of the costs to perform the disputed services in accordance with Owner's interpretations. If the parties are unable to agree and Owner expects Design-Builder to perform the services in accordance with Owner's interpretations, Design-Builder shall proceed to perform the disputed services, conditioned upon Owner issuing a written order to Design-Builder (i) directing Design-Builder to proceed; and (ii) specifying Owner's interpretation of the services that are to be performed. If this occurs, Design-Builder shall be entitled to submit in its Applications for Payment an amount equal to fifty percent (50%) of its reasonable estimated direct cost to perform the services, and Owner agrees to pay such amounts, with the express understanding that (i) such payment by Owner does not prejudice Owner's right to argue that it has no responsibility to pay for such services; and (ii) receipt of such payment by Design-Builder does not prejudice Design-Builder's right to seek full payment of the disputed services if Owner's order is deemed to be a change to the Work.

## **9.5 Emergencies.**

**9.5.1** In any emergency affecting the safety of persons and/or property, Design-Builder shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or Contract Time(s) on account of emergency work shall be determined as provided in this Article 9.

# **Article 10**

## **Contract Adjustments and Disputes**

### **10.1 Requests for Contract Adjustments and Relief.**

**10.1.1** Claims. For purposes of this Article, "Claim" means a separate demand by the Design-Builder for one of more of the following: (A) a time extension, (B) payment of money or damages arising from Work done by or on behalf of the Design-Builder pursuant to the Contract, or (C) an amount the payment of which is disputed by the City. In accordance with California Public Contract Code Section 20104.2 and Public Contract Code Section 9204, presuming Design-Builder has diligently pursued and exhausted the administrative procedures of the Contract, the procedures in this Article apply to claims between the Design-Builder and the City.

**10.1.2** If the Design-Builder believes that it is entitled to relief against the Owner for any event arising out of or related to the Work or Project, Design-Builder shall provide written notice to the Owner of the basis for its claim for relief, as provided for in Articles 8 and 9. In the event that the Design-Builder does not accept the Owner's decision on a Change Order Request, the Design-Builder must within 30 calendar days of a written rejection submit in writing and in electronic form to the Owner with all documentation which it believes relate to the issues it is raising ("Dispute Submittal"). All disputes and negotiations shall be documented by each Party in writing in accordance with the Agreement and shall state each claim specifically, show the calculation and basis for each claim for compensation and the schedule (including fragnet) analysis for each schedule demand. Any claim that lacks specific calculation or documentary support will not be considered, and will be a waiver of that claim so that no further administrative or judicial action may be taken. Pursuant to California Civil Code section 1511, the Parties agree that any failure to submit a timely and properly documented Contractor Change Request or Dispute Submittal shall constitute a waiver by Design-Builder of any claim for additional compensation, time or impact costs from Owner.

**10.1.3** Certification of Dispute Submittal. Any claim, including without limitation any claim filed on behalf of or having its source in a claim by subcontractor, sub-subcontractor, or supplier, at any tier, which the Design-

Builder chooses to make to Owner, shall be accompanied by the certification language set forth below signed by a responsible managing officer of the Design- Builder's organization, who has the authority to sign subcontracts or Purchase Orders on behalf of the Design-Builder, and who has personally investigated and confirmed the truth and accuracy of the matters set forth in such certification. Submission of certification in accordance herewith is a condition precedent to Owner's consideration of or decision on the claim and to the filing and maintenance of any legal action or proceeding to enforce or recover monies under such claim. Failure to submit such a certification along with the claim shall result in the claim being returned to the Design-Builder without any decision, and shall waive the Design-Builder's right to pursue the claim either on its own behalf or on behalf of such subcontractor or supplier.

**10.1.4** The certification shall state: ""I hereby certify under penalty of perjury that I am a managing officer of (Design-Builder's name) and that I have reviewed the Claim presented herewith on Design-Builder's behalf and/or on behalf of (subcontractor's/supplier's name(s)) and that the following statements are true and correct:

The facts alleged in or that form the basis for the Claim are true and accurate; and, Design-Builder does not know of any facts or circumstances, not alleged in the Claim, that by reason of their not being alleged render any fact or statement alleged in the Claim materially misleading; and,

Design-Builder has, with respect to any request for money or damages alleged in or that forms the basis for the Claim, reviewed the job cost records (including those maintained by Design-Builder and by any subcontractor or supplier, of any tier, that is asserting all or any portion of the Claim) and confirmed with mathematical certainty that the losses or damages suffered by Design-Builder and /or such subcontractor or supplier were in fact suffered in the amounts and for the reasons alleged in the Claim; and,

Design-Builder has, with respect to any request for extension of time or claim of delay, disruption, hindrance or interference alleged in or that forms the basis for the Claim, reviewed the job schedules(including those maintained by Design-Builder and by any subcontractor or supplier, of any tier, that is asserting all or any portion of the Claim) and confirmed on an event-by-event basis that the delays or disruption suffered by Design-Builder and /or such subcontractor or supplier were in fact experienced for the durations, in the manner, and with the consequent effects on the time and/or sequence of performance of the Work, as alleged in the Claim; and,

Design-Builder has not received payment from Owner for, nor has Design-Builder previously released Owner from any portion of the Claim."

Design-Builder Signature Line \_\_\_\_\_

**10.1.5** City's Response. Upon receipt of a claim pursuant to this Article, the City shall conduct a reasonable review of the claim and provide a written response to the Design-Builder within 45 days of the date of the claim, identifying the portion of the claim that is disputed and the portion that is undisputed. Upon receipt of a claim, the City and the Design-Builder may, by mutual agreement, extend the time period provided in this subdivision.

**10.1.5.1** All amounts that the City identifies in its response as undisputed must be processed and paid within 60 days of the City's response. Pursuant to Public Contract Code section 9204(d)(4), if the City fails to pay within 60 days, undisputed amounts not paid will bear interest at 7 percent per annum.

**10.1.5.2** If the City needs approval from its governing body to provide the Design-Builder a written statement identifying the disputed portion and the undisputed portion of the claim, and the City's governing body does not meet within the 45 days or within the mutually agreed to extension of time following receipt of a claim sent by registered mail or certified mail, return receipt requested, the City shall have up to (3) three days following the next duly publicly noticed meeting of the City's governing body after the 45-day period, or extension, expires to provide the Design-Builder a written statement identifying the

disputed portion and the undisputed portion.

**10.1.6 Meet and Confer.** If the Design-Builder disputes the City's written response, or the City fails to respond within the time prescribed, the Design-Builder may so notify the City, in writing, either within 15 days of receipt of the City's response or within 15 days of the City's failure to respond within the time prescribed, respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. Upon receipt of a demand, the City shall schedule a meet and confer conference within 30 days for settlement of the dispute.

**10.1.7 Mediation.** Within 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 City 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 60 days after the City issues its written statement. If the City fails to pay within 60 days, undisputed amounts not paid will bear interest at 7 percent per annum. Any disputed portion of the claim, as identified by the Design-Builder in writing, shall be submitted to nonbinding mediation, with the City and the Design-Builder sharing the associated costs equally. The City and Design-Builder shall mutually agree to a mediator within 10 business days after the disputed portion of the claim has been identified in writing, unless the parties agree to select a mediator at a later time.

**10.1.7.1** If the parties cannot agree upon a mediator, each party shall select a mediator and those mediators shall select a qualified neutral third party to mediate with regard to the disputed portion of the claim. Each party shall bear the fees and costs charged by its respective mediator in connection with the selection of the neutral mediator.

**10.1.7.2** For purposes of this section, mediation includes any nonbinding process, including, but not limited to, neutral evaluation or a dispute review board, in which an independent third party or board assists the parties in dispute resolution through negotiation or by issuance of an evaluation. Any mediation utilized shall conform to the timeframes in this section.

**10.1.7.3** Unless otherwise agreed to by the City and the Design-Builder in writing, the mediation conducted pursuant to this section shall excuse any further obligation under Public Contract Code Section 20104.4 to mediate after litigation has been commenced.

**10.1.7.4** This section does not preclude the City from requiring arbitration of disputes under private arbitration or the Public Works Contract Arbitration Program, if mediation under this section does not resolve the parties' dispute.

**10.1.7.5** The mediation shall be held no earlier than the date the Design-Builder completes the Work or the date that the Design-Builder last performs Work, whichever is earlier. All unresolved claims shall be considered jointly in a single mediation, unless a new unrelated claim arises after mediation is complete.

**10.1.8 Arbitration.** Upon receipt of a claim, the City and the Design-Builder may mutually agree to waive, in writing, mediation and proceed directly to the commencement of a civil action or binding arbitration.

## **10.2 Legal Proceedings**

**10.2.1 Civil Actions.** Procedures for civil actions to resolve claims of \$375,000 or less between the City and the Design-Builder are governed pursuant to Public Contract Code Section 20104.4.

**10.2.2 Government Code Claims.** In addition to any and all contract requirements pertaining to notices of and requests for compensation or payment for extra Work, disputed Work, construction claims and/or changed conditions, the Design-Builder must comply with the claim procedures set forth in Government Code Sections 900, et seq. prior to filing any lawsuit against the City. Such Government Code claims and any subsequent lawsuit based upon the Government Code claims

shall be limited to those matters that remain unresolved after all procedures pertaining to the extra Work, disputed Work, construction claims, and/or changed conditions have been followed by the Design-Builder. If no such Government Code claim is submitted, or if the prerequisite contractual requirements are not satisfied, no action against the City may be filed. A Government Code claim must be filed no earlier than the date the Work is completed or the date the Design-Builder last performs Work on the Project, whichever occurs first. A Government Code claim shall be inclusive of all unresolved claims unless a new unrelated claim arises after the Government Code claim is submitted.

**10.2.3 Non-Waiver.** The City's failure to respond to a claim from the Design-Builder within the time periods described in this Article or to otherwise meet the time requirements of this Article shall result in the claim being deemed rejected in its entirety. A claim that is denied by reason of the City's failure to have responded to a claim, or its failure to otherwise meet the time requirements of this section, shall not constitute an adverse finding with regard to the merits of the claim or the responsibility or qualifications of the Design-Builder.

**10.2.4 Forum for Dispute Resolution.** It is the express intention of the parties that all legal proceedings related to this Agreement or to the Project or to any rights or any relationship between the parties arising therefrom shall be solely and exclusively initiated and maintained in Contra Costa County Superior Court. The Design-Builder and Owner each irrevocably consents to the jurisdiction of such courts in any such legal proceeding and waives any objection it may have to the laying of the jurisdiction of any such legal proceeding.

**10.2.5** The prevailing party in any legal action or proceeding, or any other final, binding dispute proceeding upon which the parties may agree, shall be entitled to recover from the other party reasonable attorneys' fees and expenses incurred by the prevailing party.

### **10.3 Duty to Continue Performance.**

**10.3.1** Unless provided to the contrary in the Contract Documents, Design-Builder shall continue to perform the Work and Owner shall continue to satisfy its payment obligations to Design-Builder, pending the final resolution of any dispute or disagreement between Design-Builder and Owner.

## **Article 11**

### **Suspension and Termination for Cause**

#### **11.1 Owner's Right to Suspend Work.**

**11.1.1** Owner may suspend all or any part of the Work by written order signed by Owner ("Suspension Order"), without invalidating the Agreement, for such period or periods as it may deem necessary due to:

**11.1.1.1** Any reason for the convenience of the Owner, with or without cause;

**11.1.1.2** An order from a state or federal court or a government administrative agency; or

**11.1.1.3** The Design-Builder's failure to perform any provision of the Contract Documents.

**11.1.2** Upon receipt from Owner of a Suspension Order, the Design-Builder shall, unless the notice requires otherwise:

**11.1.2.1** Immediately discontinue work on the date and to the extent specified in the notice;

**11.1.2.2** Place no further orders or subcontracts for material, services, or facilities with respect to suspended work other than to the extent required in the notice;,,



**11.1.2.3** Promptly make every reasonable effort to obtain suspension in terms satisfactory to Owner of all orders, subcontracts and rental agreements to the extent they relate to performance of suspended work;

**11.1.2.4** Continue to protect and maintain the Work including those portions on which work has been suspended; if the Design-Builder fails to properly provide for public safety, traffic, and protection of the Work during periods of suspension, Owner may elect to do so and back charge or deduct the cost thereof from monies due the Design-Builder. Such actions will not relieve the Design-Builder from liability.

**11.1.2.5** Within three (3) days of the receipt of the Suspension Order, submit a suspension plan to Owner for acceptance. The plan shall describe how the Design- Builder will store all materials in a manner so that the materials will not become an obstruction or become damaged in any way, what cost effective methods it will employ to prevent damage to or deterioration of the Work and otherwise protect the Work, how suitable drainage will be provided, what temporary structures will be necessary, and how the Design-Builder will prepare for resuming the Work for the least possible remobilization cost. After the plan is accepted, the Design-Builder shall implement it in accordance with instructions received from Owner; and

**11.1.2.6** Take any and all measures to minimize costs associated with such suspension.

**11.1.3** Under no circumstance shall a suspension absolve the Design-Builder or the Design-Builder's sureties of the duties and responsibilities guaranteed under the performance and payment bond(s). The Design-Builder shall again proceed with the Work when it is ordered to do so in writing by Owner.

**11.1.4** Design-Builder is entitled to seek an adjustment of the Contract Price and/or Contract Time(s) if its cost or time to perform the Work has been adversely impacted by any suspension or stoppage of the Work by Owner. If the Design-Builder intends to assert a claim for compensation or time extension under this Article, it must, and notwithstanding any time limitations specified elsewhere in the Contract Documents, within seven (7) calendar days after receipt of notice to resume work, submit to Owner a Contractor Change Request setting forth the schedule impact and monetary impact of the suspension in sufficient detail to permit thorough analysis. Adjustment of work Completion Time, if appropriate, will be made pursuant to the provisions of the Contract Documents. Adjustment of the not to exceed contract amount, if any, will be within the Owner's sole discretion and shall not in any event, exceed the cost of the extra work resulting from such suspension. Such cost, if any, shall be determined in accordance with the Contract Documents. Pursuant to California Civil Code section 1511, the Parties agree that any failure to submit a timely and properly documented Contractor Change Request shall constitute a waiver by Design-Builder of any claim for additional compensation, time or impact costs from Owner.

**11.1.5** Suspension due to a ruling of City, State or Federal Court. The Suspension Order will identify the court or agency ruling which caused the suspension, and subject to Owner approval, may extend the Work Completion Time by the stated amount of time specified by the court or agency order. If the ruling causes suspension for an indefinite period of time and as a result a time extension cannot be established, the Suspension Order may also be for an indefinite period of time, subject to Owner approval. If the Suspension Order is issued because of acts or omissions of the Design-Builder, the Design-Builder shall not be entitled to a time extension or payment for any additional costs it incurs.

**11.1.6** Suspension Resulting from Design-Builder's Failure to Perform. If a Suspension Order results from the Design-Builder's failure to satisfactorily perform any of the provisions of the Agreement, including but not limited to faulty workmanship, safety concerns, improper or inadequate manpower, equipment, supplies or supervision, or failure to perform the Work or pay employees, subcontractors or suppliers in a timely manner, the Suspension Order will identify the reason, or reasons, for the order. In this circumstance, no time extension will be authorized for the Design-Builder and any costs to the Design-Builder resulting from such Suspension Order will not

be reimbursed by Owner. A Suspension Order issued under these circumstances will remain in effect until the Design-Builder has removed or corrected the grounds for the suspension, or the Suspension Order expires by its terms.

## **11.2 Owner's Right to Perform and Terminate for Cause.**

**11.2.1** If Design-Builder persistently fails to (i) provide a sufficient number of skilled workers, (ii) supply the materials required by the Contract Documents, (iii) comply with applicable Legal Requirements, (iv) timely pay, without cause, Design Consultants or Subcontractors, (v) prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Time(s), as such times may be adjusted, or (vi) perform material obligations under the Contract Documents, then Owner, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Sections 11.2.2 and 11.2.3 below.

**11.2.2** Upon the occurrence of an event set forth in Section 11.2.1 above, Owner may provide written notice to Design-Builder that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design-Builder's receipt of such notice. If Design-Builder fails to cure, or reasonably commence to cure, such problem, then Owner may give a second written notice to Design-Builder of its intent to terminate within an additional seven (7) day period. If Design-Builder, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Owner may declare the Agreement terminated for default by providing written notice to Design-Builder of such declaration.

**11.2.3** Upon declaring the Agreement terminated pursuant to Section 11.2.2 above, Owner may elect to:

**11.2.3.1** Enter upon the premises and take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Work, all of which Design-Builder hereby transfers, assigns and sets over to Owner for such purpose, and to employ any person or persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Owner in completing the Work, such excess shall be paid by Owner to Design-Builder. Notwithstanding the preceding sentence, if the Agreement establishes a Guaranteed Maximum Price, Design-Builder will only be entitled to be paid for Work performed prior to its default. If Owner's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then Design-Builder shall be obligated to pay the difference to Owner. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Owner in connection with the procurement and defense of claims arising from Design-Builder's default, subject to the waiver of consequential damages set forth in Article 13 in the 545 Design Build Agreement hereof; or

**11.2.3.2** Serve written notice upon the Design-Builder and its surety on its performance bond demanding satisfactory compliance with the Contract.

- i. If the surety assumes the Contract, all money which may become due the Design-Builder shall be payable to the surety as the Work progresses, subject to the terms of the Contract.
- ii. If the surety does not assume the Contract and commence performance of the Work within twenty-one (21) days after receiving the Executive Director's notice and demand, or fails to continue to comply, the Executive Director may remove the surety from the premises. If the surety bond has provisions contrary to this right, then the 60-day time limit stated elsewhere in this Contract shall apply.

- iii. Upon any Surety default, Owner may then take possession of all material and equipment and complete the Work by use of its own forces, by letting the unfinished work to another Design-Builder, or by a combination of such methods. In any event, the cost of completing the Work shall be charged against the Design-Builder and its surety and may be deducted from any money due or becoming due from the Design-Builder. If the amount unpaid under the Agreement is insufficient for completion, the Design-Builder or surety shall pay to Owner within five (5) days after the completion and an itemized demand for payment from Owner, all costs and damages incurred by Owner in excess of the amount unpaid under the Agreement.

**11.2.4** If Owner improperly terminates the Agreement for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of Article 8 of the Agreement.

### **11.3 NOT USED**

## **11.4 Design-Builder's Right to Terminate for Cause.**

**11.4.1** Design-Builder, in addition to any other rights and remedies provided in the Contract Documents or by law, may terminate the Agreement for cause for the following reasons:

**11.4.1.1** The Work has been stopped for sixty (60) consecutive days, or more than ninety (90) days during the duration of the Project, because of court order, any government authority having jurisdiction over the Work, or orders by Owner under Section 11.1.1 hereof, provided that such stoppages are not due to the acts or omissions of Design-Builder or anyone for whose acts Design-Builder may be responsible.

**11.4.1.2** Owner's failure to provide Design-Builder with any information, permits or approvals that are Owner's responsibility under the Contract Documents which result in the Work being stopped for sixty (60) consecutive days, or more than ninety (90) days during the duration of the Project, even though Owner has not ordered Design-Builder in writing to stop and suspend the Work pursuant to Section 11.1.1 hereof.

**11.4.1.3** NOT USED.

**11.4.2** Upon the occurrence of an event set forth in Section 11.4.1 above, Design-Builder may provide written notice to Owner that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Owner's receipt of such notice. If Owner fails to cure, or reasonably commence to cure, such problem, then Design-Builder may give a second written notice to Owner of its intent to terminate within an additional seven (7) day period. If Owner, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Owner of such declaration. In such case, Design-Builder shall be entitled to recover in the same manner as if Owner had terminated the Agreement for its convenience under Article 8 of the Agreement.

## **11.5 Bankruptcy of Owner or Design-Builder.**

**11.5.1** If either Owner or Design-Builder institutes or has instituted against it a case under the United States Bankruptcy Code (such party being referred to as the "Bankrupt Party"), such event may impair or frustrate the Bankrupt Party's ability to perform its obligations under the Contract Documents. Accordingly, should such event occur:

**11.5.1.1** The Bankrupt Party, its trustee or other successor, shall furnish, upon request of the non-Bankrupt Party, adequate assurance of the ability of the Bankrupt Party to perform all future material obligations under the Contract Documents, which assurances shall be

provided within ten (10) days after receiving notice of the request; and

**11.5.1.2** The Bankrupt Party shall file an appropriate action within the bankruptcy court to seek assumption or rejection of the Agreement within sixty (60) days of the institution of the bankruptcy filing and shall diligently prosecute such action.

If the Bankrupt Party fails to comply with its foregoing obligations, the non-Bankrupt Party shall be entitled to request the bankruptcy court to reject the Agreement, declare the Agreement terminated and pursue any other recourse available to the non-Bankrupt Party under this Article 11.

**11.5.2** The rights and remedies under Section 11.5.1 above shall not be deemed to limit the ability of the non-Bankrupt Party to seek any other rights and remedies provided by the Contract Documents or by law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code or the right of Design-Builder to stop Work under any applicable provision of these General Conditions of Agreement.

## **Article 12**

### **Electronic Data**

#### **12.1 Electronic Data.**

**12.1.1** The parties recognize that Contract Documents, including drawings, specifications and three-dimensional modeling (such as Building Information Models) and other Work Product may be transmitted among Owner, Design-Builder and others in electronic media as an alternative to paper hard copies (collectively "Electronic Data").

#### **12.2 Transmission of Electronic Data.**

**12.2.1** Owner and Design-Builder shall agree upon the software and the format for the transmission of Electronic Data. Each party shall be responsible for securing the legal rights to access the agreed-upon format, including, if necessary, obtaining appropriately licensed copies of the applicable software or electronic program to display, interpret and/or generate the Electronic Data.

**12.2.2** Neither party makes any representations or warranties to the other with respect to the functionality of the software or computer program associated with the electronic transmission of Work Product. Unless specifically set forth in the Agreement, ownership of the Electronic Data does not include ownership of the software or computer program with which it is associated, transmitted, generated or interpreted.

**12.2.3** By transmitting Work Product in electronic form, the transmitting party does not transfer or assign its rights in the Work Product. The rights in the Electronic Data shall be as set forth in Article 5 of the Agreement. Under no circumstances shall the transfer of ownership of Electronic Data be deemed to be a sale by the transmitting party of tangible goods.

#### **12.3 Electronic Data Protocol.**

**12.3.1** The parties acknowledge that Electronic Data may be altered or corrupted, intentionally or otherwise, due to occurrences beyond their reasonable control or knowledge, including but not limited to compatibility issues with user software, manipulation by the recipient, errors in transcription or transmission, machine error, environmental factors, and operator error. Consequently, the parties understand that there is some level of increased risk in the use of Electronic Data for the communication of design and construction information and, in consideration of this, agree, and shall require their independent contractors, Subcontractors and Design

Consultants to agree, to the following protocols, terms and conditions set forth in this Section 12.3.

**12.3.2** Electronic Data will be transmitted in the format agreed upon in Section 12.2.1 above, including file conventions and document properties, unless prior arrangements are made in advance in writing.

**12.3.3** The Electronic Data represents the information at a particular point in time and is subject to change. Therefore, the parties shall agree upon protocols for notification by the author to the recipient of any changes which may thereafter be made to the Electronic Data, which protocol shall also address the duty, if any, to update such information, data or other information contained in the electronic media if such information changes prior to Final Completion of the Project.

**12.3.4** The transmitting party specifically disclaims all warranties, expressed or implied, including, but not limited to, implied warranties of merchantability and fitness for a particular purpose, with respect to the media transmitting the Electronic Data. However, transmission of the Electronic Data via electronic means shall not invalidate or negate any duties pursuant to the applicable standard of care with respect to the creation of the Electronic Data, unless such data is materially changed or altered after it is transmitted to the receiving party, and the transmitting party did not participate in such change or alteration.

## **Article 13**

### **Miscellaneous**

#### **13.1 Confidential Information.**

**13.1.1** Confidential Information is defined as information which is determined by the transmitting party to be of a confidential or proprietary nature and: (i) the transmitting party identifies as either confidential or proprietary; (ii) the transmitting party takes steps to maintain the confidential or proprietary nature of the information; and (iii) the document is not otherwise available in or considered to be in the public domain. The receiving party agrees to maintain the confidentiality of the Confidential Information and agrees to use the Confidential Information solely in connection with the Project.

**13.1.2** The parties understand that all the material provided or produced under this Agreement may be subject to the California Public Records Act, Cal. Government Code section 7920.000, et seq., and that in the event of a request to the Owner for disclosure of such information, the Owner shall advise the Design-Builder of such request in order to give the Design-Builder the opportunity to object to the disclosure of any of its proprietary or confidential material. In the event of the filing of a lawsuit to compel such disclosure, the Owner will tender all such material to the court for judicial determination of the issue of disclosure and the Design-Builder agrees to intervene in such lawsuit to protect and assert its claims of privilege against disclosure of such material. The Design-Builder further agrees to defend, indemnify and save and hold harmless the Owner, its council, officers, agents and employees, from any claim, damages, expense, loss or costs arising out of the Design-Builder's intervention to protect and assert its claims of privilege against disclosure under this Article including, but not limited to, prompt reimbursement to the Owner of all reasonable attorney fees, costs and damages that the Owner may incur directly or may be ordered to pay by such court.

#### **13.2 Assignment.**

**13.2.1** Neither Design-Builder nor Owner shall, without the written consent of the other assign, transfer or sublet any portion or part of the Work or the obligations required by the Contract Documents.

**13.2.2** For purposes of this Contract, the terms "transfer" and "assign" shall include, but

not be limited to, the following:

**13.2.2.1** If the Design-Builder is a joint venture, a limited liability company, or a partnership, the transfer of fifty percent (50%) or more of the interest or membership in the joint venture, the limited liability company, or the partnership;

**13.2.2.2** If the Design-Builder is a corporation, any cumulative or aggregate sale, transfer, merger, assignment, or hypothecation of fifty percent (50%) or more of the voting shares of the Design/Builder;

**13.2.2.3** The dissolution by any means of Design-Builder; and

**13.2.2.4** A change in business or corporate structure. Any such transfer, assignment, mortgaging, pledging, or encumbering of Design/Builder without the written consent of the Owner is a violation of this Contract and shall be voidable at Owner's option and shall confer no right, title, or interest in or to this Contract upon the assignee, mortgagee, pledgee, encumbrance, or other lien holder, successor, or purchaser.

### **13.3 Successorship.**

**13.3.1** Design-Builder and Owner intend that the provisions of the Contract Documents are binding upon the parties, their employees, agents, heirs, successors and assigns.

### **13.4 Governing Law.**

**13.4.1** The Agreement and all Contract Documents shall be governed by the laws of the place of the Project, without giving effect to its conflict of law principles.

### **13.5 Severability.**

**13.5.1** If any provision or any part of a provision of the Contract Documents shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to any applicable Legal Requirements, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of the Contract Documents, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

### **13.6 No Waiver.**

**13.6.1** The failure of either Design-Builder or Owner to insist, in any one or more instances, on the performance of any of the obligations required by the other under the Contract Documents shall not be construed as a waiver or relinquishment of such obligation or right with respect to future performance.

### **13.7 Headings.**

**13.7.1** The headings used in these General Conditions of Contract, or any other Contract Document, are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

### **13.8 Notice.**

**13.8.1** Whenever the Contract Documents require that notice be provided to the other party, notice will be deemed to have been validly given (i) if delivered in person to the individual intended to receive such notice, (ii) four (4) days after being sent by registered or certified mail, postage prepaid to the address indicated in the Agreement, or (iii) if transmitted by email, after confirmation of receipt that notice was received.

### **13.9 Amendments.**

**13.9.1** The Contract Documents may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party.

### **13.10 No Third Party Beneficiary**

**13.10.1** It is expressly understood and agreed that the enforcement of the terms and conditions of the Contract, and all rights of action relating to such enforcement, shall be strictly reserved to the Owner and the Design-Builder, and that nothing contained in the Contract shall give or allow any claim or right of action by any other or third person under the Contract. It is the express intention of the Owner and the Design-Builder that any member of the public, subcontractor, supplier, material man, tradesman, vendor or other person or entity other than the Owner or the Design-Builder receiving services or benefits under the Contract shall be deemed to be an incidental beneficiary only. The foregoing shall not, however, impair Owner's status as a third party beneficiary of subcontracts of any tier for the performance of work or delivery of services, material or equipment to the Project.

### **13.11 Labor and Prevailing Wages**

**13.11.1** The Design-Builder, its agents, and employees shall be bound by and comply with applicable provisions of the California Labor Code and Federal, State, and local laws related to labor. The Design-Builder shall strictly adhere to the provisions of the California Labor Code. The Design-Builder shall forfeit to the Owner the penalties prescribed in the California Labor Code for violations. In accordance with the California Labor Code, the City has on file and will publish a schedule of prevailing wage rates for the types of work to be done under the Contract. The Design- Builder shall not pay less than these rates.

**13.11.2** Each worker shall be paid subsistence and travel as required by the collective bargaining agreements on file with the State of California Department of Industrial Relations. The Design- Builder's attention is directed to Section 1776 of the California Labor Code which imposes responsibility upon the Design-Builder for the maintenance, certification, and availability for inspection of such records for all persons employed by the Design-Builder or subcontractor in connection with the project. The Design-Builder shall agree through the Contract to comply with this Section 1776 and the remaining provisions of the California Labor Code. The Design-Builder shall comply with all DIR regulations, including but not limited to, DIR registration and shall require the same of all of its subcontractors. The Design-Builder shall indemnify the Owner pursuant to the indemnification provisions set forth herein, for any violation by the Design-Builder and/or its subcontractors of any applicable Labor Code and/or prevailing wage requirements.

**13.11.3** The Design-Builder expressly acknowledges and agrees that the Owner contemplates the Project receiving a tax credit/rebate pursuant to Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), amended §§ 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D of the Internal Revenue Code (Code). Accordingly, the Design-Builder shall ensure at all times that the Work complies with the prevailing wage and apprenticeship requirements necessary to qualify for the IRA tax credit, including but not limited to keeping records necessary to document such compliance as further described in IRS Notice 2022-61. The Parties agree that if any additional specific requirements are necessary to capture the Owner's expected tax credit/rebate they shall be incorporated into the Phase 2 Amendment mutually agreed to by the Parties.

### **13.12 Payroll Records**

**13.12.1** Design-Builder and each subcontractor performing any portion of the Work under

this Contract shall keep an accurate record, showing the name, address, social security number, work classification, straight time and overtime hours for each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, professional, salaried, or other employee employed by him or her in connection with the Work.

**13.12.2** The payroll records of Design-Builder and each subcontractor (including payroll records for professional or salaried employees) shall be certified and shall be available for inspection at the principal office of Design-Builder.

**13.12.3** Design-Builder shall file a certified copy of the payroll records (including those applicable to professional and salaried employees) with Owner within ten (10) days after receipt of a written request from Owner.

**13.12.4** Design-Builder shall inform Owner of the location of said payroll records, including the street address, City and County, and shall, within five (5) working days, provide a notice of change of location and address of said payroll records.

**13.12.5** In the event of noncompliance with the requirements of this clause, Design-Builder shall have ten (10) days in which to comply subsequent to receipt of written notice specifying in what respect it must comply. Should noncompliance exist after said ten (10) day period, Design-Builder shall, be subject to a fee of one hundred dollars (\$100.00) for each calendar day, or portion thereof, for each worker to whom the noncompliance pertains, until strict compliance is effectuated. Design-Builder acknowledges that, without limitation as to other remedies of enforcement available to Owner, upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement of the California Department of Industrial Relations, such penalties shall be withheld from progress payments then due Design-Builder.

### **13.13 Labor Discrimination**

**13.13.1** Design-Builder shall comply with all of the following sections of the California Labor Code:

**13.13.1.1** Section 1735. No discrimination shall be made in the employment of persons upon Public Works because of race, color, national origin or ancestry, or religion of such persons and every Contractor for Public Works violating this section is subject to all the penalties imposed for a violation of this chapter.

**13.13.1.2** Section 1420. It shall be unlawful employment practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of California: for an employer, because of the race, religious creed, color, national origin, or ancestry of any person, to refuse to hire to employ him/her or to bar or to discharge from employment such person, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

### **13.14 CARB Compliance.**

**13.14.1** To the extent applicable, Design Builder shall comply, and shall ensure all subcontractors comply, with all requirements of the most current version of the California Air Resources Board ("CARB") including, without limitation, all applicable terms of Title 13, California Code of Regulations Division 3, Chapter 9 and all pending amendments ("Regulation").

**13.14.2** Throughout the Project, and for three (3) years thereafter, Design Builder shall make available for inspection and copying any and all documents or information associated with Design



Builder's and subcontractors' fleet including, without limitation, the Certificates of Reported Compliance, fuel/refueling records, maintenance records, emissions records, and any other information the Design Builder is required to produce, keep or maintain pursuant to the Regulation upon two (2) calendar days' notice from the Owner.

**13.14.3** Design Builder shall be solely liable for any and all costs associated with complying with the Regulation as well as for any and all penalties, fines, damages, or costs associated with any and all violations, or failures to comply with the Regulation. Design Builder shall defend, indemnify and hold harmless the Owner, its officials, officers, employees and authorized volunteers free and harmless from any claims, liabilities, costs, penalties or interest arising out of any failure or alleged failure to comply with the Regulation.

**EXHIBIT A**

**TO BE INSERTED WITH PHASE 2 AMENDMENT**

**EXHIBIT B**  
**TO BE INSERTED WITH PHASE 2 AMENDMENT**

## **EXHIBIT C**

## Exhibit C

### Phase 1 – Scope of Services

Design-Builder and subcontractor shall perform the following design and development services as part of Phase 1:

- 30% Design Services
- Guaranteed Maximum Price (GMP) Proposal for Phase 2 Services
- Permit Support Services

### **30% Design Services**

#### *Scope*

Phase 1 – 30% Design	
Item	Deliverable
<b>Design Basis Package</b>	<ul style="list-style-type: none"> <li>• Block Flow Diagram (“BFD”)</li> <li>• Process Flow Diagram (“PFD”)</li> </ul>
<b>P&amp;ID Package</b>	<ul style="list-style-type: none"> <li>• Piping and Instrumentation Diagram (“P&amp;ID”)</li> <li>• Major Equipment Drawings and Specifications</li> <li>• Equipment List</li> <li>• Instrument List</li> <li>• Valve List</li> </ul>
<b>Site Design Package</b>	<ul style="list-style-type: none"> <li>• 30% Package</li> <li>• Controls &amp; Network</li> <li>• Site Layout &amp; Model</li> </ul>

#### *Engineering Document List*

Item #	Package	Document Name
1	Design Basis Package	BFD
2	Design Basis Package	PFD
3	P&ID Package	P&ID
4	P&ID Package	Equipment Specifications
5	P&ID Package	Equipment List
6	P&ID Package	Valve List
7	P&ID Package	Instrument List
8	Site Design Package	IO List
9	Site Design Package	Utilities & Chemical Consumption List
10	Site Design Package	Process Design Basis Report
11	Site Design Package	Process Control Narrative
12	Site Design Package	Civil – Site Survey Report
13	Site Design Package	Civil – Geotechnical Report
14	Site Design Package	Civil – Site Plan

*Engineering Document List – Cont.*

15	Site Design Package	Civil – Grading Plan
16	Site Design Package	Civil – Paving Plan
17	Site Design Package	Civil – Stormwater Plan
18	Site Design Package	Civil – Underground Utilities Plan
19	Site Design Package	Civil – Specifications
20	Site Design Package	Structural – Foundation Plan
21	Site Design Package	Structural – Specifications
22	Site Design Package	Structural – Standard Details
23	Site Design Package	Mechanical – Mechanical Site Plan
24	Site Design Package	Mechanical – Equipment & Piping 3D Model
25	Site Design Package	Mechanical – Specifications
26	Site Design Package	Mechanical – Standard Details
27	Site Design Package	Electrical – Specifications
28	Site Design Package	Electrical – Electrical Site Plan
29	Site Design Package	Electrical – Single Line Diagram
30	Site Design Package	Electrical – Hazardous Zone Classification Plan
31	Site Design Package	Electrical – MCC Elevation Plan
32	Site Design Package	Electrical – Grounding Plan
33	Site Design Package	Electrical – Lighting Plan
34	Site Design Package	Control – Control Architecture
35	Site Design Package	Control – Network Diagram
36	Site Design Package	Control – Specifications

**Guaranteed Maximum Price (GMP) Proposal for Phase 2 Services**

*Scope*

GMP for Phase 2 Services	
Item	Deliverable
<b>GMP Package</b>	<ul style="list-style-type: none"> <li>• GMP Proposal</li> <li>• Proposed Project Warranty/Guarantee</li> <li>• Project Schedule</li> <li>• Final Front End Engineering Design (FEED) Package</li> </ul>

**Permitting Services**

*Scope*

Design-Builder and subcontractor shall perform the following air permitting services as part of Phase 1:

Phase 1 – Air Permitting Services	
Item	Deliverable
<b>Prepare Technical Reports</b>	<ul style="list-style-type: none"> <li>• Air quality technical assessment</li> <li>• Vehicle miles travelled (“VMT”)</li> </ul>
<b>Air Permitting Services</b>	<ul style="list-style-type: none"> <li>• Prepare required air quality permit applications for Bay Area Air Quality Management District (“BAAQMD”)</li> <li>• Prepare technical documentation, including New Source Review (“NSR”), Best Available Control Technology (“BACT”), and emission offsets</li> </ul>
<b>Clarifications</b>	<ul style="list-style-type: none"> <li>• Design-Builder assumes no more than one round of reasonable comments and revisions for the specified services.</li> </ul>
<b>Exclusions</b>	<ul style="list-style-type: none"> <li>• Scope does not include testing, other non-air permitting, public notice, emission reduction credits items.</li> <li>• Permit application fees, agency review costs, laboratory costs, public notice distribution, copying of documents and notices, emission credits and other 3<sup>rd</sup> party fees are not included.</li> </ul>

**Schedule**

Design-Builder anticipates completing 30% Design & GMP services as follows:

	Month					
	1	2	3	4	5	6
Notice to Proceed						
Design Basis Package						
P&ID Package						
Site Design Package						
GMP Package						
GMP Proposal						

## Payment Schedules

### Pricing

The lump sum pricing for the Phase 1 services is **\$1,166,600**. The table below provides a breakdown of pricing.

Phase 1 – Pricing	
Item	Price
<b>30% Design &amp; GMP Services</b>	\$954,300
<b>Permitting Services</b>	\$212,300
<b>Total</b>	<b>\$1,166,600</b>

### Payment Schedule – 30% Design & GMP Services

Item	Description	Milestone Payment
<b>1</b>	Execution of the Contract	\$195,860 (20% of 30% Design & GMP Pricing)
<b>2</b>	Design Basis Package Submission	\$195,860 (20% of 30% Design & GMP Pricing)
<b>3</b>	P&ID Package Submission	\$195,860 (20% of 30% Design & GMP Pricing)
<b>4</b>	Site Design Package Submission	\$195,860 (20% of 30% Design & GMP Pricing)
<b>5</b>	GMP Package Submission	\$195,860 (20% of 30% Design & GMP Pricing)

### Payment Schedule – Permitting Services

Progress payments will be paid monthly based on the percentage of completion of services specified.



**EXHIBIT D**

**TO BE INSERTED WITH PHASE 2 AMENDMENT**

**EXHIBIT E**

**TO BE INSERTED WITH PHASE 2 AMENDMENT**

**EXHIBIT F**

**NOT USED**

**EXHIBIT G**

## EXHIBIT G

### INSURANCE TERMS

**Insurance.** No later than ten days following City's notice of award of the Contract, DBE must procure and provide proof of the insurance coverage required by this section in the form of certificates and endorsements acceptable to City. The required insurance must cover the activities of DBE and its Subcontractors relating to or arising from the performance of the Work, and must remain in full force and effect at all times during the period covered by the Contract through the date of City's recordation of the notice of completion for the Project. All required insurance must be issued by a company licensed to do business in the State of California, and each such insurer must have an A.M. Best's financial strength rating of "A" or better and a financial size rating of "VIII" or better. If DBE fails to provide any of the required coverage in full compliance with the requirements of the Contract Documents, City may, at its sole discretion, purchase such coverage at DBE's expense and deduct the cost from payments due to DBE, or terminate DBE for default. The procurement of the required insurance will not be construed to limit DBE's liability under this Contract or to fulfill DBE's indemnification obligations under this Contract.

(A) ***Policies and Limits.*** The following insurance policies and limits are required for this Contract unless otherwise specified in the Progressive Design Build Agreement:

- (1) ***Commercial General Liability ("CGL") Insurance:*** The CGL insurance policy must be issued on an occurrence basis, written on a comprehensive general liability form, and must include coverage for liability arising from DBE's or its Subcontractor's operations in the performance of the Work, including DBE's protected coverage, blanket contractual, completed operations, vehicle coverage and employer's non-ownership liability coverage, with limits of at least \$5,000,000.00 per occurrence, and \$10,000,000.00 aggregate. The CGL policy must name City as an additional insured for all liability arising out of the operations by or on behalf of the named insured, and must protect City, its officers, employees, and agents against any and all liability for personal injury, death, or property damage or destruction arising directly or indirectly in the performance of the Contract. The additional insured endorsement must be provided using ISO form CG 20 10 11 85 alone, or both forms CG 20 10 10 01 and CG 20 37 10 01. The CGL coverage may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by excess or umbrella policies, provided each such policy complies with the requirements set forth herein.
- (2) ***Builder's Risk Insurance:*** Prior to beginning Phase 2, the builder's risk insurance policy must be issued on an occurrence basis, for all-risk coverage on a 100% completed value basis on the insurable portion of the Project for the benefit of City. The builder's risk policy must name City as an additional insured using the endorsement forms set forth in Paragraph (A)(1) above.
- (3) ***Workers' Compensation Insurance and Employer's Liability:*** The workers' compensation and employer's liability insurance policy must comply with the requirements of the California Workers' Compensation Insurance and Safety Act, providing coverage of at least \$1,000,000.00 or as otherwise required by

the statute. If DBE is self-insured, DBE must provide its Certificate of Permission to Self-Insure, duly authorized by the Department of Industrial Relations.

- (4) ***Automobile Liability Insurance.*** The automobile liability insurance policy must provide coverage of at least \$2,000,000.00 combined single-limit per accident for bodily injury, death or property damage. The automobile liability policy must name City as an additional insured using the endorsement form(s) required under Section 4.4(A)(1), above.
  - (5) ***Professional Liability.*** The professional liability insurance policy must insure against the Design Professionals' negligent errors and omissions in the provision of services under this Contract, in an amount not less than \$1,000,000.00 combined single limit. The Professional Liability policy must include prior acts coverage sufficient to cover all services provided by the Design Professionals for this Project, and the coverage must continue in effect for four years following final payment to DBE.
- (B) ***Notice.*** Each certificate of insurance must state that the coverage afforded by the policy or policies will not be reduced, cancelled or allowed to expire without at least 30 days written notice to City, unless due to non-payment of premiums, in which case ten days written notice must be made to City.
- (C) ***Waiver of Subrogation.*** Each required policy must include an endorsement providing that the carrier agrees to waive any right of subrogation it may have against City.
- (D) ***Required Endorsements.*** The CGL policy, the builder's risk policy, and the automobile liability policy must include the following specific endorsements:
- (1) The inclusion of more than one insured will not operate to impair the rights of one insured against another, and the coverages afforded will apply as though separate policies have been issued to each insured.
  - (2) The insurance provided by DBE is primary and no insurance or self-insurance held or owned by City, its officers, officials, employees or volunteers may be called upon to contribute to a loss. Any insurance or self-insurance held or owned by City, its officers, officials, employees and volunteers is excess to DBE's insurance and may not be called on to cover or contribute to any loss covered by DBE's insurance.
  - (3) This policy does not exclude explosion, collapse, underground excavation hazard, or removal of lateral support.
- (E) ***Subcontractors.*** DBE must ensure that each Subcontractor is required to maintain the same insurance coverage required for DBE under this Contract, with respect to its performance of Work on the Project, including those requirements related to the additional insureds and waiver of subrogation with limits for General Liability of at least \$1,000,000.00 per occurrence and \$2,000,000.00 in the aggregate subject to the discretion of the Design-Builder as applicable to subcontractor's scope. DBE must confirm that each Subcontractor has complied with these insurance

requirements before the Subcontractor is permitted to begin Work on the Project. Upon the request of City, DBE must provide certificates and endorsements submitted by each Subcontractor to evidence compliance with this requirement. The insurance requirements for Subcontractors do not replace or limit DBE's insurance obligations.

- (F) ***Deductibles and Self-Insured Retentions.*** Any deductibles or self-insured retentions that apply to the required insurance (collectively, "deductibles") are subject to approval by City, acting in its sole discretion, and must be declared by DBE when it submits its certificates of insurance and endorsements pursuant to this Section. If City determines that the deductibles are unacceptably high, at City's option, DBE must either reduce or eliminate the deductibles as they apply to City and all required additional insureds, as stated in Subsection (A)(1) above, or provide a financial guarantee, to City's satisfaction, guaranteeing payment of losses and related investigation, claim administration and legal expenses.

**EXHIBIT H**

**NOT USED**



**EXHIBIT I**  
**NOT USED**

**EXHIBIT J**

**PERFORMANCE BOND (100% of Contract Price)**

**(Note: Design Build Entity must use this form, NOT a surety company form.)**

**KNOW ALL PERSONS BY THESE PRESENTS:**

THAT WHEREAS, the City of Brentwood, (hereinafter referred to as "City") has awarded to \_\_\_\_\_, (hereinafter referred to as the "Contractor") an agreement for \_\_\_\_\_, (hereinafter referred to as the "Project").

WHEREAS, the work to be performed by the Contractor is more particularly set forth in the Contract Documents for the Project dated \_\_\_\_\_, (hereinafter referred to as "Contract Documents"), the terms and conditions of which are expressly incorporated herein by reference; and

WHEREAS, the Contractor is required by said Contract Documents to perform the terms thereof and to furnish a bond for the faithful performance of said Contract Documents.

NOW, THEREFORE, we, \_\_\_\_\_, the undersigned Contractor and \_\_\_\_\_ as Surety, a corporation organized and duly authorized to transact business under the laws of the State of California, are held and firmly bound unto the City in the sum of \_\_\_\_\_ DOLLARS, (\$ \_\_\_\_\_), said sum being not less than one hundred percent (100%) of the total amount of the Contract ("Penal Sum"), for which amount well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that, if the Contractor, his or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and agreements in the Contract Documents and any alteration thereof made as therein provided, on its part, to be kept and performed at the time and in the manner therein specified, and in all respects according to their intent and meaning; and shall faithfully fulfill all obligations including the one (1) year guarantee of all materials and workmanship; and shall indemnify and save harmless the City, its officials, officers, employees, and authorized volunteers, as stipulated in said Contract Documents, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

As a part of the obligation secured hereby and in addition to the face amount specified therefore, there shall be included costs and reasonable expenses and fees including reasonable attorney's fees, incurred by City in enforcing such obligation.

As a condition precedent to the satisfactory completion of the Contract Documents, unless otherwise provided for in the Contract Documents, the above obligation shall hold good for a period of one (1) year after the acceptance of the work by City, during which time if Contractor shall fail to make full, complete, and satisfactory repair and replacements and protect the City from loss or damage resulting from or caused by defective materials or faulty workmanship as provided for in the Contract, Surety's obligations shall remain in full force and effect. The obligations of Surety hereunder shall continue so long as any obligation of Contractor remains. Nothing herein shall limit the City's rights or the Contractor or Surety's obligations under the Contract, law or equity, including, but not limited to, California Code of Civil Procedure Section 337.15.

Whenever Contractor shall be, and is declared by the City to be, in default under the Contract Documents, the Surety shall remedy the default pursuant to the Contract Documents, or shall promptly, at the City's option:

- i. Remedy the default;
- ii. Take over and complete the Project in accordance with all terms and conditions in the Contract Documents; or
- iii. Obtain a bid or bids for completing the Project in accordance with all terms and conditions in the Contract

Documents and upon determination by Surety of the lowest responsive and responsible bidder, arrange for a Contract between such bidder, the Surety and the City, and make available as work progresses sufficient funds to pay the cost of completion of the Project, less the balance of the contract price, including other costs and damages for which Surety may be liable. The term “balance of the contract price” as used in this paragraph shall mean the total amount payable to Contractor by the City under the Contract and any modification thereto, less any amount previously paid by the City to the Contractor and any other set offs pursuant to the Contract Documents.

- iv. Permit the City to complete the Project in any manner consistent with California law and make available as work progresses sufficient funds to pay the cost of completion of the Project, less the balance of the contract price, including other costs and damages for which Surety may be liable. The term “balance of the contract price” as used in this paragraph shall mean the total amount payable to Contractor by the City under the Contract and any modification thereto, less any amount previously paid by the City to the Contractor and any other set offs pursuant to the Contract Documents.

Surety expressly agrees that the City may reject any contractor or subcontractor which may be proposed by Surety in fulfillment of its obligations in the event of default by the Contractor.

Surety shall not utilize Contractor in completing the Project nor shall Surety accept a bid from Contractor for completion of the Project if the City, when declaring the Contractor in default, notifies Surety of the City’s objection to Contractor’s further participation in the completion of the Project.

The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract Documents or to the Project to be performed thereunder shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the Contract Documents or to the Project, including but not limited to the provisions of sections 2819 and 2845 of the California Civil Code.

By their signatures hereunder, Surety and Contractor hereby confirm under penalty of perjury that surety is an admitted surety insurer authorized to do business in the State of California.

**[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK]**

IN WITNESS WHEREOF, we have hereunto set our hands and seals this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

(Corporate Seal)

\_\_\_\_\_  
Contractor/ Principal

By \_\_\_\_\_

Title \_\_\_\_\_

(Corporate Seal)

Surety \_\_\_\_\_

By \_\_\_\_\_  
Attorney-in-Fact

Title \_\_\_\_\_

(Attach Attorney-in-Fact Certificate)

**APPROVED BY CITY:**

s/ \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name, Title

The rate of premium on this bond is \_\_\_\_\_ per thousand. The total amount of premium charges is \$\_\_\_\_\_.  
(The above must be filled in by corporate attorney.)

**THIS IS A REQUIRED FORM**

Any claims under this bond may be addressed to:

(Name and Address of Surety)

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

(Name and Address of Agent or Representative for service of process in California, if different from above)

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

(Telephone number of Surety and Agent or Representative for service of process in California)

\_\_\_\_\_

## Notary Acknowledgment

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA  
 COUNTY OF \_\_\_\_\_

On \_\_\_\_\_, 20\_\_\_\_, before me, \_\_\_\_\_, Notary Public, personally

appeared \_\_\_\_\_, who proved to me on the basis of satisfactory

evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary Public \_\_\_\_\_

### OPTIONAL

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

**CAPACITY CLAIMED BY SIGNER**

**DESCRIPTION OF ATTACHED DOCUMENT**

- Individual
- Corporate Officer

\_\_\_\_\_  
 Title(s)

- Partner(s)  Limited
- Attorney-In-Fact  General
- Trustee(s)
- Guardian/Conservator
- Other:

Attorney-In-Fact

Trustee(s)

Guardian/Conservator

Other:

Signer is representing:

Name Of Person(s) Or Entity(ies)

\_\_\_\_\_  
 Title or Type of Document

\_\_\_\_\_  
 Number of Pages

\_\_\_\_\_  
 Date of Document

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

\_\_\_\_\_  
 Signer(s) Other Than Named Above

NOTE: This acknowledgment is to be completed for Contractor/Principal.

## Notary Acknowledgment

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

On \_\_\_\_\_, 20\_\_\_\_, before me, \_\_\_\_\_, Notary Public, personally

appeared \_\_\_\_\_, who proved to me on the basis of satisfactory

evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary Public \_\_\_\_\_

### OPTIONAL

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

#### CAPACITY CLAIMED BY SIGNER

- Individual
- Corporate Officer

\_\_\_\_\_  
Title(s)

- Partner(s)                       Limited
- General

- Attorney-In-Fact
- Trustee(s)
- Guardian/Conservator
- Other:

Signer is representing:  
Name Of Person(s) Or Entity(ies)

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

#### DESCRIPTION OF ATTACHED DOCUMENT

\_\_\_\_\_  
Title or Type of Document

\_\_\_\_\_  
Number of Pages

\_\_\_\_\_  
Date of Document

\_\_\_\_\_  
Signer(s) Other Than Named Above

NOTE: This acknowledgment is to be completed for the Attorney-in-Fact. The Power-of Attorney to local representatives of the bonding company must also be attached.

**END OF PERFORMANCE BOND**

**EXHIBIT K**



**PAYMENT BOND**

**Contractor's Labor & Material Bond (100% of Contract Price)**

**(Note: Design Build Entity must use this form, NOT a surety company form.)**

**KNOW ALL PERSONS BY THESE PRESENTS:**

WHEREAS, the City of Brentwood (hereinafter designated as the "City"), by action taken or a resolution passed \_\_\_\_\_, 20\_\_\_\_, has awarded to \_\_\_\_\_ hereinafter designated as the "Principal," a contract for the work described as follows: \_\_\_\_\_ (the "Project"); and

WHEREAS, the work to be performed by the Principal is more particularly set forth in the Contract Documents for the Project dated \_\_\_\_\_ ("Contract Documents"), the terms and conditions of which are expressly incorporated by reference; and

WHEREAS, said Principal is required to furnish a bond in connection with said contract; providing that if said Principal or any of its Subcontractors shall fail to pay for any materials, provisions, provender, equipment, or other supplies used in, upon, for or about the performance of the work contracted to be done, or for any work or labor done thereon of any kind, or for amounts due under the Unemployment Insurance Code or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of said Principal and its Subcontractors with respect to such work or labor the Surety on this bond will pay for the same to the extent hereinafter set forth.

NOW THEREFORE, we, the Principal and \_\_\_\_\_ as Surety, are held and firmly bound unto the City in the penal sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) lawful money of the United States of America, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH that if said Principal, his or its subcontractors, heirs, executors, administrators, successors or assigns, shall fail to pay any of the persons named in Civil Code Section 9100, fail to pay for any materials, provisions or other supplies, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor thereon of any kind, or amounts due under the Unemployment Insurance Code with respect to work or labor performed under the contract, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department or Franchise Tax Board from the wages of employees of the contractor and his subcontractors pursuant to Revenue and Taxation Code Section 18663, with respect to such work and labor the Surety or Sureties will pay for the same, in an amount not exceeding the sum herein above specified, and also, in case suit is brought upon this bond, all litigation expenses incurred by the City in such suit, including reasonable attorneys' fees, court costs, expert witness fees and investigation expenses.

This bond shall inure to the benefit of any of the persons named in Civil Code Section 9100 so as to give a right of action to such persons or their assigns in any suit brought upon this bond.

It is further stipulated and agreed that the Surety on this bond shall not be exonerated or released from the obligation of this bond by any change, extension of time for performance, addition, alteration or modification in, to, or of any contract, plans, specifications, or agreement pertaining or relating to any scheme or work of improvement herein above described, or pertaining or relating to the furnishing of labor, materials, or equipment therefore, nor by any change or modification of any terms of payment or extension of the time for any payment pertaining or relating to any scheme or work of improvement herein above described, nor by any rescission or attempted rescission or attempted rescission of the contract, agreement or bond, nor by any conditions precedent or subsequent in the bond attempting to limit the right of recovery of claimants otherwise entitled to recover under any such contract or agreement or under the bond, nor by any fraud practiced by any person other than the claimant seeking to recover on the bond and that this bond be construed most strongly against the Surety and in favor of all persons for whose benefit such bond is given, and under no circumstances shall Surety be released from liability to those for whose benefit such bond has been given, by reason of any breach of contract between the owner or City and original contractor or on the part of any obligee named in

such bond, but the sole conditions of recovery shall be that claimant is a person described in Civil Code Section 9100, and has not been paid the full amount of his claim and that Surety does hereby waive notice of any such change, extension of time, addition, alteration or modification herein mentioned, including but not limited to the provisions of sections 2819 and 2845 of the California Civil Code.

By their signatures hereunder, Surety and Principal hereby confirm under penalty of perjury that surety is an admitted surety insurer authorized to do business in the State of California.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

(Corporate Seal)

\_\_\_\_\_  
Contractor/ Principal

By \_\_\_\_\_

Title \_\_\_\_\_

(Corporate Seal)

\_\_\_\_\_  
Surety

By \_\_\_\_\_  
Attorney-in-Fact

(Attach Attorney-in-Fact Certificate)

Title \_\_\_\_\_

**APPROVED BY CITY:**

s/ \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name, Title

Signatures of those signing for the Contractor and Surety must be notified and evidence of corporate authority attached. A Power-of-Attorney authorizing the person signing on behalf of the Surety to do so much be attached hereto.

# Notary Acknowledgment

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA  
 COUNTY OF \_\_\_\_\_

On \_\_\_\_\_, 20\_\_\_\_, before me, \_\_\_\_\_, Notary Public, personally

appeared \_\_\_\_\_, who proved to me on the basis of satisfactory

evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary Public \_\_\_\_\_

## OPTIONAL

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

### CAPACITY CLAIMED BY SIGNER

### DESCRIPTION OF ATTACHED DOCUMENT

- Individual
- Corporate Officer

\_\_\_\_\_ Title(s)

\_\_\_\_\_ Title or Type of Document

- Partner(s)                       Limited
- General

\_\_\_\_\_ Number of Pages

- Attorney-In-Fact
- Trustee(s)
- Guardian/Conservator
- Other:

\_\_\_\_\_ Date of Document

Signer is representing:  
 Name Of Person(s) Or Entity(ies)

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

\_\_\_\_\_ Signer(s) Other Than Named Above

NOTE: This acknowledgment is to be completed for Contractor/Principal.

# Notary Acknowledgment

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

On \_\_\_\_\_, 20\_\_\_\_, before me, \_\_\_\_\_, Notary Public, personally

appeared \_\_\_\_\_, who proved to me on the basis of satisfactory

evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

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\_\_\_\_\_  
Date of Document

Signer is representing:  
Name Of Person(s) Or Entity(ies)  
  
\_\_\_\_\_

\_\_\_\_\_  
Signer(s) Other Than Named Above

NOTE: This acknowledgment is to be completed for the Attorney-in-Fact. The Power-of-Attorney to local representatives of the bonding company must also be attached.

**END OF PAYMENT BOND**

**EXHIBIT L**

**NOT USED**

**EXHIBIT M**

**TO BE INSERTED WITH PHASE 2 AMENDMENT**

**EXHIBIT N**

**TO BE INSERTED WITH PHASE 2 AMENDMENT**

**EXHIBIT O**

**TO BE INSERTED WITH PHASE 2 AMENDMENT**



**EXHIBIT P**

**NOT USED**